

Texting While Driving

Executive Summary

During the course of the study year, the Crime Commission decided to review the issue of texting while driving due to a fatal accident that occurred in Virginia. There is significant national concern with texting while driving, as it is believed to be the cause of many accidents and fatalities. Several studies have shown that performing an additional cognitive task while driving seriously degrades a driver's ability to operate their motor vehicle. There are several studies that show talking on a cellular phone while driving interferes with a person's ability to drive, even suggesting that cell phone use while driving is just as or more dangerous than drinking and driving. The recent studies on texting while driving demonstrate that drivers are at a greater risk for an accident and divert their eyes from the road for significant amounts of time while texting. National statistics for accidents indicate that distracted driving is a factor in up to 16% of all fatalities. Precise numbers of accidents and fatalities specifically caused by texting and driving are not yet available at a national level, but Virginia began collecting accident information involving texting in 2012. In 2009, the Virginia General Assembly passed a statute that punished texting while driving as a traffic infraction. While the statute is still new, there has been a continuous increase in charges and convictions each year since its passage.

In Virginia, reckless driving is considered a criminal violation, as opposed to a traffic infraction. There are two "general" reckless driving statutes that punish driving done in a reckless manner or without consideration of "life, limb, and property." There are also 13 *per se*, or strict, reckless driving offenses in Virginia.

The states surrounding Virginia, namely Kentucky, Maryland, North Carolina, Tennessee, and West Virginia, punish texting while driving as fines, similar to Virginia. Only one state in the country, Utah, statutorily punishes texting with more than a simple fine: either by including it as a factor in negligent homicide or as "careless driving," punishable by up to three months in jail.

As a result of the study effort, the Crime Commission endorsed the following recommendation at its December 5, 2012, meeting:

Recommendation 1: Amend Va. Code § 46.2-853 (Driving a vehicle that is not under control) by adding the following language; *"Driving a motor vehicle that is not under proper control" includes driving a motor vehicle on any highway in the Commonwealth while simultaneously using a handheld personal communications device for any purpose other than verbal communication.*" The existing penalty for Va. Code § 46.2-853 would make texting while driving a reckless driving offense, punishable as a Class 1 misdemeanor.

Background

The Crime Commission decided to study the issue of texting and driving, due to a 2012 fatal accident that occurred in Fairfax County, Virginia. In the accident, a driver struck and killed another person, who was parked on the side of the road, with evidence suggesting that the driver was texting right before and after the accident.¹ The driver was charged with reckless driving, but the judge dismissed the charge, saying that since the Virginia General Assembly had made texting while driving a fined offense, he could not find the driver guilty of reckless driving.²

There has been growing concern in recent years with the potential danger from texting while driving and it has been allegedly linked to numerous highway fatalities.³ The National Highway Transportation Safety Administration (NHTSA) has made a major effort to curtail “distracted driving,” which includes texting while driving, with public service announcements and information.⁴ According to NHTSA, there are three types of driving distractions: manual -- taking your hands off the steering wheel; visual -- taking your eyes off the road; and cognitive -- taking your mind off driving.⁵ Furthermore, NHTSA states that because text messaging requires visual, manual, and cognitive attention from the driver, it is by far the most alarming distraction.⁶ There has been a very sharp increase in the use of texting over the past few years, with an estimated 2.72 trillion text messages sent or received in 2012, up from 240.8 billion in 2007.⁷ A recent study from the Pew Center reported that up to 26% of respondents indicated engaging in texting while driving, and 48% reported being in a car where the driver texted.⁸ One organization has even estimated that up to 28% of all traffic accidents involved the use of “cell phones and texting.”⁹

There are several behavioral studies which suggest that drivers who engage in an additional cognitive task seriously reduce their driving ability.¹⁰ Additionally, there are many studies that focus on cell phone use while driving, which come to the same conclusion that the additional task of cell phone use interferes with driving.¹¹ A recent study from Carnegie Mellon used MRI imaging to examine individuals engaged in simulated driving while having cell phone conversations.¹² This study showed that listening to a conversation on a cell phone while driving reduces brain activity associated with driving by 37%.¹³ One researcher has even concluded that driving while talking on a cell phone is as dangerous as driving while intoxicated, because, according to the simulation study, drivers using cell phones had slower braking reactions.¹⁴

