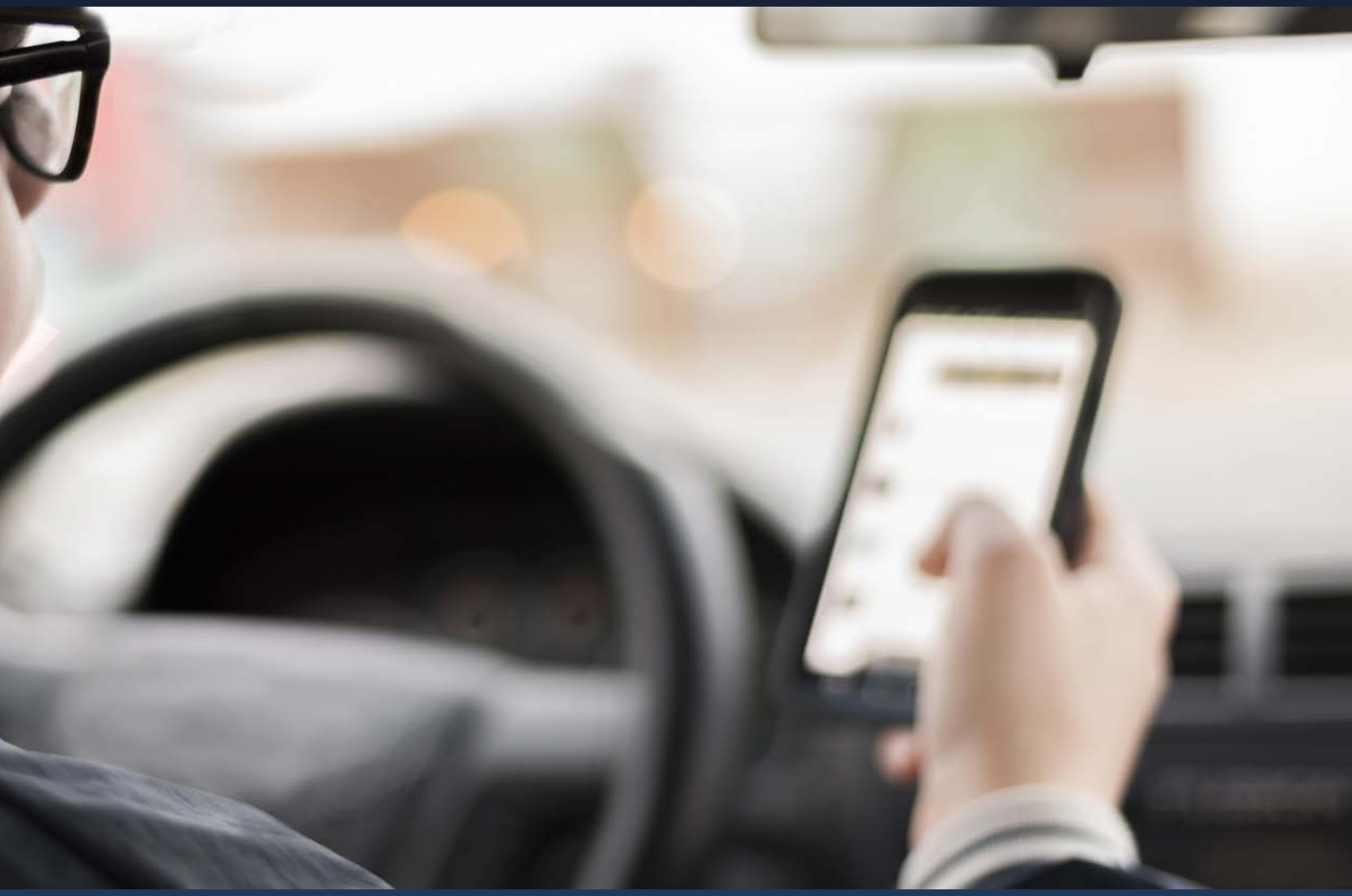
Investigation and Prosecution of Distracted Driving Cases



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This publication is intended to provide a general overview of the investigation and prosecution of distracted driving cases. While some sections of this publication address issues that are inherently legal, this publication is not intended to provide legal advice. Therefore, it is important to seek out legal advice from a licensed attorney on specific issues or questions the reader may have.

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Chapter One—Why Distraction Is a Problem

Drivers must engage in several primary or necessary tasks to safely operate motor vehicles. However, drivers often engage in many secondary or unnecessary tasks that can present significant distractions to their ability to safely operate vehicles.[1] Reaching for an object and dialing a phone, for example, create greater distractions from necessary tasks, and therefore greater crash risk, than eating or talking to a passenger.[2] Those unnecessary tasks also pose greater crash risks than simply drinking or smoking.[3] None of these tasks or behaviors are necessary to operate a motor vehicle but rather are done out of habit or convenience.

Reportedly, nearly one-third of all U.S. drivers 18 to 64 years old read or send text or email messages while driving.[4] Reading or sending text or email messages while driving and other distracted driving behaviors lead to more than 420,000 injuries and more than 3,100 deaths every year in the United States.[5] Simply knowing the risks of distracted driving has not yet translated into reducing the behavior.[6]

Distracted driving is commonly defined as "when a driver's attention is diverted away from driving by a secondary task that requires focusing on an object, event, or person not related to the driving task."[7] All distractions compromise a driver's ability to some extent and threaten the safety of that driver, other drivers, passengers, and pedestrians in the vicinity. Every time a driver adjusts a radio, tends to an irritable child, adjusts air conditioning or heating, applies make up, shaves, talks to passengers, eats, or reads a map (paper or electronic), the driver is engaging in a distracting task or activity. When drivers think about things other than driving, for example an argument with a spouse/significant other or financial problems, they can become distracted from the task of driving.

It is a myth that all humans have the ability to multi-task.[8] Most people actually engage in task switching. Our cognitive ability does not allow us to engage in more than one

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[1] Stutts, J., Feaganes, J., Rodman, E., Hamlet, C., Meadows, T., Rinfurt, D., Gish, K., Mercadante, M., & Staplin, L. (2003). *Distractions in everyday driving.* Washington, DC: AAA Foundation for Traffic Safety; Klauer, S. G., Dingus, T. A., Neale, V. L., Sudweeks, J. D., & Ramsey, D. J. (2006). *The impact on driver attention on near crash/crash risk: An analysis using the 100-Car Naturalistic Driving Study data* (Report No. DOT HS 810 594). Washington, DC: National Highway Traffic Safety Administration. Available at www.nhtsa.gov/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/810594.pdf

[2] Klauer, Dingus, Neale, Sudweeks, & Ramsey (2006).

[3] Klauer, Dingus, Neale, Sudweeks, & Ramsey (2006).

[4] Centers for Disease Control and Prevention. Mobile Device Use While Driving – United States and Seven European Countries, 2011. *Morbidity and Mortality Weekly Report, March 15, 2013/62*(10); 177-182.

[5] National Center for Statistics and Analysis. (2016, April). Distracted driving 2014 (Traffic Safety Facts Research Note. Report No. DOT HS 812 260). Washington, DC: National Highway Traffic Safety Administration. Available at https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812260

[6] Atchley, P., Hadlock, C., & Lane, S. (2012). Stuck in the 70s: The role of social norms in distracted driving, *Accident Analysis & Prevention, 40,* 279-284.

