



Employer Liability and the Case for Comprehensive Cell Phone Policies

FROM THE NATIONAL SAFETY COUNCIL

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Executive Summary

Cell phones first gained popularity as a business tool in the 1980s when they were called ‘car phones.’ Early adopters saw the potential in using their time on the road to communicate with anyone, anywhere. Now, research shows that the tool that had its beginnings in the car can significantly impair driving skills. This impairment, combined with the large numbers of drivers using cell phones, significantly increases the risk of crashes.

Companies with strong safety cultures take action by reducing risk in areas that protect their employees and the communities in which they operate. CEOs of leading companies committed to best practices in safety understand that safety is good business.

Banning the use of cell phones while driving is a risk reduction effort. Employers have an obligation to protect their employees and others with whom they share the roads. The best action for employers is to implement a total ban policy that includes handheld and hands-free devices and prohibits all employees from using cell phones while driving. This policy should be reinforced throughout the year with education.

With the cell phone’s origin as a corporate productivity tool, it’s understandable that there is concern that prohibiting its use while driving could affect productivity. However most employers that have passed total ban cell phone policies report that the policies do not adversely impact productivity, and some even report that productivity improves after a ban is implemented.

Implementing enforced total ban policies can help protect employees from crashes and injury, as well as help protect employers from liability. An employer may be held legally accountable for negligent employee actions if the employee was acting within the scope of his or her employment at the time of a crash. The key phrase “acting within the scope of his or her employment” can and has been defined broadly in cases of crashes involving cell phones.

To assist companies with implementing cell phone policies, NSC has created a **FREE** Cell Phone Policy Kit, available for download at cellphonekit.nsc.org.

A Total Employer Cell Phone Ban Covers:

- ✓ Handheld and hands-free devices
- ✓ All employees
- ✓ All company vehicles
- ✓ All company cell phone devices
- ✓ All work-related communications – even in a personal vehicle or on a personal cell phone

When tragedy strikes

... Mindy and Peggye should have been safe

The morning of Jan. 25, 2010, was a clear, sunny Texas day. Mindy Ragsdale, a 31-year-old stay-at-home mother of two, and her 82-year-old grandmother, Peggye Woodson, were on their way to Mindy's mother's home. Their sedan was stopped, waiting to make a left turn onto a heavily traveled two-lane rural highway. For 14 seconds prior to the crash, their vehicle should have been in full view of the driver of a cable TV utility pickup truck as it crested a hill and headed toward them with the cruise control set at approximately 70 mph.

But even though the truck's driver had a one-quarter mile visibility, the truck slammed into the rear of Mindy and Peggye's vehicle at full speed with the cruise control still engaged. Mindy and Peggye were killed on impact.

The crash's aftermath and its ripple effect were felt by many people. Mindy and her husband, Jeremy, had known each other a long time, since high school. Mindy's young children, ages 3 and 9, were left without a mother.

In addition to her children, Mindy cared for both sets of grandparents. Peggye's husband of 62 years lost the attention and care of his lifelong partner and had no choice but to leave their family home and live out his remaining days in a nursing home.

All day, every day, millions of vehicles on our roads stop at red lights or make left-hand turns and aren't struck. Mindy and Peggye should have been safe as they waited for traffic to clear. They should have arrived home safely as they had countless times before. So why did this tragedy occur? In the immediate aftermath of the collision, the truck's driver told an emergency medical technician that he had been texting prior to the crash. The driver was employed by a cable company, and the truck was owned by that corporation. For the driver and the cable company, this was only the beginning of the story.

Mindy Ragsdale
31, mom of 2



Mindy and her husband, Jeremy, had known each other a long time, since high school. Mindy's young children, ages 3 and 9, were left without a mother. In addition to her children, Mindy cared for both sets of grandparents.



Peggye Woodson
82, wife and grandmother

Peggye's husband of 62 years lost the attention and care of his lifelong partner and had no choice but to leave their family home and live out his remaining days in a nursing home.



Cell phones and crash risk

In 2010, the year of Mindy and Peggie's crash, motor vehicle crashes killed nearly 33,000 people in the United States.¹ Motor vehicle crashes are the No. 1 cause of work-related deaths and account for 24% of all fatal occupational injuries.² On-the-job crashes are costly to employers, incurring costs of more than \$24,500 per property damage crash and \$150,000 per injury crash.³

Driver distraction is a significant factor in crashes, and cell phones have played an increasing role as cell phone use has grown rapidly in the past 15 years, from a small percentage of the population using cell phones to virtually everyone. Today there are more U.S. cell phone subscriptions than there are people living in the United States.⁴

The National Safety Council estimates that at least 24% of crashes in 2010 involved drivers using cell phones, including 1.1 million crashes where drivers were talking on cell phones and a minimum of 160,000 crashes where drivers were texting.⁵ These estimates include property damage, injury and fatal crashes.