Texting while driving is thought to be more dangerous than talking on a cell phone and driving, because texting “utilizes cognitive functioning while also requiring the driver to remove her eyes from the road to see the phone.”¹⁵ Another study concluded that drivers who are texting look away from the road up to 14 times in a 30 second time period.¹⁶ Another finding from this same study noted that drivers inadvertently leave their lanes 10% more often when texting.¹⁷ A recent study by the Virginia Tech Transportation Institute (VTTI) studied video of truck drivers over several million miles.¹⁸ The VTTI study concluded that texting while driving increased the risk of accident 23.2 times over non-distracted driving, with drivers taking their eyes off the road every 4.6 out of 6 seconds.¹⁹

While there are many academic studies that point to the danger of texting and driving, official accident and highway deaths do not provide an accurate picture of deaths directly related to texting. In fact, NHTSA has stated that estimating the role of distraction in accidents “is difficult because the police-reported distraction and inattention data appear to have a wide degree of reporting and collection variability.”²⁰ At least as early as 2006, NHTSA has been recording “distracted affected” accidents. This category includes texting, but also several other distractions, including: using a cell phone or smartphone, eating and drinking, talking to passengers, grooming, reading (including maps), using a navigation system, watching a video, and adjusting a radio, CD player, or MP3 player. According to NHTSA, nearly 10% - 16% of fatalities have been labeled “distracted affected” from 2006-2010.²¹

Figure 1: Total Number of Highway and “Distracted Affected” Highway Fatalities, CY2006-2010

Calendar Year	Total Highway Fatalities	Total “Distraction Affected” Highway Fatalities
2006	42,708	5,836
2007	41,259	5,917
2008	37,423	5,838
2009	33,883	5,474
2010	32,885	3,092

Source: National Highway Traffic Safety Administration.

While national numbers that specifically attribute texting to accidents or fatalities are limited and not precise, the Virginia Department of Transportation began collecting data on accidents that involved texting in January 2012. This data was not readily available at the time of this report.

LEGAL ANALYSIS

According to the American Automobile Association, there are 40 states/jurisdictions, including Virginia and the District of Columbia, that penalize texting while driving.²² Included in those 40 jurisdictions are the states surrounding Virginia. All five of the states surrounding Virginia, (Kentucky, Maryland, North Carolina, Tennessee, and West Virginia) penalize texting while driving as a fined offense, although unlike Virginia, each of these states has made it a primary offense.²³ Only Utah currently penalizes texting while driving with more than a fine. Utah, which permits a simple fine for texting while driving, also allows for the prosecution of criminal homicide if a “person operates a moving motor vehicle in a criminally negligent manner” while texting.²⁴ Additionally,

Utah has a statute criminalizing what is called “careless driving,” where the commission of a traffic violation while “using a wireless telephone or other electronic device” could result in a sentence of up to 90 days in jail, and a possible license revocation if the violation causes a death.²⁵

In 2009, the Virginia General Assembly passed a general prohibition against texting while driving, Va. Code § 46.2-1078.1.²⁶ This offense covers using a “handheld personal communication device” while operating a motor vehicle to:

- Manually enter multiple letters or text in the device as a means of communicating with another person; or,
- Read any email or text message transmitted to the device or stored within the device, provided that this prohibition shall not apply to any name or number stored in the device nor to any caller identification information.²⁷

There are exceptions for being at a lawful stop, using GPS, emergency vehicles, and reporting an emergency. The penalty for a violation is a \$20 fine for the first offense, and a \$50 fine for any subsequent violation. Additionally, this prohibition is a secondary offense, which means the offense may only be charged when a person has already been stopped for another violation.

While the statute is relatively new, the number of charges and convictions has increased each year, as seen in Figure 2 below.

Figure 2: Va. Code § 46.2-1078.1-Total Charges and Convictions, FY10-FY12

Fiscal Year*	Total Charges	Total Convictions
2010	285	229
2011	422	334
2012**	511	414

Source: Virginia Criminal Sentencing Commission.

*Fiscal year in which the charge was concluded.

** Data do not include charges that were still pending at the end of FY12. Includes charges and convictions for subsequent offenses.

In the Commonwealth, reckless driving is considered a criminal offense, rather than a traffic offense. The statutory scheme in the Commonwealth has a two pronged approach to defining reckless driving, by either general conduct which is covered under the general reckless driving statute, or 13 specific, also called *per se*, offenses.