[7] Ranney, T. A. (2008). *Driver distraction: A review of the current state-of-knowledge* (Report No. DOT HS 810 787). Washington, DC: National Highway Traffic Safety Administration. Available at https://pdfs.semanticscholar.org/0b43/68899ff974a8167b888ffed49f80270a43b3.pdf

[8] Kahneman, D. (1973). *Attention and effort*. Upper Saddle River, NJ: Prentice-Hall.; Smiley, A. (2005). *What is distraction?* International Conference on Distracted Driving, Toronto, Canada, October 2-5, 2005.

conscious task simultaneously. As people add additional tasks or the tasks become more complex, switching takes longer and people can experience mental overload. Based on extensive research, many psychologists have concluded that when people switch between tasks, productivity is reduced.[9] Being able to subtly switch tasks is helpful in many circumstances but it can conflict with safety when operating a motor vehicle.[10]

A car traveling at 55 miles per hour covers more than 80 feet every second. Sending or reading a text message can take the driver's eyes off the road for an average of 4.6 seconds. Sending or reading a text message while driving a vehicle at 55 miles per hour means, therefore, that the vehicle will travel the length of a football field without any visual guidance.[11]

Even when a driver appears to be "looking," he may not be "seeing." As a driver focuses his attention on a task other than driving, he begins to suffer from "inattentional blindness." Unrelated to any visual problems, inattentional blindness means that a person fails to notice something fully visible because his attention is focused on a task other than driving. For example, a driver conversing on a cellphone may fail to see many of the visual cues around him.[12]

The increased use of electronic devices by drivers has brought new awareness to the problem of distracted driving. Research continues to demonstrate the dangers of driving while using a cell phone and texting. Studies have shown the overall crash risk increases 3.6 times over model driving when a driver interacts with a handheld device.[13] In 2014, there were 3,179 people killed and 431,000 injured in motor vehicle crashes involving distracted drivers.[14] For every incident, law enforcement investigated the cause of the crash and prosecutors determined whether any driving behavior that contributed to the crash warranted an infraction, a misdemeanor, or a felony. Absent drug or alcohol impairment, mechanical failure, or obvious recklessness, determining what a driver did or failed to do that caused the crash can be challenging.

What can law enforcement do to better identify and collect evidence of distracted driving? Were there witnesses to the driver's pre-collision behavior? Is there evidence that the driver knew or should have known of the dangers of the particular distraction? Can we preserve evidence of the distraction? Can we prove the driver's actions in court and

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[9] A small segment of the population, 2.5 percent, is made up of "supertaskers" with the ability to dual-task without an apparent degradation in performance. Medeiros-Ward, N., Watson, J. M., & Strayer, D. L. (2014). On supertaskers and the neural basis of efficient multitasking. *Psychonomic Bulletin & Review, 22*(3), 876-883.

[10] American Psychological Association. (2006, March 20). *Multitasking: Switching costs.* (Web page). Washington, DC: Author. Available at http://www.apa.org/research/action/multitask.aspx; Rubinstein, J. S., Meyer, D. E., & Evans, J. E. (2001). Executive Control of Cognitive Processes in Task Switching, *Journal of Experimental Psychology: Human Perception and Performance; 27*(4): 763-797.

[11] Olson, R. L., Hanowski, R. J., Hickman, J. S., & Bocanegra, J. (2009). *Driver Distraction in Commercial Vehicle Operations*. (Report No. FMCSA-RRR-09-042). Washington, DC: Federal Motor Carrier Safety Administration.

[12] Simons, D. J., & Chabris, C. F. (1999). Gorillas in our midst: Sustained inattentional blindness for dynamic events. *Perception 28*: 1059-1074.

[13] Dingus, T. A., Guo, F., Lee, S., Antin, J. F., Perez, M., Buchanan-King, M., & Hankey, J. (2016). *Driver crash risk factors and prevalence evaluation using naturalistic driving data*." W. J. Horrey, Ed. Proceedings of the National Academy of Sciences 113.10: 2636-641.

[14] National Center for Statistics and Analysis. (2016, April). *Distracted driving 2014* (Traffic Safety Facts Research Note. Report No. DOT HS 812 260). Washington, DC: National Highway Traffic Safety Administration.

can we demonstrate to the jury the unreasonableness of this action? What exhibits are useful? What experts should be sought? Prosecutors may also need to submit a preservation letter to a phone company and should become familiar with what information is available from cell towers, cell phone providers, and from the phone itself. Additionally, prosecutors should consider if there are better ways to educate our jurors, our judges, and our legislators about the dangers of distracted driving.

Drivers have a legal obligation to obey the rules of the road and to operate their vehicles in a reasonable manner. This means driving a safe speed, maintaining control, exercising awareness, observing traffic signals, using directional signals and headlights, and avoiding unnecessary distractions. When drivers engage in distracting behavior, they violate that obligation to safely operate their vehicles in a reasonable and responsible manner. Crash risks increase significantly when drivers are distracted.[15] Failure of this obligation can result in a traffic citation or summons for a driver. More importantly, it may tragically result in an injury or fatality for the driver, a passenger, a bystander, or an occupant of another vehicle. This can result in significant criminal and civil implications for the driver and negatively affects public safety.

To prove that a driver crashed due to being inattentive requires finding out what activities the driver was doing in the car, preserving proof of those activities through witnesses and forensics, demonstrating that the choice to engage in the activity put lives in danger, and determining what consequences resulted from that choice. At least 16 percent of all motor vehicle traffic crashes, as reported to law enforcement in 2014, were crashes caused by distraction.[16] Every prosecutor and law enforcement officer must therefore be prepared to investigate and prosecute distracted driving incidents. A State may have specific laws against the use of a cell phone or texting while driving. However, laws targeting distraction may also be for any electronic devices. Those laws prohibit devices that can access the Internet or send an electronic message in the vehicle. Therefore, when making a stop and investigating distracted driving, law enforcement officers should recover cell phones, tablets, laptops, video streaming devices, and in-vehicle entertainment systems using current State law and guidance to obtain evidence.

[15] Klauer, S., Guo, F., Simons-Morton, B.G., Ouimet, M.C., Lee, S.E., & Dingus, T.A. (2014). Distracted driving and risk of road crashes among novice and experienced drivers. *New England Journal of Medicine*; 370:54-59. DOI: 10.1056/NEJMsa1204142

[16] NCSA, 2016.

Chapter Two—Types of Distractions

Most activities that dangerously distract drivers involve more than one type of distraction. This danger applies to the use of all electronic devices, not just cell phones. Other examples of electronic devices include: tablets, laptops, video streaming devices, in-vehicle entertainment systems, GPS units, DVD players, radar detectors, etc. For simplicity, this chapter often uses the term "cell phone," but the reader should recognize that distractions include other electronic devices as well. Utilization of a cell phone may be the most common distraction. Texting, for example, requires the driver to manipulate the device, look at the device, and focus attention on the text conversation. However, research suggests that eliminating visual or manual distraction does not necessarily improve driver performance when that driver continues to be cognitively distracted. For instance, voice-based systems do not appear to improve driver performance and some, such as speech-to-text systems, may cause greater distraction.[17] Initial research found no apparent difference between hands-free or hand-held phone use in driver distraction.[18]

The term "distracted driving" can be used to describe a wide variety of driver behaviors. These behaviors may be a result of external or internal distractions, including visual, manual, or cognitive.[19] In general, NHTSA primarily uses distracted driving to mean "the inattention that occurs when drivers divert their attention away from the driving task to focus on another activity."[20] This may be due to conversing with a passenger, dialing or hanging up a cell phone, having a phone conversation, or even adjusting the radio or other vehicle controls. A driver may also lose focus on driving due to engaging in other cognitive activities, such as being lost in thought or thinking about personal or financial problems. In addition, some crash-associated factors such as driver age and gender, roadway traffic, and environmental conditions may influence a driver's likelihood of distracted driving.