Several research studies found that the risk of a crash is four times as likely when a person is using a cell phone – handheld or hands-free.^{6 7} Cell phone distraction involves all types of driver distractions: visual, manual and cognitive. More than 30 research studies have found that hands-free devices offer no safety benefit, because hands-free devices do not eliminate the cognitive distraction of conversation.⁸

What does this mean for employers?

Employees who use their cell phones while driving expose themselves to a significant safety risk that they are seemingly willing to accept. This risk applies to all employees, not just commercial drivers or other employees whose work involves driving, such as field salespeople or service technicians. A recent National Highway Traffic Safety Administration survey found that drivers cite work-related communications as a reason to use phones while driving.

Employers who expect employees to use cell phones while driving as part of their business must recognize that doing so exposes their employees to preventable crash risk. Consider a situation in which an employer knew a behavior in some area of its operations exposed employees to a four times greater risk of injury. Would employers still expect or even encourage that behavior? That is precisely what happens when an employer permits or even encourages employee cell phone use while driving.

With the intense publicity surrounding cell phone distracted driving in recent years, it would be difficult for employers and employees to argue that they're not aware of the dangers. Beyond the safety issues, employers are now being held to legal responsibility.



Rules, regulations and laws



Following the law isn't enough

Employers are responsible for ensuring their employees adhere to applicable federal agency regulations and federal, state and municipal laws. However, what is often not understood is that these regulations and laws are a minimum requirement and may not be enough to keep people safe. (See Appendix A for a list of federal agency rules, state laws and municipal ordinances with which drivers and their employers must comply regarding cell phones and operation of vehicles.)

The NTSB recommendation

In addition to the list of regulations and laws in Appendix A requiring compliance, the National Transportation Safety Board recently issued the following recommendation:

In December 2011, NTSB recommended that all 50 states and the District of Columbia enact complete bans of all portable electronic devices for all drivers – including banning use of hands-free devices.⁹

This recommendation follows their total ban recommendation for commercial drivers in October, 2011. These recommendations are based on NTSB

investigations of serious and fatal crashes that found driver or operator cell phone use was a factor in the crashes. Here are a few incidents:

- A** On Nov. 14, 2004, a private tour bus struck a bridge on the George Washington Memorial Parkway in Alexandria, VA. The crash destroyed the motorcoach's roof and injured 11 students, one seriously. The bus driver was talking on a hands-free cell phone at the time of the crash. The driver had passed warning signs indicating that the right lane was nearly two feet too low for the height of the bus to pass under the bridge. The driver, who had traveled this same route only about a week earlier, said he did not see the warning signs or the bridge itself before impact. NTSB concluded that the bus driver's cognitive distraction resulting from a hands-free cell phone conversation was the probable cause* of the crash.¹⁰



The bus driver was talking on a hands-free cell phone and missed all of these posted warning signs.



Photos courtesy of NTSB and used with permission.

* Often, numerous driver, vehicle, roadway and other factors contribute to a crash. NTSB identifies probable causes and contributing factors of crashes.

B In March 26, 2010, a semitrailer traveling southbound on I-65 near Munfordville, KY, crossed the grass median and entered the northbound lanes where it was struck by a 15-passenger van. The crash killed 11 people. NTSB determined the probable cause of the crash was the truck driver's failure to maintain control of his vehicle because he was distracted by the use of his cell phone.¹¹

C On July 7, 2010, a barge being towed by a tugboat ran over a tour boat in the Delaware River in Philadelphia. The NTSB investigation revealed that the mate operating the tugboat was inattentive to his navigation duties because he was distracted by repeated cell phone use and a laptop computer as he dealt with a family emergency. Two people in the tour boat were killed and 27 suffered minor injuries.¹²

D On Aug. 5, 2010, traffic slowed before a work zone on I-44 in Gray Summit, MO as vehicles merged from the left lane to the right lane. A truck-tractor with no trailer slowed behind the traffic when it was rear-ended by a pickup truck. This set off a chain of fatal collisions. A school bus carrying 23 passengers struck the pickup truck and came to rest on top of the pickup and the truck-tractor. Moments later, a second school bus in the convoy that was carrying 31 passengers rear-ended the first school bus. Two people were killed and 38 people were injured. NTSB determined that the probable cause of the first collision was distraction due to a text messaging conversation conducted by the pickup driver that resulted in his failing to notice and react to the truck-tractor in front of him.¹³



Photos courtesy of NTSB and used with permission.



