

**To: New Jersey Law Revision Commission**  
**From: Vito J. Petitti**  
**Re: Hand Held Devices**  
**Date: February 6, 2017**

## **MEMORANDUM**

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### **Background**

This prospective project was first brought to the Commission's attention in September 2016, when Staff informed the Commission of a concern by law enforcement personnel regarding the language of N.J.S. 39:4-97.3, which addresses the use of hand held devices while operating a motor vehicle. The statute, entitled "Use of hands-free and hand-held wireless communication devices while driving; when permitted; penalty," provides, in pertinent part:

a. The use of a wireless telephone or electronic communication device by an operator of a **moving motor vehicle** on a public road or highway shall be unlawful except when the telephone is a hands-free wireless telephone or the electronic communication device is used hands-free, provided that its placement does not interfere with the operation of federally required safety equipment and the operator exercises a high degree of caution in the operation of the motor vehicle. [Emphasis added.]

\* \* \*

"Hands-free wireless telephone" means a mobile telephone that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of such mobile telephone, by which a user engages in a conversation without the use of either hand; provided, however, this definition **shall not preclude the use of either hand to activate, deactivate, or initiate a function of the telephone.** [Emphasis added.]

\* \* \*

**"Use" of a wireless telephone** or electronic communication device shall include, but not be limited to, talking or listening to another person on the telephone, **text messaging**, or sending an electronic message via the wireless telephone or electronic communication device. [Emphasis added.]

\* \* \*

The Commission asked Staff to study corresponding provisions in other jurisdictions to advise the Commission of the manner in which other states have addressed these issues. At the next meeting, in October 2016, Staff provided supplemental information in the form of a survey

of relevant statutory language in all 50 states plus the District of Columbia, which led to discussion as to the clarity of New Jersey's statutory language. The Commission directed Staff to look into to any guidance provided by the National Highway Traffic Safety Administration (NHTSA) and to conduct outreach to various entities, including municipal attorneys and police captains, to determine whether it is possible to clarify the statute without imposing policy views.

### **Legislative Intent**

As discussed at the October 2016 Commission meeting, a comparison between N.J.S. 39:4-97.3 and its accompanying Assembly Law and Public Safety Committee Statement reveals that, although the statute prohibits the use of certain hand-held devices by an operator of a "moving motor vehicle", the committee statement refers to the use of a hand-held wireless telephone or electronic communication device "while driving." According to the statement, prior to the enactment of N.J.S. 39:4-97.3, the law prohibiting "the use of a hand-held wireless telephone **while operating a motor vehicle** [emphasis added]" could be enforced only as a secondary offense.

Also, while statutory section headings are not technically under the control of the Legislature and are thus not considered enacted law, it is worth noting that even the heading of N.J.S. 39:4-97.3 refers to use of hand-held devices "while driving," but not "moving."

### **National Highway Traffic Safety Administration (NHTSA)**

NHTSA, the federal agency charged with writing and enforcing federal motor vehicle safety standards, in its Sample Texting While Driving Law, refers to the unlawful use of hand-held devices "during operation of a motor vehicle," but offers states the option to cover only motor vehicles "in motion," as New Jersey has done. Elsewhere on the agency's website can be found references to such prohibited activities "while driving" and while "behind-the-wheel."

The Sample Texting While Driving Law, in pertinent part, is as follows:

#### **§ 1 Short title**

This act may be cited as the [State] Ban on Texting While Driving Law

#### **§ 2 Purpose**

The purpose of this subchapter is to:

- (1) Improve roadway safety for all vehicle operators, passengers, bicyclists, pedestrians and other road users;
- (2) Prevent crashes related to the act of text messaging while driving a motor vehicle;
- (3) Reduce injuries, death, property damage, health care costs, health insurance and automobile insurance rates related to motor vehicle crashes; and
- (4) Authorize law enforcement officers to stop vehicles and issue citations to persons texting while driving as a standard offense.