External and Internal Distractions

Drivers often perform tasks or activities while driving that interfere with their ability to safely drive. These activities are often due to some type of distraction that diverts the driver's attention from the primary task of driving. These distractions can be separated into two distinct causes—external distractions and internal distractions.

Drivers can often be distracted by external sources of distraction, such as objects and events outside the vehicle. Some of these objects and events include crash scenes,

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[17] Strayer, D. L., Cooper, J. M., Turrill, J., Coleman, J., Medeiros-Ward, N., & Biondi, F. (2013). *Measuring cognitive distraction in the automobile*. Washington, DC: AAA Foundation for Traffic Safety.

[18] Strayer, D. L., & Drews, F. A. (2007). *Multitasking in the automobile.* In A. Kramer, D. Wiegmann, & A. Kirlik (Eds.), Applied attention: From theory to practice. Bethesda, MD: Oxford University Press, *but see also* Fitch, G. A., Soccolich, S. A., Guo, F., McClafferty, J., Fang, Y., Olson, R.L., … & Dingus, T. A. (2013). *The impact of hand-held and hands-free cellphone use on driving performance and safety-critical event risk*. (Report No. DOT HS 811 757). Washington, DC: National Highway Traffic Safety Administration.

[19] Ranney, T. A. (2008). *Driver distraction: A review of the current state-of-knowledge*. (Report DOT HS 810 787). Washington, DC: National Highway Traffic Safety Administration.

[20] National Highway Traffic Safety Administration. (2010, April). *Overview of the National Highway Traffic Safety Administration's driver distraction program* (Report No. DOT HS 811 299). Washington, DC: Author. Available at www.nhtsa.gov/staticfiles/nti/distracted_driving/pdf/811299.pdf

billboards, pedestrians, bicyclists, other motorists, emergency vehicles, and even animals crossing the path of travel. Due to these distractions, a driver may be tempted to avert his attention from the roadway. Even a momentary glance away from the roadway can have potentially damaging consequences.

Internal sources of distraction can also dramatically compromise the driver's ability to safely drive the vehicle. There are a number of potential internal sources of distraction. For example, a driver may be distracted by movements or actions initiated by others when a driver has other occupants in the vehicle. When using a cellular telephone, a driver may be distracted when adjusting the phone controls or attempting to retrieve text or voice messages from the phone. Even if a driver is using hands-free technology, the potential for distraction is ever present when using a cellular telephone. The driver may also be distracted as a result of adjusting sound or other vehicle controls including heat, air conditioning, mirrors, or other vehicle settings. A driver may be distracted when attempting to retrieve an object from the consul, seat, or floor of the vehicle. Eating, drinking, smoking, applying makeup, and shaving also represent internal sources of distraction. Finally, conversing with another occupant in the vehicle or on the phone can contribute to distraction of the driver.

Visual Distractions

Visual distraction occurs when a driver looks at anything other than the road ahead.[21] A driver who checks his child's seat belt while driving is visually distracted. Electronic devices for the car, such as GPS devices and portable entertainment systems, also distract drivers. Visual distractions can come from sources inside or outside the vehicle.

Manual Distractions

Manual distraction occurs when a driver takes one or both hands off the wheel for any reason.[22] Some common examples of manual distraction include eating and drinking in the car, adjusting the GPS, audio controls, climate controls, or trying to retrieve an object from a purse or wallet. Even seemingly simple activities such as adjusting rearview mirrors or seats also provide a manual distraction. Smoking also represents a source of manual distraction, including lighting a cigarette and disposing of the ashes, either into the car's ashtray or outside the vehicle through the window.

Cognitive Distractions

Cognitive distraction occurs when a driver's mind isn't focused on driving.[23] Cognitive distractions can be as dangerous for the driver as visual or manual distractions. There are a variety of non-driving, cognitive activities that, either separately or collectively, may pose a distraction to a driver. Personal problems, including work-related issues or interpersonal relationship or family problems are a significant distraction from the cognitive responsibilities of driving. Financial problems involving bills, debt, credit

[21] Distracted Driving. Retrieved October 2, 2015, from *www.cdc.gov/motorvehiclesafety/Distracted_Driving/index.html*.
[22] Ibid.
[23] Ibid.

cards, or even financial problems with friends or other family members may also pose a cognitive distraction. Thoughts about upcoming events or daydreaming also represent cognitive distractions. Even audio distraction is a form of cognitive distraction.[24] A driver listening to his favorite radio station is at risk as the audio distraction can take the driver's focus away from his driving responsibility and ability to pay attention to his surroundings.

Combination Distractions

Some actions, such as eating, drinking, or using a cell phone clearly establish a purposeful distraction. Specific to cell phone usage, talking, listening, dialing, or texting all represent purposeful distractions. Some distractions are a result of sources incidental to driving. For example, manipulating the windshield wiper controls is an occasional necessity to safely operate the vehicle and represents an incidental distraction to the driving task. Similarly, adjusting the headlights or cruise control also represent an incidental distraction. Some distractions that interfere with a driver's ability to safely drive a vehicle, however, may be from uncontrollable sources. For example, an animal that crosses the roadway or an insect that flies into the vehicle are beyond the control of the driver. Thus, it is important for investigators and prosecutors to determine not only the potential source of distraction to the driver but also the mindset of the driver when distracted.

With respect to cell phone usage, sending text messages while driving is one of the most dangerous distractions possible. This represents an overlap of distraction within the visual, manual, and cognitive areas. The visual distraction is a result of the driver staring at the cell phone rather than at the road, the manual distraction is a result of the driver manipulating the texting function of the cell phone, while the cognitive distraction is a result of the focus of attention in reading and composing a text response to messages. In addition, other activities listed can cross over more than one general form of distraction. When an activity in one of these three general areas distract a driver, it is dangerous. When an activity crosses into two or three of these domains, it is especially dangerous.[25]

Conclusion

Drivers must engage in several primary or necessary tasks to safely operate motor vehicles. Drivers often engage in many secondary or unnecessary tasks, however, that can present significant distractions to their ability to safely operate vehicles. Whether the distraction occurs inside the vehicle or out, or requires a driver's hands, eyes, or mind, it detracts from the focus necessary to safely operate the vehicle.

[24] Dalton, B. H., & Behm, D. G. (2007). Effects of noise and music on human and task performance: A systematic review. *Occupational Ergonomics; 7*(3), 143–152.
[25] Distracted Driving, 2015.

Chapter Three—Trends in Enforcement

Jurisdictionally Specific Laws

To effectively enforce distracted driving statutes, law enforcement officers must first be familiar with the laws in their jurisdiction. While all States put a legal responsibility on drivers to operate in a safe manner, distracted driving laws vary across the United States in what they prohibit and how they can be enforced. Some States' laws prohibit drivers from talking on hand-held devices all together; some laws apply only to vehicles in motion whereas others also apply to drivers stopped in a travel lane. Laws focused specifically on electronic communication, or "texting," also vary in prohibited conduct. Some statutes prohibit particular behaviors, such as composing, viewing, or transmitting electronic communications, but do not outlaw other actions such as entering a phone number or entering GPS data.