Photo courtesy of NTSB and used with permission.



Photo courtesy of NTSB and used with permission.

Rules, regulations and laws (cont.)

Employers should set policies that exceed existing rules, regulations and laws

Safety policies and systems in many companies are designed to reduce significant risks and protect employees. Companies whose leaders are committed to safety excellence know that their safety systems and policies often exceed OSHA requirements or state laws, because regulations and laws often prescribe minimum standards, not best-in-class safety. Designing safety policies that only comply with federal rules, regulations or state laws often leave employees vulnerable to injury and companies exposed to liability and financial costs. Cell phone use while driving is, in this way, no different than many other occupational safety issues. Employers can and have been held liable for actions that are actually allowed by federal regulation and individual state laws.



Cell Phone Policies:

Employers can and should design cell phone policies to follow best safety practice, reduce significant risks and minimize liability. Employers should implement cell phone policies which include:*

- ✓ **Handheld and hands-free devices**
- ✓ **All employees**
- ✓ **All company vehicles**
- ✓ **All company cell phone devices**
- ✓ **All work-related communications - even in a personal vehicle or on a personal cell phone**

Employers need to:

- ✓ **Educate employees**
- ✓ **Monitor compliance**
- ✓ **Enforce the policy**
- ✓ **Address violations**

* Policies can be extended further to cover volunteers, contractors and vendors; any vehicles driven on corporate property; etc. For example, the National Safety Council extended its total ban policy beyond employees to include the vendors that provide transportation at its conferences. Policies can also be extended to cover additional electronic devices such as computers.



Employer role to protect employees and reduce liability

As a first step, employers must realize the full extent of their exposure to liability. The legal theory of *respondeat superior*, or vicarious responsibility, means that an employer may be held legally accountable for negligent employee actions if the employee was acting within the scope of his or her employment at the time of a crash. The key phrase “acting within the scope of his or her employment” can and has been defined broadly in cases of crashes involving cell phones.

To highlight a few:

- A jury found that a driver and the corporation that owned the vehicle were liable for \$21.6 million because testimony revealed that the driver may have been talking with her husband on a cell phone at the time of the fatal crash.
- An off-duty police officer was texting moments before a fatal crash and because he was driving a police cruiser, his employer was held liable for \$4 million.
- An employee was involved in a fatal crash while making “cold calls” as he drove to a non-business-related event on a Saturday night. The firm did not own the phone or the vehicle, but the plaintiff claimed that the company was liable because it encouraged employees to use their “car phones” and lacked a policy governing safe cell phone use. His firm settled the lawsuit for \$500,000.

The lines that we may think exist between employment-related and personal or private life get blurred in some of these cases which involved:

- Cell phones owned by employees as well as employer-provided equipment

- Vehicles that were employee-owned as well as employer-owned or -leased
- Situations where employees were driving during non-working hours or were engaged in personal phone calls

See Appendix B for a list of crashes for which employers were found liable and resulted in large awards or settlements.

Understand what can happen if you are sued

Employers should understand what they may face in today’s courtroom climate. We might expect an employer to be held liable for a crash involving a commercial driver’s license (CDL) holder who was talking on a cell phone with dispatch about a work-related run at the time of an incident – especially if the employer had processes or a workplace culture that made drivers feel compelled to use cell phones while driving.

Attorney Todd Clement, based in Dallas, specializes in trucking and commercial vehicle cases involving catastrophic injuries and death, including cases where employees were involved in crashes while using cell phones. According to Clement, juries are generally motivated to award large verdicts not by sympathy or outrage; rather, large verdicts are returned when the jurors believe that such verdicts make themselves and their children safer. Crashes involving cell phone use appeal to a juror’s sense of self-preservation. Public opinion polls show that the majority of people believe it is very dangerous for other drivers to use cell phones while driving (even though many of these same people report using cell phones themselves while driving). See the results of these polls in Appendix C.

Many people – including those on juries – do not want other drivers to use cell phones, and they most certainly do not want drivers to text. Because much of the public is now well aware of the risks, drivers engaging in distracting behavior are perceived as grossly negligent,* not just ignorant. Juries likewise expect employers to be aware of the risk so that their failure to prevent this dangerous behavior can be seen as grossly negligent. It follows that employers should now be aware of the risks; and thus for them to allow employees to engage in the distracting behavior of texting or talking on a cell phone while driving is also seen as negligent and willful, not just ignorant.