### **§ 3 Application**

Except as provided in Section 4, this subchapter applies to all drivers during operation of a motor vehicle on the travel portion of public streets, roads and highways [Option: States may elect to cover only motor vehicles in motion]. This subchapter amends [insert state code] to make it unlawful to manually type or enter multiple letters, numbers, symbols or other text in a wireless communication device, or send or read data in the device, for the purpose of non-voice interpersonal communication, including texting, emailing and instant messaging.

\* \* \*

Regarding use of “operating,” which is used in section 3 of NHTSA’s Sample Texting While Driving Law, above, a former police officer cautioned Staff that “operating” is a term of art in driving while intoxicated (DWI) cases, which can refer to sitting in the driver’s seat with a key in the ignition. Indeed, DWI cases are said to have resulted in convictions when the subject was asleep in the driver’s seat while parked on the side of the road, but with the key in the vehicle’s ignition. The officer suggested that the Legislature used the term “moving motor vehicle” because of the DWI issue. He said that, as worded, N.J.S. 39:4-97.3 allows (or requires) a driver to lawfully pull the vehicle over to the side of the road to speak or text using a hand-held device with the engine running.

### **Outreach**

Pursuant to the Commission’s request for additional information, Staff reached out to a number of stakeholders regarding the current statutory language prohibiting the use of hand-held devices “by an operator of a moving motor vehicle,” and also solicited input regarding the fact that the statute neither specifically permits, nor prohibits, dialing a phone number while driving. In *State v. Malone*, a 2011 unpublished Appellate Division case, the Court held that motorists are permitted to hold the cell phone in one hand for the limited purpose of activating, deactivating, or initiating a function. In both cases, commenters replied that there is an impact on law enforcement.

### **“Moving Motor Vehicle”**

All parties responding to Staff’s inquiry agreed that N.J.S. 39:4-97.3 should be changed to prohibit using a cell phone while stopped at a traffic light. Distracted drivers who cause delays when the signal turns green not only inconvenience other drivers, but also cause “increased traffic hazards thus causing more motor vehicle accidents.” One officer attributed aggressive driving to delays caused by distracted drivers, and said the delays “defeat the function of the traffic signal by interrupting the flow of traffic.”

A commenter with municipal prosecutor and criminal defense experience agreed with the opinions of law enforcement officers as described in previous Staff Memoranda on this

subject that the “moving motor vehicle” language presents a law enforcement problem. He asserted that, as a defense attorney, “moving” means just that: the vehicle is in motion.

### **“Activate, Deactivate, or Initiate”**

As regards the statute’s allowance for “the use of either hand to activate, deactivate, or initiate a function of the telephone,” all law enforcement commenters, including a sitting chief of police, agreed that such activities still constitute potential distractions and should be prohibited except in case of emergencies.

The *Malone* issues were characterized by a municipal prosecutor as even more problematic for law enforcement than the “moving motor vehicle” issue discussed above. Acknowledging that *Malone* is an *unpublished* decision, he described the statute as an “unworkable piece of legislation that provides an unnecessary burden on law enforcement.” Although he pointed out that merely holding a phone is not evidence of a violation, and it is easy for officers to prove when the phone is at a driver’s ear, a traffic officer informed Staff separately that such cases are unpredictable in court. The prosecutor went on to say that these cases are “currently problematic for the State” when the defendant, defense attorney, and/or judge know what the statute and *Malone* actually require as proof beyond a reasonable doubt.

A traffic safety specialist patrol officer portrayed this part of the statute as vague, saying it “guts the law” and interferes with enforcement because it makes it “impossible to prove texting vs. activation.”

### **Conclusion**

Although it has been argued that the statute’s language is clear and unambiguous, its interpretation nevertheless seems to present difficulties for officers and in the municipal courts. Staff seeks authorization to continue research and outreach to determine whether these issues raised can be addressed by statutory revision.