Federal Law

Officers should also be familiar with Federal bans on cell phone use while operating commercial motor vehicles or transporting hazardous materials. Specifically, in 2010 and 2011 Federal law banned commercial truck drivers, bus drivers, and drivers transporting hazardous materials from using hand-held cell phones and messaging on electronic devices.[26]

Distracted Driving Indicators

There are significant challenges to enforcing cell phone use and "texting" bans. The most obvious challenge is the difficulty in observing the elements of the offense. When enforcing most driving infractions, an officer first makes observations of the vehicle in motion and then stops the vehicle before making many observations of the driver. Alternatively, to prove the elements of the infraction, distracted driving enforcement requires a concentrated visual focus on the driver's actions *before* the stop is made. Specific and articulable observations are critical to establish the elements of a distracted driving violation.

There are two basic ways that an officer may be alerted to distracted driving infractions: by observing the driver's prohibited behavior, or by observing the vehicle in motion cues. Many of the vehicle in motion cues associated with impaired driving are consistent with a distracted driver. Unlike impaired driving enforcement, however, once the driver is stopped, the prohibited behavior has generally ceased. Below is a list of some distracted driving indicators:

- Nearly striking an object or vehicle;
- Failure to safely maintain lane control;
- Driving into opposing or crossing traffic;
- Slow response to traffic signals;

[26] For example, see 49 CFR § 392.80 and § 392.82. https://www.fmcsa.dot.gov/regulations

- Turning abruptly or illegally;
- Failure to maintain consistent speed;
- Failure to signal;
- Intermittently looking down;
- Night time glow of the device; and
- Hand to ear with device in hand.[27]

The list of distracted driving indicators relates not just to distractions caused by cell phones, but all manners of distractions. Weaving out of the designated travel lane may be a clue that a driver's attention may not be focused on the road, but rather on a task such as texting. Failure to maintain a consistent speed may be another sign that a driver is not fully focused on the task of driving. Similarly, a driver who fails to pay full attention at traffic-controlled intersections oftentimes exhibits delayed reaction time to the signal. Many drivers try to covertly disguise the fact that they are engaged with a device. This is particularly the case when a driver is aware that there are laws precluding device usage and that enforcement activity is focused in the area. A driver will attempt to use a device from a lower position to avoid detection, holding the device below the steering wheel or on an armrest. In these instances, a driver lowers his field of vision from the roadway in a characteristic nodding motion.

Countermeasures and Strategies

Distracted driving enforcement must be a leadership priority. Before implementing a distracted driving high-visibility enforcement (HVE) initiative, a number of steps should be considered to ensure enforcement efforts will be safe and productive. Departments must address the specific violation codes serving as the basis for enforcement and understand the State/local judicial interpretation of these codes before sharing the information with the enforcement officers. It may also be a good idea to meet with judges/magistrates before kicking off an enforcement effort to get their buy-in and interpretation of the distracted driving laws.

Law Enforcement Training

Distracted driving enforcement is not intrinsic to law enforcement and to some degree is contrary to traditional patrol strategies. Traditional patrol strategies involve observing violations as officers routinely patrol their assigned area. The enforcement of distracted driving requires more police officers than traditional patrol strategies and the officers must be more visible to the public. It also requires specialized skill to detect violators who conceal distracting devices. Therefore, pre-deployment training of officers and reallocation of resources are essential components of distracted driving enforcement. Enforcement directed toward distracted driving requires a clear understanding of the specific assignment and expectations. Sharing pertinent research and statistics with officers about the dangers of distracted driving and how enforcement can increase public safety encourages positive attitudes toward the enforcement initiative. Officers must be familiarized with the applicable laws for their enforcement jurisdiction, strategies and

[27] This list is NOT intended to be all-inclusive. Law enforcement observations may vary.

tactics for detecting offenders, and the elements that must be established for a successful adjudication. Officers should be knowledgeable on the legal decisions and current trends in the court.

For an effective HVE initiative, officers should be instructed to provide maximum visibility for deterrent purposes and saturate the targeted areas using a "zero-tolerance" approach, taking immediate and appropriate action on motor vehicle violations observed, with a particular focus on distracted driving offenses.

The relationship between law enforcement officers and their first line supervisors and command leadership is crucial to effectiveness, morale, and mission success. Supervisors not only manage the day-to-day activities of line staff, but also provide guidance and encouragement to support the agency's public safety mission and goals. Officers who receive positive guidance and feedback regarding the enforcement of distracted driving laws will be more motivated and committed to the initiative.

High-Visibility Enforcement

HVE programs are intended to increase a driver's perception of the likelihood of being ticketed for violating a particular traffic safety law. HVE, coupled with a concentrated media campaign, may be the best deterrent tool law enforcement professionals can deploy to curtail driver initiated distracted driving.[28] To be effective, the public must be aware of the enforcement campaign and cognizant of the purpose of the heightened law enforcement presence. Public education and awareness is best achieved through a variety of earned and paid media applications, as well as outreach from the law enforcement officers themselves through public safety events, speaking engagements, and roadside communications.

An omnipresence of police enforcement activity is best achieved by saturating a targeted jurisdiction with directed enforcement patrols focused on detecting and citing violators for distracted driving offenses. The designated patrol area must not be overextended, as it will detract from the desired effect. Since few law enforcement agencies possess the resources to independently sustain a high level of directed traffic enforcement, partnerships should be established between State, county, and municipal law enforcement agencies. These regional enforcement teams act as a force multiplier, maximizing resources and personnel. Enforcement in the targeted communities can then be rotated, maximizing the HVE effect in all of the participating communities.

Patrol Strategies

While HVE traditionally requires the deployment of marked patrol vehicles, distracted driving enforcement can be accomplished through discrete tactics. Finding a balance between the use of marked and unmarked patrol vehicles may be the best enforcement practice. Marked patrol vehicles create a visible deterrent, while concealed enforcement

[28] Chaudhary, N. K., Connolly, J., Tison, J., Solomon, M., & Elliott, K. (2015). *Evaluation of the NHTSA distracted driving high-visibility enforcement demonstration projects in California and Delaware* (Report no. DOT HS 812 108). Washington, DC: National Highway Traffic Safety Administration.

is the most efficient means to detect distracted drivers. Violators are typically aware of jurisdictional distracted driving laws and enforcement initiatives and will oftentimes attempt to hide their use of a communication device to avoid detection. Unmarked trucks, vans, and SUV's provide a higher vantage point for an officer to observe the interior of an adjacent vehicle, while tinted windows allow the officer to remain undetected. Arguably the use of unmarked patrol vehicles can detract from the HVE model; however, motorists viewing violators stopped by a uniformed officer in an unmarked vehicle are alerted to the fact that they may not be able to avoid a violation simply by watching for marked patrol vehicles. This tactic acts as a force multiplier when effectively employed.

Another technique used by officers in both marked and unmarked vehicles is to use existing cover, such as alleyways, bushes, bridge abutments, and other places where officers can observe drivers' actions before a violator can spot the officer. Law enforcement officers must operate within the law and department policies and procedures when deploying alternative enforcement tactics.

Highway Enforcement

Mobile highway distracted driving enforcement (patrolling) is most effective during periods of slower moving traffic. Traffic congestion may create a greater tendency for drivers to engage in distracted driving behaviors and avails patrol officers safer and extended opportunities to observe a driver's actions. However, stopping vehicles on highways during "rush hour" traffic can create additional safety concerns and increase traffic congestion. This method of distracted driving enforcement presents other challenges for law enforcement as an officer needs to strategically position the patrol vehicle to afford a view of the offender's actions while ensuring their own attention to driving is not diverted. Due to the short window of viewing opportunity, stationary distracted driving enforcement (parking the police vehicle and observing with or without binoculars) on highway shoulders is effective only during periods of very heavy traffic congestion.