So what happens when an employee driver acts with negligence and the result is serious injury or death? What happens when a driver runs a red light or a stop sign, or crosses the wide median of a freeway, or rear-ends a vehicle at high speed without ever hitting the brakes? Skilled victim’s attorneys will investigate the underlying cause of these negligent acts, particularly cell phone use, since these are the circumstances of numerous crashes involving texting or talking on cell phones. The victim’s attorneys will then seek large jury verdicts, including punitive damages (where permitted), as a way to send the message to society that people shouldn’t take actions that are perceived as threatening to life and limb.



Understand what you may face during legal discovery

A victim’s attorney’s job is to demonstrate the factors that led to negligence. In cases involving an employee in which any aspect of the crash scenario was workplace-related, a smart lawyer will follow the trail of evidence. This trail will lead not only to the employee, but to the employer as well. This is the legal discovery process. Discovery can uncover:

- Driver cell phone records revealing the amount of time during the workday when the employee is using the phone
- Cell tower records where the calls begin in one location and end in another, thereby proving cell phone use while driving
- Texting records which may even include the actual texts
- Telemetric records which correlate with the phone records to provide an accurate picture of this risky behavior
- Details about the employer’s cell phone policy, and the extent of its policy implementation and enforcement

An employer must demonstrate that a policy has been enforced. The policy must be more than words on paper. Further, an employer should not in any way develop a culture where employees feel that they need to use cell phones while driving.

* Someone is negligent when he or she proceeds with an action despite knowing the risks of the action on the safety of others. This standard can apply not just to individuals and their actions, but also to corporations that know the risks and whether the corporation banned employees from engaging in the risky action.



Employer role to protect employees and reduce liability (cont.)

Implement and enforce a total ban policy

Employers can never be 100% protected in the event of a lawsuit. However, if employers can show that they implemented a total ban policy, educated employees, monitored compliance and enforced the policy, they will be in a more defensible position than if they had not followed these practices. As Todd Clement describes it, an employer should have an “enforced cell phone policy.”

The best practice is to prohibit all employees from using any cell phone device while driving in any vehicle during work hours or for work-related purposes. Regarding off-the-job hours, precedent has been set by lawsuits (see Appendix B). Thus employers may want to extend their policies to cover off-the-job use of company-provided wireless devices, use of personally-owned devices that are reimbursed by the company, and use of devices in company-provided vehicles. All work-related cell phone use while driving should be banned 24/7.

U.S. Department of Transportation regulations include interstate commercial fleets (see Appendix A) but most vehicles – including intrastate operations and passenger vehicles – are not included in these federal rules. Non-commercial drivers such as field sales people and other employees who drive to service calls, meetings, events and job-related errands are exposed to crash risk just as the commercial drivers are. Despite this, some employers exempt operations such as their field sales teams from policies due to productivity concerns. However it may be argued that because of the large number of work-related miles traveled by mobile sales operations compared to other employees, their exposure is higher and thus their crash risk is likely higher. Indeed, several lawsuits

Cell phone bans are *not* likely to decrease productivity

Productivity concerns are often cited as a common barrier to total ban policies. Companies sometimes want to allow their employees to use hands-free devices so that they can continue communicating with customers and colleagues while driving. This, however, is not a best practice in safety.

Among companies with policies prohibiting both handheld and hands-free devices, productivity decreases are rare:

- In a 2009 survey of 469 National Safety Council members that had implemented total cell phone bans, only 1% reported that productivity decreased.
- In a 2010 survey of Fortune 500 companies that had implemented total cell phone bans, only 7% of respondents said productivity decreased, while 19% thought productivity had actually increased.¹⁴
- Before AMEC, an international engineering firm with a large professional field force, implemented its total cell phone ban, more than half of employees expected productivity to decrease. But in reality, after employees adjusted to the ban, 96% reported productivity stayed the same or increased.¹⁵

As with other policy expectations of employees, they eventually figure out how to eliminate inefficiencies and maintain their productivity and service levels.

described in Appendix B involved serious injury and fatal crashes in which the salesperson’s use of a cell phone was a factor.

Epilogue

In the case of the cable company truck involved in the fatal crash that was described in the Introduction, many recommended corporate cell phone policy practices were not implemented. The field technician driver's phone records showed habitual cell phone use and texting while on the job. Had he been paying full attention to driving on that two-lane highway the morning of Jan. 25, 2010, experts testified that there would have been plenty of time for him to stop safely without hitting the vehicle occupied by Mindy Ragsdale and Peggye Woodson.

Todd Clement was the plaintiff's attorney who investigated the company's safety practices. Part of his strategy was to expose the lack of a strong, enforced cell phone policy as a factor that could have helped to prevent the crash. During videotaped depositions, a company executive testified that the company didn't "think that's respectful to our associates or reasonable in this day and age to ban communications," and that the company trusted employees to "have really great judgment" regarding cell phone use while driving. The collision and resulting tragedy showed just how wrong they were.

