



Texting While Driving

By Donald P. DeNault, Jr., O'Reilly Rancilio PC

Everyone knows that the Michigan Legislature recently imposed a ban on "texting while driving," and many people know it took effect on July 1, 2010. However, few seem to know the actual details in the new law.

Before we examine those details, however, let's begin with some background.

Federal Motor Carrier Safety Administration research shows that drivers who send and receive text messages take their eyes off the road for an average of 4.6 seconds out of every six seconds while texting. This is a very powerful statistic. At 55 miles per hour, this means that the driver is traveling the length of a football field, including the end zones, without looking at the road!

Therefore, as of January 26, 2009, truck and bus drivers who text while driving commercial vehicles may be subject to civil or criminal penalties of up to \$2,750.00. Texting includes reviewing, not just sending, text messages. It also includes any form of electronic data retrieval (i.e., internet browsing).

In addition, as of December 30, 2009, federal

employees are directed by Executive Order of the President not to engage in texting while driving government-owned vehicles or with government-owned equipment while driving.

Michigan offers additional reasons for banning texting while driving. The Senate Fiscal Agency's analysis of the new law notes that studies by the Virginia Tech Transportation Institute found that sending and receiving text messages is by far the riskiest use of electronic devices in vehicles, because it diverts the driver's attention from the road for extended periods of time. A driver sending a text message is 23.2 times more likely to be in a crash or near-crash than while not distracted. In contrast, talking on a cell phone is only 1.3 times as risky as driving while not distracted, and dialing a cell phone only carries 2.8 times the risk. Over 135 billion text messages are sent each month.

For these reasons, as of July 1st it is illegal to text while driving in Michigan (the 24th state to institute such a ban). The offense is a primary offense, meaning a driver may be pulled over for tex-

ting, even if the texting has no other visible effects on the driver's operation of the vehicle. A first offense will cost \$100; a second, \$200. Exceptions apply for reporting certain emergencies and crimes.

So what does the new law actually say?

To start, the new law prohibits the act of reading, manually typing, or sending a text message on a wireless 2-way communication device that is located in the person's hand or in the person's lap while operating a motor vehicle that is moving on a highway or street.

Some exceptions are built into the statute, both explicitly and implicitly. For example, the statute explicitly exempts GPS devices if they are "affixed" to the motor vehicle. In addition, it would seem implicit that if the communications device is not "in" your hand or "in" your lap, you are free to type away.

Also, and please don't share this one with any teenagers, if the vehicle that you are operating is *not moving* on a highway or street (defined by the Vehicle Code as pretty much every public roadway), apparently you are allowed to text to your heart's

content, even though you should still be paying attention to the road and the vehicles around you. The law also seems to allow driving while texting in parking lots and on other private property that is open to the public, because those things aren't highways or streets (but watch out for a careless driving charge, of course). The more interesting loophole, though, is that you are allowed to text while motionless at, say, a stop sign or traffic light. Or even while stopped in backed up traffic on the freeway! For whatever reason, the Legislature chose not to broaden the definition of "operate" like the courts have done for drunk driving cases (where you can essentially be sleeping it off in the driver's seat with the engine running and still be guilty of drunk driving). In other words, "texting while not moving" will not violate the law.

Also interesting is the fact that, although the statute is designed to prevent the "distraction" caused by text messaging activities, it does not cover other forms of distracted driving related to technology. For example, the law does not address the use of

MP3 devices to find songs while driving.

The law also contains two obvious flaws. First, it specifically forbids the transmission of your ticket for "texting while driving" to your master driving record, yet somehow you will magically pay a higher fine for a second offense. How will anyone know you were ticketed previously if the ticket isn't on your record?

Second, how does the Legislature expect a police officer to catch you? Theoretically, an officer can detect the "glow" from the device during evening hours, but daytime texting may not be detectable. Will that

"glow" constitute reasonable suspicion for a traffic stop? (Probably.) Can an officer request consent to search your phone if you've just been involved in an accident or if you were stopped because the officer saw the "glow"? (Sure.) But if you refuse that consent, what is the police officer going to do?

Clearly, enforcement of the new law will be interesting on a going-forward basis. Only time will tell whether the law makes any difference in distracted driving or accident rates. In the meantime, though, the new law specifically preempts ("supersedes") all local ordinances regulating

the use of a communications device while operating a motor vehicle in motion on a highway or street, with the exception that a municipality may still enforce an ordinance that substantially corresponds to the new law. More than likely, this means certain "distracted driving" ordinances may be at least partially preempted. However, in communities that have adopted the Vehicle Code by reference, local enforcement and prosecution probably began promptly just a few days ago, at midnight on July 1, 2010. ■

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would prefer you not send him a text message while he's driving, because the law says he's not allowed to read it until his car is stopped. Not that you'll know when he's driving, of course. Just call him first to find out, because fumbling with, answering, and talking on the phone aren't "distracted driving" and are obviously much safer things to ask him to do while he's driving. And if you call and find out he's not driving, then hang up and send the text message, because old-fashioned phone conversations are so yesterday. Unless you're the one who's driving while all of this is going on. In that case, even though you'll risk being "that driver" everyone is glaring at, honking at, and cursing at, you may as well just go ahead and have the phone conversation.