Secondary Roadways

The detection of distracted drivers on secondary roadways, particularly at traffic signals, is most effective in a static unmarked patrol vehicle. Busy intersections provide officers a place to observe slow moving and stopped vehicles. Slower vehicle speeds make it easier for an officer to check more vehicles for distracted driving behaviors and provides more time for tracking and gathering information of the violation.

Paired Officer Enforcement

Officer safety and public safety concerns are essential elements of any enforcement activity, especially when the enforcement requires searching for specific driver behaviors occurring inside the vehicle. Two officers partnering in a patrol vehicle is a safe and effective alternative to single-officer distracted driving enforcement. With the second officer in the vehicle observing drivers, the officer driving the patrol vehicle is able to maintain situational awareness and concentrate on safe operation of the vehicle. While

this method is somewhat manpower-intensive, it affords the second officer a greater opportunity to determine that elements of a particular distracted driving offense are met and to identify a greater number of offenders.

Alternatively, “spotter” techniques may be effective in high traffic areas. The spotter technique requires an officer to stand on the shoulder of the road at an intersection, preferably in an elevated position, and observe traffic. The spotter should be in plain clothes, if jurisdiction laws and department policies allow. From this vantage, the spotter is able to view the interior of vehicles and identify driver behaviors, like instances of the misuse of cell phones and other distracted driving behaviors. The spotter radios ahead to uniformed officers who stop and cite the violator a short distance from the observation point. Although effective, this method of enforcement is manpower-intensive and requires some degree of preplanning and coordination. Spotter deployments provide opportunities to develop strong enforcement partnerships and require officers from State, county, and municipal agencies to coordinate efforts to cover the roadways identified for the enforcement initiative.

Motorcycle Patrol

Deploying uniformed officers on motorcycles is an efficient alternative to traditional patrol vehicles and an added value to the HVE model. A motorcycle provides significant advantages to the detection of distracted driving law violators. An officer on a motorcycle has a higher vantage point offering a better view into the interior of a passenger vehicle, while the maneuverability of the motorcycle enables the officer to more readily affect the stop for faster turnover and increased productivity. Due to the inherent vulnerabilities of the motorcyclist in traffic, officer safety and situational awareness must be stressed.

Documenting Infractions

To establish that the elements of a distracted driving offense are met, law enforcement must present appropriate evidence that the driver was in clear violation of the laws specific to their jurisdiction. Detailed documentation of an officer’s observations should include, but not be limited to, the following: any erratic or unsafe movement of the vehicle, how the driver was manipulating a cell phone or other device (entering, viewing, or thumbing through data), whether the device was held with the left or right hand, a description of the device (color, for example), how many seconds the driver was observed engaging in the illegal activity prior to the traffic stop, and if the vehicle was stopped or in motion during the observed activity.

Conclusion

Law enforcement officers should be familiar with the distracted driving laws in their jurisdictions. Police departments should provide training for officers to detect the observable cues of distracted driving as well as how to appropriately document the violations. High-visibility enforcement may provide the best deterrent effect for distracted driving enforcement but may require additional labor and other resources to achieve the best results.

Chapter Four—Investigating and Charging Distracted Driving Cases

The function of law enforcement shifts to investigation when there is a motor vehicle crash. Law enforcement's obligation in a crash investigation is to establish the cause and contributing factors of the crash.

Investigating any crash scene can pose several challenges. After ensuring medical attention for those who warrant it, law enforcement must attempt to determine the cause of the crash. Crash scenes may have been unavoidably contaminated due to life-saving efforts of emergency medical, fire, or rescue personnel. Nevertheless, law enforcement must analyze a crash scene that may extend for hundreds of yards, interview any witnesses, and examine physical evidence that may be spread out on the street, mangled inside a vehicle, or embedded in a tree. After conducting the investigation, law enforcement must make a determination regarding the cause of the crash.

Collection of Evidence

Once an investigator determines that distracted driving is a factor in a crash, the critical task of collecting evidence begins. Effective evidence gathering at this early stage often directly impacts ultimate trial success. At the very least, it can be the best chance to determine the truth regarding how a crash occurred, even if a driver is not criminally charged. Early action is beneficial because, as time passes, witnesses' memories tend to fade, witnesses can disappear, and suspects and their accomplices can destroy evidence.

Physical Evidence

Evidence generally falls within two categories, physical or testimonial. Physical evidence includes items in the involved vehicles and on the scene. As described above, electronic devices are examples of physical evidence located within a car, with cell phones being the most commonly suspected distraction. Note that a State might have an electronic distraction law, which expands the scope of prohibited devices to include anything with the ability to access the Internet or send an electronic message. Investigators, therefore, should be alert for the presence of not only cell phones, but also devices such as tablets, laptops, video streaming devices, and in-vehicle entertainment systems. Additionally, some devices are not capable of accessing the Internet or sending messages, but may still offer a distraction to a driver. GPS units, DVD players, radar detectors, vehicle performance monitors, and dash cameras are just a few of the items in this category.

Event Data Recorders

An event data recorder (EDR) is a device or function within a motor vehicle's system that records extremely helpful information about the dynamics of a crash. Often a component of a vehicle's air bag computer system, an EDR records certain pre- and post-crash data about that vehicle's operation. EDR data serve a variety of purposes, including crash investigations, research purposes, and determining whether a vehicle's safety system functioned properly in a crash. A manufacturer could also use the information to improve those safety systems.

Some of the information collected by an EDR might include vehicle speed, accelerator pedal position, steering wheel angle, brake pedal application, and the delta V (change in velocity) that the vehicle experienced in the collision. NHTSA requires that vehicles containing voluntarily installed EDRs record certain parameters of a vehicle's system operation at the time of a crash, such as whether the accelerator was pressed, the brake applied, or whether the driver's seat belt was buckled.[29] In practice, vehicle manufacturers record much more information not in an EDR, which may be useful to investigators and prosecutors.

Crash reconstructionists physically access the data located in EDRs in two ways: through a vehicle's OBDII (on board diagnostic) port, located in the area below the steering wheel, or directly from the air bag computer that is located within the interior of the vehicle. Proprietary hardware and software download the raw hexadecimal data from the EDR and present that data in a report format that is easily reviewable.

Access to EDR data typically requires a search warrant or court orders. Law enforcement must be familiar with specific constitutional and privacy laws on this issue and should seek prosecutor guidance.[30]

EDR data is important in a distracted driving investigation. For example, the information contained in the EDR could help explain the action—or lack of action—taken by a driver in the moments before the crash (as more fully explained in the following sections). This information may prove useful during a later trial by providing a prosecutor with additional information on which to argue the behavior was the result of distracted driving.

Non-Electronic Evidence

Some physical evidence is not electronic at all, but might be just as persuasive in proving a distracted driving case. Investigators and rescue personnel should be aware that food, drinks, reading materials, shaving items, makeup, and even other passengers all are potential distractions to a driver of a vehicle. On-scene physical evidence can also include tire marks and vehicle damage.

Absence of Evidence

The absence of evidence also might be significant. For instance, if a police officer administers the standardized field sobriety tests to a suspect driver and the driver does not exhibit any clues of impairment, an alternative explanation for the erratic driving may be distraction.