The general reckless driving offense, Va. Code § 46.2-852, defines the offense as “irrespective of the maximum speeds permitted by law, any person who drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb,

or property of any person shall be guilty of reckless driving.” The penalty for a violation of this statute is a Class 1 misdemeanor. Case law has further defined the term “reckless” to mean “a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb, or property.”²⁸ The statute is broad enough to cover conduct that meets the standard of indifference to life, limb, and property, but “speculation and conjecture” is not sufficient to find guilt²⁹, nor is just intoxication by itself.³⁰

While most cases concerning reckless driving point out what conduct will not suffice for a conviction under the statute, there are some decisions that provide a better understanding of prohibited “reckless” conduct. The Virginia Court of Appeals has held that evidence which suggests that a driver who crashed his motor vehicle, knowing he was sleepy and that there was a known defect with his car, was sufficient to infer reckless driving under the statute.³¹ Additionally, the Virginia Court of Appeals has held that a driver, with local knowledge of a short merge lane, who speeds up, making it difficult for another driver to merge in front of him, is guilty of reckless driving, even when the other driver had the duty to yield.³²

The General Assembly has also deemed specific acts to be reckless driving. There are 13 specific offenses, also referred to as *per se* offenses, meaning that if there is evidence that a driver committed one of the prohibited acts, he may be found guilty of reckless driving and punished consistent with a Class 1 misdemeanor. These specific offenses include:

- Overtaking or passing an emergency vehicle that is operating its lights or siren;³³
- Operating a vehicle “not properly under control” or with “inadequate or improper adjusted” brakes;³⁴
- Passing or overtaking a vehicle on a curve or approaching a grade or crest;³⁵
- Driving a vehicle that is loaded in such a way as to obstruct the driver’s view or prevent proper control of the vehicle;³⁶
- Passing two vehicles abreast, going the same direction;³⁷
- Driving two abreast in a single lane, in the same direction;³⁸
- Overtaking or passing at a railroad crossing;³⁹
- Failure to stop for a school bus;⁴⁰
- Failure to give an adequate or timely signal when turning, slowing down, or stopping;⁴¹
- Driving too fast for conditions;⁴²
- Exceeding the speed limit by 20 mph or more, or in excess of 80 mph;⁴³
- Failing to stop at an entrance to a highway from a side road; and,⁴⁴
- Racing two or more cars, on highways, roads, or parking lots open to the public.⁴⁵

Based on the current Virginia statutory scheme, texting while driving could form the basis of a violation of Va. Code § 46.2-853 as long as the act of texting is shown to be “a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb, or property.” As a policy option, the General Assembly could make texting while driving a *per se* offense.

Conclusion

The concern with texting and driving is based on the evidence that it could be a significant cause of accidents. Studies have shown that drivers engaging in additional cognitive tasks, including talking on a cell phone or texting, are at a much greater risk for accidents. Additionally, recent studies on texting while driving have estimated that drivers who text pose a significant risk of accidents, in part, because their eyes leave the road much more often while texting. Statistics show that distracted driving, which texting while driving is a subset, is a factor in up to 16% of all highway fatalities.

Texting while driving is penalized as a fine in Virginia, just as it is in the states that border the Commonwealth, however, it is not a primary offense. In Virginia, reckless driving is considered a crime and not treated as a traffic infraction. In addition to a “general” reckless driving statute, there are 13 specific reckless driving infractions, and the General Assembly could create additional ones.

As a result of the study effort, the Crime Commission endorsed the following recommendation at its December 5, 2012, meeting:

Recommendation 1: Amend Va. Code § 46.2-853 (Driving a vehicle that is not under control) by adding the following language; *“Driving a motor vehicle that is not under proper control” includes driving a motor vehicle on any highway in the Commonwealth while simultaneously using a handheld personal communications device for any purpose other than verbal communication.*” The existing penalty for Va. Code § 46.2-853 would make texting while driving a reckless driving offense, punishable as a Class 1 misdemeanor.