After a year-long investigation, and two weeks before trial where the victims' families were bringing a wrongful-death lawsuit, the company settled for a confidential amount. The case itself has attracted the type of wide-spread national media attention that is not beneficial to corporations.

We now know from public opinion polls and behavior surveys that despite the public's awareness of the dangers of cell phone distracted driving, for many people this is a difficult behavior to change without the incentive of policies or laws that they know will be enforced. Cell phone use while driving is a significant safety risk.

Companies with strong safety cultures take action by reducing risk in areas that protect their employees and the communities in which they operate. CEOs of leading companies committed to best practices in safety understand that safety is good business.

Banning the use of cell phones while driving clearly is a risk reduction effort. Employers have an obligation to protect their employees and others with whom they share the roads. The time for company leaders to act is now.



The NSC Cell Phone Policy Kit has materials to assist employers with every step of policy implementation:

- ✓ **Building management support to implement a total ban**
- ✓ **Getting employee buy-in to improve compliance**
- ✓ **Educating employees with ready-made promotional pieces**

The kit includes a sample total ban cell phone policy and materials to educate management and employees about the risks of hands-free and handheld phones. The kit is **FREE** and can be downloaded at cellphonekit.nsc.org.



Appendix A

Federal rules

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION AND PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION – These agencies passed a joint rule that prohibits commercial drivers from using handheld mobile phones while operating commercial trucks or buses.¹⁶ The ban includes texting and handheld device dialing and conversation. Federal civil penalties include:

- \$2,750 for each offense
- Disqualification from operating commercial vehicles for multiple offenses
- A maximum penalty of \$11,000 for commercial truck and bus companies that allow their drivers to use handheld cell phones while driving.

Plus, states can suspend a commercial driver's license after two or more serious traffic violations. This rule applies to about 4 million commercial drivers.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION – Employers should prohibit any work policy or practice that requires or encourages workers to text while driving, or the employers risk being in violation of the Occupational Safety and Health Act of 1970.¹⁷ Employers violate the OSH Act if they require their employees to text while driving or organize work so that texting is a practical necessity even if not a formal requirement. Workers may file a confidential complaint with OSHA.

PRESIDENTIAL EXECUTIVE ORDER – President Obama issued an Executive Order banning all civilian Federal Government employees from texting while driving on Government business or using Government-supplied devices. The order applies to about 3 million employees. Federal contractors, subcontractors, grant recipients and subrecipients are encouraged to develop similar policies.¹⁸ Texting includes SMS, email, obtaining navigation information, and other electronic data retrieval and communication.

FEDERAL RAILROAD ADMINISTRATION – The FRA restricts railroad operating employees' use of personal and railroad-supplied mobile phones and other distracting electronic devices¹⁹ in trains and on the ground around trains. Personal electronic devices must be turned off with any earpiece removed from the ear during specified times. FRA sanctions for violations may include civil penalties, removal from safety-sensitive service, and disqualification from safety-sensitive service on any railroad. The FRA rule sets minimum standards requiring compliance, and railroads may adopt more stringent requirements.

FEDERAL AVIATION ADMINISTRATION – The FAA called on air carrier operators to create and enforce policies that will limit distractions in the cockpit.²⁰ The Information for Operators (InFO) guidance reminds crewmembers and air carriers that any cockpit distraction that diverts attention from required duties can "constitute a safety risk." This includes use of personal electronic devices for activities unrelated to flight. The FAA's Sterile Cockpit Rule prohibits pilots from engaging in any type of distracting behavior during critical phases of flight, including take-off and landing. The InFO asks air carriers to address distraction through crew training programs and to also create safety cultures to control cockpit distractions.

Appendix A

State laws

State legislatures have also responded by passing laws at a rapid pace. As of March 2012:

- Thirty-six states ban all drivers from texting.²¹
- Eleven states and the District of Columbia ban all drivers from talking on handheld phones.²²
- Thirty-one states and the District of Columbia ban Graduated Driver License holders or teen drivers from any cell phone use.²³
- Nineteen states and the District of Columbia have laws restricting cell phone use by bus, school bus or transit drivers.²⁴

Visit the Insurance Institute for Highway Safety at iihs.org/laws/cellphonelaws.aspx for current details about all U.S. state laws.