[29] 49 CFR Part 563. www.gpo.gov/fdsys/pkg/FR-2006-08-28/pdf/06-7094.pdf#page=47

[30] The Driver Privacy Act of 2015, part of Fixing American's Surface Transportation Act (Pub. L. No. 114-94, §§ 24301-24302, 129 Stat. 1312, 1713-14 [2015]), provides limitations on data retrieval from vehicle EDRs and assigns ownership of that data to the owner or lessee of a motor vehicle. Specifically, the Driver Privacy Act of 2015 states that data recorded or transmitted by an EDR may not be accessed by a person other than the owner or lessee of a motor vehicle unless enumerated circumstances apply. One of those enumerated circumstances is a court or other judicial or administrative order. As the Driver Privacy Act of 2015 is a Federal law, general principles of preemption apply to any conflicting State laws or regulations. Even so, law enforcement should also familiarize themselves with state and local laws regarding evidence and search and seizure.

Seizing Physical Evidence

Once an investigator identifies physical evidence of potential evidentiary significance, the next step is to ask how legally to seize it. Is a search warrant required? For example, if an investigator locates a cell phone in a vehicle involved in a crash, does he need a warrant to examine its contents? Is there a legal justification for the warrantless seizure of a piece of evidence? For instance, is the vehicle exception to the warrant requirement applicable? Does an investigator have any administrative powers with respect to obtaining evidence?

Some States permit the issuance of administrative subpoenas for cell phone company toll records, showing activity on a phone (albeit, not message content). And, while it might seem obvious, a preliminary question to ask is whether police even have the ability to tow a vehicle without a warrant from a crash scene for further inspection.

Individuals tasked with investigating distracted driving should be familiar with the laws of search and seizure in their respective jurisdictions. Having a readily accessible resource who can provide advice in the immediate aftermath of a crash, is helpful. Many offices have a prosecutor on-call to travel to crash scenes, to answer questions from responding officers, or to assist in other ways, such as drafting search warrant applications, interviewing witnesses, and obtaining court orders.

Preserving Physical Evidence

The preservation of physical evidence is as important as its seizure. Failing to preserve evidence cannot only hinder the ability to prove a case, but can potentially lead to a destruction of evidence jury instruction and case dismissal.

The scene of a crash is the first item requiring preservation. Once emergency personnel have completed their extrication and rescue efforts, investigators should ensure that other vehicular traffic, cleanup crews, and other police personnel do not disturb evidence in the roadway. This evidence might easily be destroyed, altered, or moved. Destroying, altering, or moving evidence could adversely affect the calculations typically made in a reconstruction case, if not making those calculations impossible. Examples of these crucial pieces of evidence include the final resting positions of the vehicles, tire marks, debris fields, and, in cases of pedestrian strikes, articles of clothing and biological evidence. Mapping and photography of a scene are important to portray the conditions at the time of a crash. Weather conditions should also be noted. A video of the route of travel taken by a suspect driver approaching the crash scene under the same conditions can be invaluable in making a charging decision or in trying the case to a jury.

Investigators also should ensure the integrity of the involved vehicles. Evidence could exist on the exterior or in the interior of a vehicle that might be destroyed during transport or storage. Samples potentially subject to forensic testing should be photographed, documented, and collected as soon as practicable. To the extent possible, investigators should assess the pre-crash functionality of a vehicle’s main systems, such as steering, braking, and acceleration; a mechanic can assist in this task.

When a reconstructionist has completed examination of a vehicle, it is best to retain the vehicle as evidence pending completion of the case. If indefinite retention is not a possibility, law enforcement should work with the prosecutor to provide the defense an opportunity to inspect the vehicle, before it is released. If a defendant is not afforded an opportunity for inspection, it is likely that opportunity will be lost forever. A "totaled" vehicle is almost always given to the driver's insurer, which promptly will destroy it or sell it as salvage. This situation becomes especially problematic in cases where the defense is able to establish that the destroyed vehicle likely contained exculpatory evidence, such as a mechanical defect. In these circumstances, the prosecution potentially faces dismissal of the charges. Note that police are part of the prosecution team for this analysis. If an officer acts alone in releasing a vehicle, it is as though the prosecutor authorized the release.

Preserving Electronic Data

Investigators should take all necessary steps to preserve the data contained in cell phones and other distracting devices. Search warrants or court orders may be required to obtain data files from forensic downloads of cell phones. Like other evidence, data should be preserved for use by the prosecution, defense, judge, and jury. Consider the use of a Faraday bag to reduce the possibility of phone data being corrupted or lost due to outside interference or static electricity.

Electronic records acquired from a wireless provider under a search warrant, subpoena, or court order can be compared to the data file to determine whether such data loss or corruption has occurred or whether a defendant intentionally has deleted data in an effort to, for example, conceal phone use. As described above, a distracted driving investigator must be familiar with the search and seizure laws in his jurisdiction.

Testimonial Evidence

Effective gathering of testimonial evidence can bolster the prosecution of a distracted driving case. Investigators should aim to get information from a variety of sources to conduct a complete investigation and corroborate the conclusions the reconstructionist makes from the physical evidence. Perhaps the most helpful piece of testimonial evidence comes from the suspect driver. An investigator must know the rules for interviewing a driver during the early stages of a crash investigation in his jurisdiction. *Miranda*[31] requires warnings for custodial interrogation. An early interview, preferably at the scene, generally does not involve custody or interrogation.[32] The early interview may reduce the opportunity to fabricate or conspire with others. It can also serve to limit what a driver can credibly claim in subsequent interviews or during trial testimony.

[31] See *Miranda v. Arizona*, 384 U.S. 436 (1966) and subsequent cases citing *Miranda*. Law enforcement officers must be familiar with recent case law regarding custody, interrogation, and advice of rights.

[32] The roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute custodial interrogation for purposes of the *Miranda* doctrine. See *Berkemer v. McCarty*, 468 U.S. 420 (1984).

Documenting Statements and Consent to Search

To assist in documenting the preliminary interview, many investigators carry a pocket audio recorder. One of the benefits of an audio recorder is that it is highly portable and, therefore, easily accessible during the hectic moments after a crash. The recorder permits interviews to be conducted in difficult locations, such as the side of the road, in the back of an ambulance, or in a suspect's vehicle. Digital recorders are preferred, as its electronic files are easily copied and distributed to others, including other investigators and the prosecutor.

During the preliminary on-scene interview, investigators should consider asking a driver for consent to examine the cell phone and other devices. Simple consent forms can be kept in a police cruiser along with other commonly used documents. When signed by the driver, the consent form might obviate the need for a search warrant to conduct a forensic examination. In addition, investigators might find it beneficial to ask the driver to review the contents and activity on a cell phone while on scene. By doing so, the investigator can commit the driver to statements regarding cell phone usage or non-usage before a crash, claims that can be corroborated or disputed with phone company records at a future date.

Subsequent to any on scene interviews, police should make efforts to conduct a follow-up interview with the driver at the police station. Preferably, the driver should be asked to consent to video recording of the interview. During these recorded interviews, police have the opportunity to demonstrate their fair treatment of the driver and to show the absence of any duress. In addition to eliciting details regarding the events leading up to the crash, police should ask the driver to review again the contents of the phone or other device. Because the interview is on video, the driver becomes further "locked in" with respect to his claims. If the driver's statement changes, the driver risks investigators or jurors viewing him or her as making inconsistent statements. Also, by the time of this recorded interview, investigators should possess cell phone records and/or the results of a forensic examination of the cell phone; as such, investigators might be able to determine easily whether a driver's statements with respect to cell phone and other electronic device usage are consistent.

Should a driver decline video recording of the interview, an investigator might consider asking the driver to handwrite, and sign, a statement. An alternative is for the investigator to write the statement as the driver is speaking, have him review it, initial each page, then sign it. By using one of these methods, police can ensure that a driver adopts what was written.

