

RESOLUTION 03-14-04

DIGEST

Motor Vehicles: Use of Cellular Telephones

Adds Vehicle Code section 23338 to bar the use of cellular telephones while operating a motor vehicle.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to Resolution 05-05-00 which was disapproved.

Reasons:

This resolution adds Vehicle Code section 23338 to bar the use of cellular telephones while operating a motor vehicle. This resolution should be disapproved because it defines a violation of the statute as a misdemeanor rather than an infraction, as most vehicular offenses are defined.

A number of highly credible studies have shown that driver inattention, not cell phone use per se, is the reason for most accidents for which cellular telephone use has been blamed. (See, e.g., *Redelmeir et al., Association Between Cellular-Telephone Calls and Motor Vehicle Collisions* (Feb. 13, 1997) *The New England Journal of Medicine*, 336(7):453.) This resolution ignores those well-established facts and attempts to attribute driver inattention to one minor factor.

The more significant problem, however, is the fact that the proposed resolution goes far beyond the language of pending proposals in the legislature and the law in nearby states. Assembly Bill 45 (2003-2004 Reg. Session), currently pending in the Senate Transportation Committee, would make driving while using a cell phone an infraction punishable by a \$20 fine plus costs. Senate Bill 1582 (2003-2004 Reg. Sess.) would make it an infraction for a provisional licensee to drive while using a cellular telephone. A similar resolution in 2000 (which was disapproved) would have made driving with a cellular telephone without a hands-free device an infraction.

None of these proposals would apply to the use of hands-free devices properly used or to the use of a cellular phone to contact a law enforcement agency or public safety entity for emergency purposes. This resolution, on the other hand, would mandate a fine of at least \$500 and/or six months' jail time, with no exception for hands-free or emergency use.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to add California Vehicle Code Section 23338 to read as follows:

- 1 §23338
- 2 No person shall operate a motor vehicle while using a cellular telephone. It shall
- 3 be a misdemeanor to operate a motor vehicle while dialing, answering, or speaking on a

4 cellular telephone and each offense shall be punishable by the imposition of a fine of not
5 less than \$500.00 and or 6 months' jail time at the discretion of the court.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Santa Barbara County Bar Association

STATEMENT OF REASONS:

Existing Law: There is no existing law prohibiting the operation of motor vehicles while using a cellular telephone.

This Resolution: This Resolution would greatly enhance the health and safety of the people of California by eliminating this very real danger to life and limb.

The Problem: Last year, a 16-year old girl killed another driver on the freeways of Los Angeles because she was operating her vehicle while using a cellular telephone. It has been documented that drivers who are initiating, answering, and or engaged in conversations on cellular telephones have the same accident rating as drivers who are driving under the influence.

Each time a police officer responds to the scene of an accident, the first thing he or she looks for the presence of a cellular telephone. Insurance companies are threatening to or have left the state of California because doing business here is becoming less and less economical. Every one of us has had a driver cut in front, turn left or right from an inappropriate lane, not stop for either a stop sign or a red light at an intersection with a traffic light and or any number of other irresponsible acts only to observe that this person was on a cellular phone totally distracted from the business of driving. Most countries in Europe prohibit driving while engaged on a cellular telephone call. It is time for this state to join that practice.

Each year innocent children and adults lose their lives due to irresponsible driving by people using cellular telephones. There is simply no justification for letting this practice continue. What possible business reason can outweigh the life of a child? It is incumbent upon a driver to pull to the side of the road to answer a telephone call and or initiate or engage in a conversation on a cellular telephone only while off the highway.

Adding California Vehicle Code Section 23338 will further the public policy by saving lives of both children and adults, saving huge amounts of taxpayer funds, and will not have a detrimental effect upon the process.

IMPACT STATEMENT

This proposed resolution will not affect any other code sections.

