

To: New Jersey Law Revision Commission
From: Vito J. Petitti
Re: Hand-held Devices
Date: June 6, 2016

MEMORANDUM

Introduction

The Office of the Attorney General, Division of Highway Traffic Safety, describes distracted driving as a dangerous epidemic on New Jersey's roadways. According to statistics available at the Division's website, driver inattention has been a major contributing factor in nearly 800,000 motor vehicle crashes in the state from 2010 to 2014 – in 2014 alone, 3,179 were killed nationwide in distracted driving crashes.¹ A member of the public apprised Staff of a concern regarding the ability of police to enforce N.J.S. 39:4-97.3, which prohibits the use of a wireless telephone by the operator of a motor vehicle on a public road or highway. New Jersey law permits cautious, hands-free cell phone use, but allows hand-held usage in certain extreme circumstances, such as to report a biohazard, dangerous driver, or traffic accident. Although New Jersey drivers are permitted to use one hand to turn on or initiate the function of the phone, traffic officers who stop motorists for doing what appears to be text messaging or "texting" are often told they were simply "dialing" their phones. Some officers believe a statutory revision is necessary in order to enforce the law against texting while driving.

N.J.S. 39:4-97.3

N.J.S. 39:4-97.3, 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.]

* * *

b. The operator of a motor vehicle may use a hand-held wireless telephone while driving with one hand on the steering wheel only if:

¹ State of New Jersey, Office of the Attorney General, Division of Highway Traffic Safety, http://www.nj.gov/oag/hts/phone_down_overview.html (last visited September 5, 2016).

(1) The operator has reason to fear for his life or safety, or believes that a criminal act may be perpetrated against himself or another person; or

(2) The operator is using the telephone to report to appropriate authorities a fire, a traffic accident, a serious road hazard or medical or hazardous materials emergency, or to report the operator of another motor vehicle who is driving in a reckless, careless or otherwise unsafe manner or who appears to be driving under the influence of alcohol or drugs. A hand-held **wireless telephone user's telephone records** or the testimony or written statements from appropriate authorities receiving such calls shall be deemed **sufficient evidence of the existence of all lawful calls** made under this paragraph. [Emphasis added.]

As used in this act:

* * *

“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.]

* * *

N.J.S. 2A:65D-1 defines text messaging as “the wireless transmission of text, images or a combination of text and images by means of a cellular telephone, a paging or message service, a personal digital assistant or any other electronic communications device.” Preliminary outreach indicates that, while not all law enforcement professionals agree that drivers are “getting away with texting,” some differ quite strongly with this position. According to one officer, the statutory provisions for activation, deactivation, and initiation of a cell phone are the basis of what has become a popular defense for texting while driving. An officer “needs to make some type of extended observation of a person texting” to counter the frequent claim, “I was just turning my phone on.” In one case, at trial, the defendant driver explained such a long observation by the officer (i.e., the driver had been handling the phone for a long period of time) by asserting that he had been “re-booting” his phone.

The same officer asserted that more and more drivers offer the “activation argument.” In a recent case, he witnessed a driver “holding the cell phone in her right hand, phone facing her at chest height, with her thumb on the screen.” The officer was standing by the vehicle at the time and could clearly see an “open text” on the screen. The driver’s first argument was that she was temporarily stopped at the traffic light, but the officer had seen her in motion as she approached the light. Next, the driver argued that she had merely unlocked the phone and that the text screen had been the last screen open when she locked the phone several minutes earlier. The officer issued a ticket, but was not confident that it will “stick.” In the officer’s words, “the improper wording destroys the texting portion of the statute.” He went on to say that, as more officers lose their cases, they become unwilling to issue the tickets.

The provision emphasized in bold above, in subsection b.(2), regards the use of cellular telephone records. Reportedly, this language provides an effective defense to a ticketed driver who may own a single account with multiple phones. It is said that the ticket can be successfully challenged by bringing to court a spouse’s phone, since both phones are in the driver’s name. The commenter strongly recommends a statutory revision to address such a “dangerous violation.”

Pending New Jersey Legislation

There are no less than six bills now pending in the New Jersey Legislature which would amend N.J.S. 39:4-97.3, if enacted. None would be affected by a proposed revision regarding the two issues discussed in this Memorandum, which involve the activation, deactivation, or function initiation of a hand-held device while driving, and the presentation of phone records as exculpatory evidence.

Senate Bill 1897, introduced March 10, 2016, would extend to 90 days the statute of limitations for the unlawful use of cell phone while driving, and also would increase the penalties for texting while driving.

Senate Bill 1898, also introduced March 10, 2016, would increase the penalties for texting while driving, and would establish a “Distracted Driver Enforcement and Education Fund” to be paid for by fines for unlawfully texting or talking on a telephone.

As mentioned above, New Jersey statute, as currently written, ostensibly allows a driver to operate a hand-held device while temporarily stopped in traffic. Senate Bill 1773, introduced March 7, 2016, and referred to the Senate Transportation Committee, would make it a violation for motorists to talk or text on hand-held wireless devices while the vehicle is temporarily stopped. It would also require driver's license examinations to include questions on distracted driving.

Senate Bill 1180 was introduced February 8, 2016, and referred to the Senate Law and Public Safety Committee. If signed into law, it would provide that offenses committed prior to

the date of enactment for talking or texting on hand-held device while driving are not considered previous violations.

Assembly Bill 1908, introduced January 27, 2016, and referred to the Assembly Transportation and Independent Authorities Committee, would prohibit the operator of a motor vehicle from engaging in any activity unrelated to the actual operation of a motor vehicle in a manner than interferes with the safe operation of the vehicle.

Finally, Senate Bill 360, introduced January 12, 2016, and referred to the Senate Law and Public Safety Committee, would, if enacted, increase the penalties for talking or texting on a hand-held device while driving. The fines and driver's license suspension periods imposed under this bill are the same as those imposed for driving while intoxicated (DWI) offenses.

Summary

Six years ago, Forbes.com named New Jersey, along with California, Connecticut, New York, Oregon, Utah, and Washington as one of the worst states for distracted drivers.² This was related to the fact that all seven states had outright bans on using any handheld cell phone while driving. More recently, New Jersey does *not* appear on the list of Ten Toughest States for Texting While Driving, compiled by InsuranceQuotes.com.³ These lists tend to focus chiefly on the scope of the restrictions as well as the associated penalties. But New Jersey laws prohibiting texting while driving appear, upon initial review, to be difficult to enforce and could benefit from revision.

Staff requests the Commission's guidance as to whether further research and outreach would be appropriate with a view to possibly improving the language in New Jersey's Title 39 in a way that would resolve the issues raised herein.

² Worst States for Distracted Drivers, Forbes.com, <http://www.forbes.com/2010/03/17/texting-driving-iphone-lifestyle-vehicles-states-bans.html> (last visited September 5, 2016).

³ The 10 Toughest States for Texting While Driving, InsuranceQuotes.com, <http://www.insurancequotes.com/auto/toughest-states-texting-while-driving>, (last visited September 5, 2016).