Witnesses

There are potentially several types of witnesses an investigator should consider interviewing. Eyewitnesses, including the passengers in the vehicle, will be able to provide information regarding the driver's behavior and events leading up to and including the crash. Other witnesses may also provide valuable information relative to a driver's distraction even though they did not necessarily "observe" the driver's behavior or actions. For example, an investigator may obtain critical information from a person

with whom a driver was communicating in the moments prior to a crash or to whom the driver made statements after the crash. Additionally, expert witnesses (described more fully in the next chapter) will be able to provide essential information relating to the electronic evidence obtained from the cell phone or the cell phone company or technical information relating to the physics of the crash or data from the vehicle itself.

Eyewitness statements about how a crash occurred can corroborate the crash reconstruction evidence and vice versa. Eyewitnesses shed light on a driver's behavior prior and subsequent to a crash, putting the whole event into context. Jurors tend to appreciate a witness-driven case better than one based primarily on the calculations contained in a crash reconstructionist's report.

An officer who responds to the crash scene should note the name and contact information of anyone who potentially has any information about any aspect of the crash. As soon as possible, law enforcement should obtain statements from witnesses regarding their observations of the driver's behavior before and after the crash.

Investigators also can gather testimonial evidence from those participants in the calls, messaging, or other distractions with the accused driver. Essentially, these are the people "on the other end of the phone." Investigators can determine who these individuals are by reviewing the toll and text records or the forensic analysis of the driver's cell phone. Police simply can call these numbers and speak to the person who answers or they might choose to obtain further legal process to obtain subscriber information.

Note that in reviewing phone records from some devices, investigators should be aware that some messaging apps do not appear in the text records delivered by the cell service provider. If no text message activity appears in the offending driver's phone records near the time of the crash, investigators should not assume that the driver was not messaging. A subpoena or search warrant will need to be issued before this determination can be made.

Similarly, if an officer detects any Internet activity on a driver's phone at the time of a crash, the officer might be able to track the corresponding URL to social network activity which could potentially uncover other methods of communication. After sending a preservation request to a social networking site, an investigator may then use the appropriate process to obtain the records from that site. The investigator can then potentially determine which individuals were messaging with the driver; in turn, these witnesses might be able to provide information about the driver during the time leading up to a crash. Determining whether a driver was on a social networking site at the time of a crash can be difficult because smartphone apps continually update themselves in the background without any input from the user.

Likewise, an investigator may discover testimonial evidence as a result of social network activity after a collision. Sometimes, the driver posts comments about the crash on social media. Often, police are alerted to this activity by members of the public who are monitoring social networking pages or who might be "friends" with the driver. Snapshots of these posts are extremely persuasive pieces of evidence and it might be a good practice

for investigators to monitor the public social media pages of a driver to see whether any inculpatory posts were made.

Investigators should also review 911 call recordings and logs since they are another potential source of eyewitness testimony. These witnesses tend to be overlooked because they often come across a crash scene after the event and do not remain to be interviewed. Occasionally, though, these callers see the crash occur. They may have probative observations of the driver's operation and activities inside the vehicle prior to the crash. Investigators should attempt to locate and interview every 911 caller in a serious crash case.

Eyewitness testimony also can be found in the medical records of a driver or a passenger. Medical personnel treating a driver may eliminate other explanations for erratic behavior, such as intoxication or the sudden onset of an unanticipated medical event. Further, a driver may be more open to making statements to medical personnel about how a crash really occurred than he would be to police.

Charging Decisions

Investigators in distracted driving cases, particularly those resulting in injury or death, should have a working knowledge of the elements of the potential charges. These crimes vary from State to State. For instance, some States have a criminal charge for negligent operation of a motor vehicle, while others require more egregious driving behavior, such as gross negligence or recklessness, before any criminal charges issue. Even among the States with negligent operation statutes, there is no agreement regarding the definition of negligence. Some define negligence as ordinary civil negligence, while others require a higher level of culpability, often termed "criminal negligence" or recklessness. By being familiar with the requisite level of criminal conduct, investigators can focus their investigations so as to gather the best evidence to prove their cases.

Despite the variance in potential criminal charges, as described above, drivers in all States have an obligation to operate their vehicles safely. They must drive as a reasonable person would under the same circumstances and conditions. Whether criminal or not, their "fault" for the injuries they inflict upon others is subject to foreseeability analysis. That is, if a reasonable person should have expected that his driving behavior could have resulted in the crash, he is responsible for it.

Investigators also should be aware of the admissibility of consciousness of guilt evidence in their respective States. Whenever a suspect driver acts in a manner inconsistent with that of an innocent person, that evidence may be admissible at trial to prove guilt. Such evidence includes, but is not limited to, destruction of evidence, efforts to conceal the crime, flight, misleading investigators, and intimidation of witnesses. This conduct also might form the basis for a State's obstruction of justice charge.

Conclusion

Of course, crimes vary among jurisdictions. Regardless of the particular charge, without a thorough investigation of the crash and all the surrounding circumstances, prosecutors may have difficulty proving that distraction caused the crash. Detailed report writing and complete documentation of all the evidence can substantially aid in successful prosecutions. In a post-crash investigation, usage of a cell phone or other device can be established through testimonial evidence from the driver, witnesses, and/or participants. A cursory view of the device based on owner consent, or as allowed under law, might reveal the history and status of the device at the time of the crash. Administrative review of records from the cell phone carrier might further establish a usage timeline. Forensic downloads, generally based on a search warrant, may reveal relevant evidence on the status of the device and any application in use at the time of the crash. The increasing possibility of surveillance cameras in the vicinity of the crash, as well as on-board cameras in patrol vehicles, should also be considered as part of the investigation. With a thorough investigation, law enforcement will be able to clearly explain to the prosecutors how individual pieces of evidence fit into the puzzle and will lead the jury to the same conclusion, that is, that the crash was the result of the defendant’s distracted driving.

Chapter Five—Proving the Distracted Driving Case

The prosecutor in a distracted driving case, like any case that is set for trial, will have to assess not only what evidence will be needed to prove the case, but also how to most effectively present that evidence to the jury. While the charges will vary depending on the applicable State law, the prosecutor will likely have to prove some form of criminal negligence or recklessness.

After considering the elements of the charged offense, the prosecutor must determine which witnesses — expert and lay — will need to testify, as well as what physical evidence will need to be presented. By their very nature, distracted driving cases involve technical evidence in the sense that they involve the use of technological devices (e.g., phones and GPS devices). The process by which law enforcement gathers the necessary evidence of the use of an electronic device requires technical extraction of the data from the device itself. The extraction process, and the subsequent interpretation of the extracted data, will require the testimony of a properly qualified witness. Further, the testimony is likely to be somewhat technical in nature.

In addition to the evidence related to the phone or similar device, the prosecutor will also be presenting technical and scientific evidence related to the reconstruction of the crash. It is important that prosecutors be cognizant of the technical nature of the evidence in these cases, and be prepared to think about how to most effectively present the evidence. There may be overwhelming evidence of guilt in a case, but the evidence is of little value if jurors do not understand it.

Trial Witnesses

As in any crash case, the prosecutor should likely call the officer who initially responded to the crash scene and any civilian witnesses to the crash as witnesses at trial. The responding officer will testify to his initial observations of the scene and the driver, who is now a criminal defendant, and any initial statements made by the driver. Any civilians who witnessed the crash, the defendant's driving behavior leading up to the crash, or his behavior or comments after the crash, should also testify. If a detective or investigator conducted a follow up interview with the defendant or witnesses, that individual may be able to testify to any additional statements for purposes of impeachment. Medical personnel including emergency responders, treating physicians, and medical examiners, should be called to testify to establish the element of injury or death, depending on the particular facts of the case. Any other fact witnesses who made observations relevant to the crash should also be called to testify as needed.

