

Trends and Practice Tips for Your Distracted Driving Case

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The Scope of the Distracted Driving Problem

In the most recent NHTSA reporting¹, distracted driving accounted for 3,450 deaths in the U.S. in 2016. That figure is expected to rise as the prevalence and integration of smartphones into our daily lives continues. A NHTSA study in 2015 found at least 15 percent of accidents involved some form of distracted driving² — a number that has certainly increased over the last five years.

The NHTSA study further found:

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

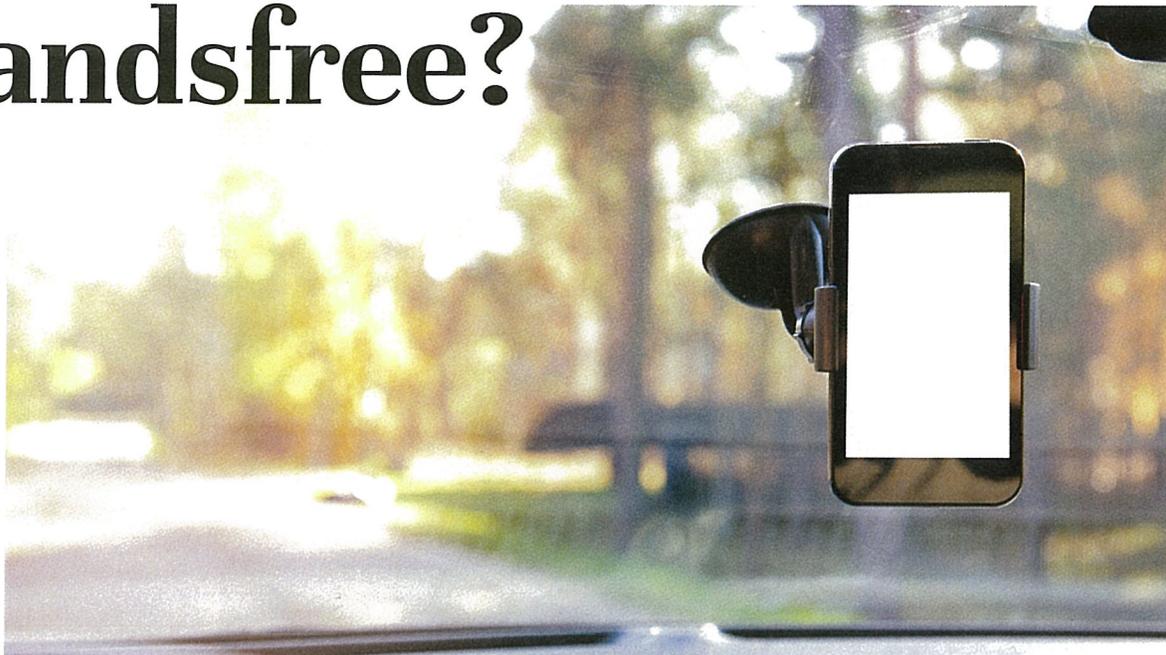
event, or person not related to the driving task.”³

Simply put, distracted driving contributes to somewhere between 15 percent to 20 percent of all auto accidents. This is a staggering statistic. There are also studies published that likens the effects of cellphone usage and distracted driving in general to the effects on people driving while intoxicated.⁴

“Rules” Regarding the Dangers of Distracted Driving

When looking for safety rules or principles regarding distracted driving, there are many resources. NHTSA has excellent websites which discuss the distracted driving problem and are very helpful. One of the best is at www.distraction.gov. Many states have statutes banning hand-held cellphone usage. Further, state drivers’ manuals and CDL manuals warn of the danger of distracted driving. There are more and more studies being conducted on the dangers of cell phone usage and distracted driving. Some are mentioned on the next page.

Handsfree?