Senator Thomas Norment introduced Senate Bill 1222 during the 2013 Regular Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was amended to modify Va. Code § 46.2-868 to include a violation of the current texting while driving statute, Va. Code § 46.2-1078.1, as an additional \$500 fine if done while also committing a violation of reckless driving. Additionally, texting while driving was designated as a primary offense, and the current fines for violations of this provision (Va. Code § 46.2-1078.1) were increased from \$20 to \$250 for the first offense, and from \$50 to \$500 for subsequent offenses. The bill was passed by both the Virginia Senate and Virginia House of Delegates as amended. The Governor proposed amendments that lowered the additional fine for a violation of Va. Code § 46.2-868 from \$500 to \$250, lowering the fine for violations of Va. Code § 46.2-1078.1 from \$250 to \$125 and \$500 to \$250, respectively, and added a requirement for DCJS to develop training for the enforcement of the new requirements. The Governor’s amendments were accepted by the Virginia House of Delegates and the Virginia Senate and became law.⁴⁶

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Virginia Department of Transportation

Virginia Criminal Sentencing Commission

¹ Justin Jouvenal, “Texting while driving law and Virginia legislature criticized by Fairfax judge,” Washington Post September 1, 2012, http://articles.washingtonpost.com/2012-09-01/local/35494796_1_virginia-tech-transportation-institute-virginia-law-top-prosecutor.

² *Id.*

³ See Fernando A. Wilson and Jim P. Stimpson, Trends in Fatalities from Distracted Driving in the United States, 1999 to 2008, 100 Am. J. Pub. Health 2213, 2215-16 (2010). Based on an estimate, the authors determine that there were 16,000 deaths as a result from texting and driving from 1998 to 2008.

⁴ Overview of the National Highway Traffic Safety Administration’s Distracted Driver Program, DOT HS 811 299 (2010); see also Distraction.Gov, the Official U.S. Government Website for Distracted Driving, <http://www.distraction.gov/>. NHTSA includes the following activities in distracted driving: Texting, using a cell phone or smartphone, eating and drinking, talking to passengers, grooming, reading (including maps), using a navigation system, watching a video, or adjusting a radio, CD player, or MP3 player.

⁵ *Id.* available at <http://www.distraction.gov/content/get-the-facts/index.html>.

⁶ *Id.*

⁷ CTIA The Wireless Association, “Wireless Quick Facts,” 2012, <http://www.ctia.org/advocacy/research/index.cfm/aid/10323>.

⁸ Mary Madden and Amanda Lenhart, *Teens and Distracted Driving*, Pew Research Center (2009), <http://pewresearch.org/pubs/1411/teens-distracted-driving-texting-cellphone-use>.

⁹ Press Release, National Safety Council, National Safety Council Estimates that At Least 1.6 Million Crashes are Caused Each Year by Drivers Using Cell Phones and Texting (Jan. 12, 2010), <http://www.nsc.org/Pages/NSCEstimates16millioncrashescausedbydriversusingcellphonesandtexting.aspx>.

¹⁰ Adcock, A., Constable, R.T., Gore, J.C., and Goldman-Rakic, P.S., Functional neuroanatomy of executive processes involved in dual-task performance, Proc. Natl. Acad. 97, 3567–3572 (2000); Calhoun, V.D., Pekar, J.J., McGinty, V.B., Adali, T., Watson, T.D., and Pearlson G.D., Different activation dynamics in multiplexed systems during simulated driving. Hum. Brain Mapp. 16, 158–167 (2002); Anttila, V., and Luoma, J., Surrogate in-vehicle information systems and driver behavior in an urban environment: A field study on the effects of visual and cognitive load, Transp. Res., Part F, 8, 121–133 (2005).

¹¹ Alm, H. and Nilsson, L., Changes in driver behavior as a function of hands free mobile phones—A simulator study, Accident Anal. Prev., 26, 441–451 (1994); Beede, K.E., Kass, S.J., Engrossed in conversation: The impact of cell phones on simulated driving performance, Accident, Anal. Prev. 38, 415–421 (2006); Brookhuis, K.A., de Vries, G., Waard, D., The effects of mobile telephoning on driving performance, Accident Anal. Prev. 23, 309–316 (1991); Consiglio, W., Driscoll, P., Witte, M. and Berg, W.P., Effect of cellular telephone conversations and other potential interference on reaction time in a braking response, Accident, Anal. Prev. 35, 495–500 (2003); Haigney, D.E., Taylor, R.G., and

Westerman, S.J., Concurrent mobile (cellular) phone use and driving performance: Task demand characteristics and compensatory processes, *Transp. Res., Part F* 3, 113–121 (2000).