In addition to the witnesses typically called in crash cases, the prosecutor in a distracted driving crash case will also likely need to present expert testimony. While the facts of each individual case will dictate what experts are necessary, the list of potential of experts includes:

- Mobile device forensic examiner/analyst who completed data extraction and interpretation.

- Cell phone company records representative and/or records custodian.
- Research scientist/expert on distractions related to driving.
- Crash reconstruction expert.
- Crash team investigator.
- Road and/or mechanical engineer.
- Auto manufacturer.

Since the source of distraction is likely to be a phone or other electronic device, the forensic examiner would be necessary at trial. Because the driver is charged, the forensic examiner's investigation confirmed that the individual was using a mobile device while driving. While there may have been an admission of distracted driving by the driver or eye witness evidence of the distraction, the most convincing evidence will come from the forensic analysis conducted by a qualified law enforcement officer. That individual will testify to the particular hardware/software tool utilized to extract, transfer, and analyze the data from the mobile device. This witness will explain the process, introduce the report generated from the download, and provide interpretation of the data generated. Ideally, one witness would be able to testify to this, but in some instances, depending on the complexity of the data and the experience level of the examiner, more than one forensic expert may be necessary.

In addition to the mobile device forensic expert, if the case involves the use of a cell phone, the prosecutor may need to have a representative or records custodian from the cell phone company testify to present further evidence of the defendant's phone use during the time surrounding the crash. The information that can be gleaned from the phone records and the data extraction programs differ, so the prosecutor should work with the investigators to determine which form of evidence, if not both, is necessary to prove his case at trial. Typically the data extraction tools can provide more specific data than the phone records, but often times presenting a combination of both forms of evidence is necessary. Since establishing that the defendant was distracted at the moment of, or in the moments leading up to, the crash is crucial, the precise timing of the defendant's phone use is vital. To demonstrate that evidence, the prosecutor will likely need both the cell phone records and the data extracted from the phone itself.

As with any case involving a significant injury or fatal crash, the prosecutor will call the crash reconstruction expert who reconstructed the crash as a witness at trial. The reconstruction expert will explain how the crash happened and discuss topics like collision sequence, vehicle speeds and directions of travel, and potential environmental and human factors contributing to the crash. The reconstruction expert can testify whether there was evidence of pre-impact braking, slowing, or other evasive action taken by the defendant prior to the crash. Depending on the experience level of the expert, the particular State's evidentiary rules governing expert testimony and the physical evidence present in the case, the reconstruction expert may also be able to testify as to whether the driving behavior is consistent with someone who is distracted or not focusing exclusively

on the driving task. Furthermore, if it is germane to the particular case and the reconstruction expert is qualified, he may be able to provide testimony about driver perception and response times.

In addition to presenting expert testimony on the mobile device evidence and crash reconstruction evidence, the prosecutor in a distracted driving crash case may also consider having an expert testify to the dangers of manipulating a phone or mobile device while driving. While jurors can certainly rely on their common sense and personal experiences to conclude that the behavior is dangerous, in some instances prosecutors may not be comfortable with leaving it to reason. In this regard, distracted driving cases may not be any different than impaired driving cases. Certainly jurors can rely on their common sense and personal experience in impaired driving cases to know that driving impaired is dangerous and can result in crashes. Nevertheless, prosecutors often present a toxicologist or other expert's testimony regarding the effects of alcohol or drugs on person's ability to safely operate a vehicle in those cases. Because distracted driving cases often involve common activity, such as operating a phone during the operation of a vehicle, the prosecutor should consider presenting expert testimony to distinguish everyday activity from the defendant's conduct.

If a prosecutor decides that he wants to give jurors more than just their common sense and personal experience to rely upon, there are experts who can testify to the dangers of distracted driving. There are research scientists throughout the country who have performed extensive research in the field of distracted driving, as well as other experts who specialize in the study of human factors engineering who could provide testimony. These experts can testify that it is not just common sense that dictates that texting or using a mobile device while driving is dangerous, but also the research and data.

Trial Exhibits

Once the prosecutor has determined which witnesses will be necessary to prove the State's case, he must also carefully consider what physical evidence or exhibits will be presented at trial. In addition to the exhibits commonly introduced in a crash case (*e.g.*, scene diagrams, photos, videos, overhead maps, and EDR data reports), there will also be exhibits related to the mobile device analysis. Any exhibits that illustrate use of the device should be presented at trial, whether it is the phone records, the extraction report, or actual evidence on the phone. These exhibits will be introduced through the testimony of the previously mentioned witnesses, either the cell phone company representative or the mobile device forensic expert, who can lay the necessary foundation for its admission. The phone records and the extraction reports can be lengthy and confusing, so the prosecutor should strongly consider finding a way to present the information in a more succinct and effective manner. Spreadsheets, charts, and timelines that can comprehensively summarize the relevant activity are often more effective than merely admitting the records and reports themselves. Once the necessary foundation has been laid and the reports and records have been admitted into evidence, the prosecutor is free to present summary exhibits like spreadsheets or timelines to the jury.

If the investigation yielded screen shots of text messages, use of social media sites, or other internet browsing, showing photos of these screen shots to the jury can be extremely powerful evidence. If these items have been received into evidence, the prosecutor can use these photos in closing arguments to demonstrate what the defendant was doing when he was supposed to be concentrating on driving, what he was doing when he took the victim's life. When the words of a seemingly trivial text message or tweet are put on display in the courtroom, it can be a very effective visual for the jury. The prosecutor should also consider admitting the actual phone or mobile device into evidence for use in closing arguments. It is after all, the manipulation of the device that caused the distraction, and eventually the crash, so why not show the device to the jury? Visual aids can be powerful tools and may assist the persuasiveness of the prosecutor's presentation to the jury.

Conclusion

The successful prosecution of a distracted driving crash case requires organization and preparation. The prosecutor must not only assess what witnesses and physical evidence are required to prove his case, but also how to most effectively present the evidence. These cases are technical by their very nature, so it is incumbent on the prosecutor to be mindful of that as he presents the State's case. Presenting evidence in a way that jurors can understand is essential and the use of demonstrative exhibits is especially important. When there is evidence of guilt and that evidence is effectively presented at trial, the jury will have no choice but to hold the distracted driver accountable.

Distracted Driving Resources

Official Department of Transportation Website for Distracted Driving:
www.distraction.gov/

National Highway Traffic Safety Administration Distracted Driving Page:
www.nhtsa.gov/risky-driving/distracted-driving

National Safety Council Distracted Driving Resources:
www.nsc.org/learn/NSC-Initiatives/Pages/distracted-driving.aspx

Insurance Institute for Highway Safety:
www.iihs.org/iihs/topics/t/distracted-driving/topicoverview

Federal Motor Carrier Safety Administration:
www.fmcsa.dot.gov/driver-safety/distracted-driving

AAA Foundation for Traffic Safety:
www.aaafoundation.org/distracted-driving

Governor's Highway Safety Association:
http://ghsa.org/html/issues/distraction/index.html

National Transportation Safety Board:
www.ntsb.gov/safety/mwl/Pages/mwl3_2014.aspx

Centers for Disease Control and Prevention:
www.cdc.gov/motorvehiclesafety/distracted_driving/

National Traffic Law Center:
www.ndaa.org/ntlc_home.html

National District Attorneys Association:
www.ndaa.org/index.html

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