Handsfree Use of a Cell Phone Is Still Distracted Driving

Research has shown that going from hand-held to hands-free provides no significant safety benefit. This is because hands-free usage doesn't address the essence of the distraction. The burden of talking on a cell phone — even if it's hands-free — saps the brain of 39 percent of the energy it would ordinarily devote to safe driving.⁵

In a recent piece of research, hand-held cellphone usage was evaluated by measuring cognitive impairment across a wide array of measurements. Both hand-held and hands-free operation were evaluated across a wide variety of measurements, and each method yielded a score of 81.6%, showing how truly difficult it is for people to complete two tasks at once.⁶

Since most states allow cell phone usage when the driver is using the phone handsfree, it is important to show the jury that handsfree cell phone usage is still distracted driving and very dangerous. Even though hands-free cell phone usage is allowed in California, the California CDL manual (and most CDL manuals) states:

“Note that hands-free devices are no less likely than hand-held cell phones to cause you to become distracted. Attention is diverted from the driving task while using either device.”⁷

Additional sources stating handsfree use is still distracted driving include the National Safety Council's “Handsfree is Not Risk Free” campaign, which was released earlier this year. In this summary of statistics, the Council found that an estimated 7 percent of drivers at any given time on American highways are using their cellphones, and that drivers miss up to 50 percent of what they see out of a windshield when they are at the same time talking on a cell phone.⁸ Expert testimony from psychologists and other experts will be needed to explain to the jury the parts of the brain that are

used in cellphone conversations.

Practice Tips for Handling a Distracted Driving Case

The statistics above show what most of us already know: i.e. my next case has a good chance that distracted driving played a part in causing the crash (and hopefully it was the other party and not my client!). A common problem in many cases is that by the time you send discovery to the defendant or depose the defendant driver, the phone has disappeared, calls or texts have been deleted, or otherwise the data has been modified.

It is important to take steps as soon as possible to preserve the phone and the data on the phone. Be sure to put all potential defendants on notice as soon as possible to preserve the cell phone and all cell phone data.

Once you have access to the cell phone and its data, be sure to use a protocol which will capture all data on the cell phone. A protocol to forensically inspect a cell phone may be obtained from AIEG.

Event data recorders (EDR's) are also a source for information on cell phone usage. Some of the more sophisticated EDR's will show if a driver has used a cell phone and the exact times for the usage. Finally, obtain all cell phone records from the cell provider and, if needed, depose a corporate representative of the provider to confirm you have all of the records.

Despite the best efforts of the plaintiff's legal team, many defendants will destroy the cell phone and its data anyway. Many defense counsel or insurance companies would rather face sanctions for spoliation claims or even a negative inference for refusing to preserve cell phones or cell phone data. Use your best efforts to preserve the evidence and if it's destroyed in violation of a preservation letter or discovery requests, aggressively pursue sanctions.

In a recent case we litigated, it was only after the Court ordered an immediate deposition of the defendant driver on

the limited issue of his cellphone use on the date of the crash that we were able to obtain his phone from that date that was previously "lost."

Conclusion

From NHTSA's 2016 data, we know that 10 percent of fatal crashes in 2016, as well as 15 percent of injury crashes, and 14 percent of all police-reported motor vehicle traffic crashes were reported as distraction-affected crashes.⁹ It is expected that distracted driving injuries and deaths will only increase. It is important for all attorneys to be prepared to discover and prove distracted driving if it contributed to injure our clients.

1. NHTSA web page dedicated to "Distracted Driving." Available at: <https://www.nhtsa.gov/risky-driving/distracted-driving>
2. NHTSA "Traffic Safety Facts Research Note," March 2017. DOT HS 812 381. Available at: <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812381>
3. "Investigation and Prosecution of Distracted Driving Cases," May 2017. DOT HS 812 407. Available at: <https://www.nhtsa.gov/document/investigation-and-prosecution-distracted-driving-cases>
4. Strayer, D., Drews, F., & Crouch, D. (2006). A comparison of the cell phone driver and the drunk driver. *Human Factors*, 48(2), 381
5. NHTSA distracted driving website, available at: www.distraction.gov
6. Atchley, P., Tran, A. & Salehinejhad, A. (2017). Constructing a publicly available distracted driving database and research tool. *Accident Analysis & Prevention*, 99, 306-311.
7. The California Commercial Driver Handbook. State of California Dept. of Motor Vehicles, Rev. 1/2017. Page 2-29, 2.94. Available at: https://www.dmv.ca.gov/web/eng_pdf/com1hdbk.pdf
8. National Safety Council web page, available at: <https://www.nsc.org/road-safety/tools-resources/infographics/hands-free-is-not-risk-free>
9. NHTSA web page dedicated to "Distracted Driving." Available at: <https://www.nhtsa.gov/risky-driving/distracted-driving>

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