¹² Just, M.A., Keller T.A, and Cynkar, J., A decrease in brain activation associated with driving when listening to someone speak, *Esliver Brain Research*, 70-80 (2008).

¹³ *Id.*

¹⁴ *See, eg.*, David L. Strayer et al., A comparison of the cell phone driver and the drunk driver, 48 *J. Hum. Factors & Ergonomics Soc'y* 381, 388-90 (2006).

¹⁵ Adam M. Gershowitz, TEXTING WHILE DRIVING MEETS THE FOURTH AMENDMENT: DETERRING BOTH TEXTING AND WARRANTLESS CELL PHONE SEARCHES, 54 *Ariz. L. Rev.* 577, 583 (2012).

¹⁶ Simon Hosking et al., Monash University Accident Research Centre, The effects of text messaging on young novice driver performance 1, 22 (Feb. 2006), available at

<http://www.distraction.gov/research/PDF-Files/Effects-of-Text-Messaging.pdf>.

¹⁷ *Id.*

¹⁸ New Data from VTTI Provides Insight into Cell Phone Use and Driving Distraction, Va. Tech.

Transp. Inst. (July 27, 2009), http://opi.mt.gov/pdf/DriverEd/RR/09VTTI_CellPhonesDistraction.pdf.

¹⁹ *Id.*

²⁰ DOT HS 811 299, *supra* note 4.

²¹ National Highway Traffic Safety Administration's Traffic Safety Facts, Research Note: Distracted Driving 2009, DOT HS 811 379 (2009); National Highway Traffic Safety Administration's, Traffic Safety Facts, Research Note: Distracted Driving 2010, DOT HS 650 379 (2010).

²² AAA Exchange, *Distracted Driving Laws*, June 2012, <http://exchange.aaa.com/wp-content/uploads/2012/06/AAA-Distracted-Driving-Laws-6-12.pdf>.

²³ KY. REV. STAT. ANN. § 189.292 (West 2012); MD. CODE ANN., TRANSP. § 21-1124.1 (West 2012); N.C. GEN. STAT. ANN. § 20-137.4A (West 2012); TENN. CODE ANN. § 55-8-199 (West 2012); W. VA. CODE ANN. § 17C-14-15 (West 2012).

²⁴ UTAH CODE ANN. § 76-5-207.5 (West 2012). This statute covers a person using a “handheld wireless communication device,” which includes texting.

²⁵ UTAH CODE ANN. § 41-6a-1715 (West 2012).

²⁶ 2009 Va. Acts. ch. 661.

²⁷ VA. CODE ANN. § 46.2-1078.1 (West 2012).

²⁸ Powers v. Commonwealth, 211 Va. 386, 177 S.E.2d 628 (1970).

²⁹ *Id.*

³⁰ Hall v. Commonwealth, 25 Va. App. 352, 488 S.E.2nd 651 (1997).

³¹ Kennedy v. Commonwealth, 1 Va. App. 469, 399 S.E.2nd 905 (1997).

³² Robinson v. Commonwealth, 48 Va. App. 623, 633 S.E.2nd 737 (2006).

³³ VA. CODE ANN. § 46.2-829 (West 2012).

³⁴ VA. CODE ANN. § 46.2-853 (West 2012).

³⁵ VA. CODE ANN. § 46.2-854 (West 2012).

³⁶ VA. CODE ANN. § 46.2-855 (West 2012).

³⁷ VA. CODE ANN. § 46.2-856 (West 2012).

³⁸ VA. CODE ANN. § 46.2-857 (West 2012).

³⁹ VA. CODE ANN. § 46.2-858 (West 2012).

⁴⁰ VA. CODE ANN. § 46.2-859 (West 2012).

⁴¹ VA. CODE ANN. § 46.2-860 (West 2012).

⁴² VA. CODE ANN. § 46.2-861 (West 2012).

⁴³ VA. CODE ANN. § 46.2-862 (West 2012).

⁴⁴ VA. CODE ANN. § 46.2-863 (West 2012).

⁴⁵ VA. CODE ANN. § 46.2-865 (West 2012).

⁴⁶ 2013 Va. Acts. ch. 790.