Municipal ordinances

Municipalities in many states have passed ordinances governing driver cell phone use within their jurisdictions. As of the writing of this paper, there is one municipal ordinance in the United States that bans hands-free devices (Chapel Hill, North Carolina); all other local ordinances currently ban texting or handheld phone use and some ban phone use in specific areas such as school zones. Unfortunately, there is no single list of all municipal ordinances.

Canadian Provinces and Territories

Most Canadian provinces and territories have passed laws governing cell phone use behind the wheel. For an updated description of laws, visit the government websites of the provinces and territories: canada.gc.ca/othergov-autregouv/prov-eng.html





Appendix B

Lawsuits involving employers

Numerous lawsuits have resulted in large awards or settlements payable by employers and their insurers when employees were involved in motor vehicle crashes while using cell phones.

Crash scenarios have included a mix of business-related and personal scenarios:

- Driving during work hours and outside of typical work hours
- Driving to or from work appointments and driving for personal reasons
- Employer-provided and employee-owned vehicles
- Employer-provided and employee-owned phones
- Hands-free and handheld devices
- Business and personal conversations

\$24.7 MILLION – COMMERCIAL TRANSPORTATION COMPANY, 2008 crash in Missouri

A federal judge awarded \$18 million, a district court awarded \$6 million, and a jury awarded \$700,000 in three cases involving a crash that killed three people and injured 15 others, some seriously. The driver of the tractor-trailer was checking his phone for text messages when his truck ran into 10 vehicles that had stopped in backed-up traffic on a freeway. The driver had reached for his phone and flipped it open, missed seeing the stopped traffic and hit the vehicles without braking first. In this instance, \$18 million was awarded to a plaintiff who sustained serious brain injuries, leaving him paralyzed and unable to walk or talk until his death in 2011; \$6 million was awarded to the family of one of the deceased; and \$700,000 was awarded to a victim who suffered broken bones. In addition to these awards there were several smaller ones.

\$21.6 MILLION – TECHNOLOGY COMPANY, 2007 crash in Ohio

A jury found the driver and the corporation that owned the company car liable when the driver rear-ended another vehicle on the freeway, causing the vehicle that was struck to cross the median into oncoming traffic lanes. The crash resulted in a fatality at the scene. Cell phone records show that the employee driver who rear-ended the vehicle was using a cell phone at the time of the crash. According to testimony, she may have been talking with her husband.

\$21 MILLION – SOFT DRINK BEVERAGE COMPANY, 2010 crash in Texas

A company driver was talking on a hands-free headset, in compliance with her company's policy which allowed hands-free use while driving, when she struck another vehicle broadside and seriously injured the driver. A jury held the company liable to pay \$21 million in compensatory and punitive damages to the injured driver.

\$16.1 MILLION – LUMBER DISTRIBUTOR, 2001 crash in Arkansas

A salesman was involved in a crash while talking on his cell phone as he drove to a sales appointment. He rear-ended a vehicle with no attempt to stop. The crash severely and permanently disabled a 78-year-old woman, who has since died. The jury originally awarded nearly \$21 million, but eventually the case settled for \$16.1 million, the combined limits of the employer's and the employee's insurance policies.

Appendix B

\$8.7 MILLION – STATE OF ILLINOIS, 2007 crash in Illinois

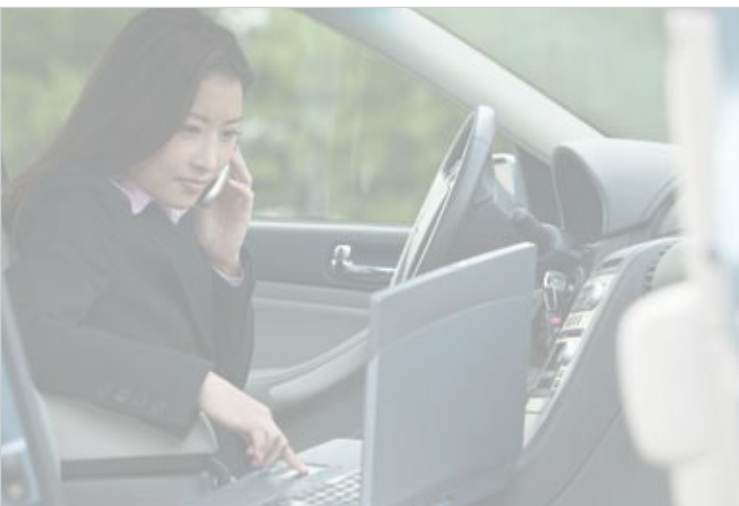
While responding to a crash, a state trooper was speeding at more than 120 mph on an interstate freeway, talking on a cell phone to his girlfriend and using email before he lost control of his squad car and crossed over the median. The crash instantly killed two teenage sisters in the first vehicle, which was hit head-on, and injured a couple in another vehicle. The family of the sisters was awarded \$8 million, and the other family was awarded \$700,000 by the State Court of Claims.

\$5.2 MILLION – PAPER COMPANY, 2007 crash in Georgia

An employee was driving on an interstate freeway and allegedly talking on her company-supplied cell phone. The employee's car was set on cruise control and she did not notice that traffic ahead had slowed. She braked too late and rear-ended the vehicle in front of her, which was being driven by a widow and mother of four. The impact caused the victim's car to go into a ditch and roll over, catching the driver's arm between the car and the ground. Her arm later had to be amputated. Even though it wasn't certain whether the employee had been using the cell phone at the exact time of the crash, the employer settled the lawsuit before going to trial.

\$5 MILLION – CONSTRUCTION COMPANY, 2002 crash in Georgia

A construction company employee reached over to a mounted, hands-free cell phone provided by his employer to retrieve a message and crashed into a stationary sedan that had stopped to turn left, severely injuring a passenger in the sedan. Evidence showed that the employee may have been returning a work-related call. In court the company claimed that the driver was commuting to his job, and thus was off-the-clock at the time of the crash, but the cell phone was provided by the company. The employer's fine was \$4.75 million of the settlement.





Appendix B (cont.)

\$4.1 MILLION – ELECTRICAL CONTRACTING COMPANY, 2006 crash in Illinois

An employee was lost and using a global positioning system on a cell phone while driving a company van. The employee allegedly ran through a red light, broadsiding another vehicle and seriously injuring a 70-year-old woman. The driver and his employer were sued, the defendants admitted liability at the beginning of a trial and the parties settled.

\$4 MILLION – PRINCE GEORGE'S COUNTY, 2009 crash in Maryland

An off-duty police officer sent or received a text message in the moments before a crash that struck another vehicle and killed a college student. Although the officer was off-duty at the time, he was driving his police cruiser and the county was held liable.

\$2 MILLION+ – LAW FIRM, 2004 crash in Virginia

An attorney was talking on her cell phone when she struck and killed a 15-year-old girl in a hit-and-run. The attorney did not see the pedestrian; allegedly she claimed that she thought she had hit a deer. Her firm settled for an undisclosed amount. A jury ordered the attorney to pay about \$2 million in damages and she was charged with a felony and served one year in jail on work release. One factor in the suit was the billable hours that the attorney typically charged to clients while talking on her cell phone.

\$1.75 MILLION – CAR DEALERSHIP, 2007 crash in Florida

A mom was on her way to a Christmas party with her three kids when their minivan was struck by a car that pulled out in front of her. The car's driver was a salesman on a cell phone. The mom was left with permanently disabling orthopedic and neurological injuries. The settlement was intended to help pay her medical bills and therapy. The car dealership sued has since closed and its assets sold to other dealerships.

\$1.5 MILLION – STATE OF HAWAII, 2001 crash in Hawaii

A State Appeals Court ordered the State of Hawaii to pay damages to the family of a pedestrian who was struck by a car being driven to work by a public school teacher employed by the state. The driver had just completed a cell phone call.

\$1.45 MILLION – CITY OF PALO ALTO, 2006 crash in California

The city agreed to pay a \$1.45 million settlement to a crash victim left with permanent, debilitating spinal injuries after being struck by a city worker who was reaching for his cell phone while driving. The injured man's vehicle was rear-ended at a red light.

\$750,000 – CONSTRUCTION COMPANY, 2003 crash in Georgia

A construction shift supervisor was involved in a crash while on his way to work. The crash resulted in injuries to the driver of another vehicle. A Georgia appeals court ruled that a commuting exception to *respondeat superior* did not apply because there was evidence that the supervisor was involved in a cell phone conversation regarding company business around the time of the crash. While the jury was deliberating, the company settled rather than risk a jury verdict.

Appendix B (cont.)

\$500,000 – BROKERAGE FIRM, 1999 crash in Pennsylvania

A brokerage firm employee ran a red light and struck and killed a motorcyclist while making “cold calls” as he drove to a non-business-related event on a Saturday night. His firm settled the lawsuit. The firm did not own the phone or the vehicle operated by the employee, but the plaintiff claimed that the company was liable because it encouraged employees to use their car phones and had not established an adequate policy for safe use of cell phones.

PARTIAL SUMMARY JUDGMENT CONSTRUCTION EQUIPMENT RENTAL COMPANY, 2007 crash in Louisiana

An employee was involved in a car crash while talking with a co-worker on a cell phone. The employer was issued a partial summary judgment based in part on this scenario: While the company didn’t authorize its employees to conduct business on cell phones while driving, it also didn’t take action to prohibit employees from doing so. In fact, the company paid the cell phone bill, and the employee regularly called customers on the cell phone while driving.

CONFIDENTIAL SETTLEMENT COMPUTER NETWORK SUPPORT COMPANY, 2011 crash in Florida

An 18-year-old female was killed when a driver reaching for a cell phone crossed over a median into oncoming traffic, and the vehicles hit head-on. The driver was driving his boss’ pickup truck and was on a personal cell phone call when he dropped the phone and bent to pick it up. The employer’s truck was loaned to the employee and the crash occurred during Saturday non-working hours. The company was found vicariously liable.

CONFIDENTIAL SETTLEMENT CABLE COMMUNICATIONS COMPANY, 2010 crash in Texas

A field technician for a cable company rear-ended another vehicle with his company truck as he approached an intersection at approximately 70 mph with cruise control on. He never hit his brakes. The other vehicle was stopped at the intersection’s red light. Two women were killed in the crash. The technician was believed to be texting at the time of the crash. The company settled two weeks before trial rather than risk going to trial.

PENDING LITIGATION PHARMACEUTICAL COMPANY, 2008 crash in Florida

A 62-year-old man was killed while pedaling his three-wheel recumbent racing bike in his Florida neighborhood. He was hit by a sales representative who was allegedly texting, according to phone records, as he drove to work in a company car. The salesman failed to yield at a stop sign. The judge has ruled that the jury may consider punitive damages as well as compensatory damages. Compensatory damages are intended to compensate the plaintiff for losses including financial loss, pain and suffering. But punitive damages are intended to punish the defendant and/or set an example for society and thereby deter others from the behavior. Punitive damages are awarded in cases displaying reckless indifference or intentional wrongdoing, and have been awarded in DUI cases. Punitive damages generally are not covered by insurance. Thus defendants with more financial resources may face punitive damages.



Appendix C

Public opinion polls

AAA FOUNDATION FOR TRAFFIC SAFETY (AAAFTS) – TRAFFIC SAFETY CULTURE INDEX

Since 2008 the AAAFTS has conducted the annual *Traffic Safety Culture Index*, a nationally-representative telephone survey, to assess a few key indicators of the degree to which traffic safety is valued and pursued. Each year questions are asked regarding driver distractions and cell phone use. This survey gives a glimpse of changes over time.

Perception of Safety Threat

In AAAFTS' 2011 survey:

- 78.8% said that drivers who are texting or emailing are a “very serious” threat to their personal safety and another 16.4% said that texting or emailing while driving is a “somewhat serious” threat. Less than 1% of people said it is not a threat.
- 57.6% said that drivers talking on cell phones are a “very serious” threat to their personal safety and another 30.2% said that texting or emailing while driving is a “somewhat serious” threat. Only 11.2% said it is a minor threat or not a threat.

Self-Reported Driver Behavior

	2008	2009	2010	2011
In the past 30 days, how often have you talked on a cell phone while you were driving?	18% - very often	24.5% - regularly	15.7% - regularly	10% - regularly
	18%	15.9% - fairly often	17.8% - fairly often	21% - fairly often
	7%	30.2% - rarely	25.6% - rarely	30.1% - rarely
	10%	8.9% - just once	9.5% - just once	6.5% - just once
	47% - never	32.6% - never	31.1% - never	31.4% - never

Appendix C

Perceptions of What Others Think (Social Norms)

In the 2011 AAFTS survey regarding texting and emailing:

- 94% said that they personally consider it unacceptable for a driver to text or email while driving
- 81% called this behavior “completely unacceptable”
- 82% believe that most other people where they live consider it unacceptable to text while driving

Regarding social disapproval toward talking on a handheld cell phone while driving:

- 71% of respondents said that doing so is somewhat or completely unacceptable
- But nearly half of all drivers believe incorrectly that most others actually approve of it



Regarding talking on a hands-free cell phone:

40.3% of respondents said that talking on a hands-free cell phone while driving is somewhat or completely unacceptable. Thus the majority of people still believe that doing so is acceptable. At this point, the public’s knowledge about the risks of cognitive distraction and cell phone conversation needs improvement, a finding that reflects the need for public education.

Regarding support for laws banning cell phone use while driving:

- 70.7% of people support restricting all drivers of all ages from using handheld cell phones while driving.
- 28.1% “strongly” support banning all drivers from using both handheld and hands-free phones.
- 24.4% “somewhat” support a total ban for all drivers.
- Thus a slight majority of respondents – 52.5% – now support legislation banning both handheld and hands-free phone use while driving.



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