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COUNTERARGUMENTS

BAR ASSOCIATION OF SAN FRANCISCO

Abuse of the driving privilege takes many forms. Using a cellular telephone without a hands-free device is one. No one disputes that. However, the use of cellular telephone with a “hands-free” device, including but not limited to speaker phones, hands-free headsets, and emerging Bluetooth-enabled technologies, balances appropriately the need to avoid the distractions which arise from using a cellular phone without such a device with the many benefits of using a cellular telephone while operating a vehicle.

No person should operate a motor vehicle while holding a boom box to his/her ear. Such use requires the use of at least one hand and at least one eye to support the boom box and adjust its volume and tuning. Yet, we can all agree that almost everyone can safely operate a vehicle while listening to the dash mounted car radio or CD player, which has volume and tuning controls on the dash or on the steering wheel and a speaker system for listening. The reason? The system permits the use of two hands and eyes for driving with only momentary distractions. We clearly are not ready to criminalize the act of operating a vehicle while changing the car radio’s station or volume, or changing the CD.

Further, and significantly, criminalizing the prohibited conduct goes too far. Is it more serious to use a cellular telephone than it is to commit the infractions of speeding or running a red light? We don’t think so. Is it more serious to use a cellular telephone than to commit the infraction of using the HOV lane when not carpooling on the freeway? We tend to think that the LA delegation and our other Southern California colleagues would not think so. In sum, we believe that misdemeanor punishment for the prohibited conduct is excessive.

We therefore urge disapproval of the resolution as written.

Alternatively, we urge the adoption of the following amended resolution:

Veh.C. §23338

No person shall operate a motor vehicle while using a cellular telephone without a hands-free device. A violation of this section shall be punishable by a fine not exceeding \$250.00.

LAWYERS’ CLUB OF SAN DIEGO

There is current pending legislation that would make it unlawful for children under the age of 18 from using a cellular telephone while operating a vehicle. The Lawyers Club of San Diego generally supports the goal of this resolution, addressing the safety issues inherent in cell phone use while operating a motor vehicle. However, as presented, this resolution goes too far. It

covers *all* cell phone use in a car, including uses that are not dangerous. For example, a driver could use on a hands-free cell phone with no more hazard than speaking to another passenger. Also, the resolution would prohibit calls that arguably should be permitted because they benefit the public, such as reporting illegal driving or an accident.

An amendment to the resolution would be supported, allowing the use of the cellular telephone while operating a vehicle in emergency situations, and allowing the use of the cellular telephone while operating a vehicle in all other situations, but only with the use of a hands free device. We believe it would be advisable to look at how other states have addressed this issue, and how effective their laws have been.

SAN DIEGO COUNTY BAR ASSOCIATION

As amended, the San Diego County Bar Association Delegation approves restricting the use of cellular telephone while operating a motor vehicle. However, an absolute ban on cellular phone use and potential jail term for a violation of the statute is overkill. The proponent does not offer any empirical studies to support their claims for increased risk by using a cellular phone while driving. Unfortunately, motorists perform many tasks while driving their car which can increase the risk of an accident including: eating, applying make-up, shaving, talking on a cellular phone, settling a squabble between children seated in the back of the car, or just admiring the passing vistas. We cannot legislate away every potential distraction. Motorists have the responsibility to operate their car in a safe manner. The motorist can be charged with reckless driving if there is a determination that their use of a cellular telephone was the cause of the accident and that their conduct met the legal definition of reckless. Additionally, the motorist who causes an accident by using their cellular telephone can also be held financially responsible for the damages.

The amended resolution reads as follows:

No person shall operate a motor vehicle using a cellular telephone without the use of a hands-free device. It shall be an infraction ~~misdemeanor~~ to operate a motor vehicle while dialing, answering, or speaking on a cellular telephone without the use of a hands-free device and each offense shall be punishable by the imposition of a fine of not less than \$500.00 ~~and or 6 months' jail time at the discretion of the court~~. This statute shall not make unlawful the use a cellular telephone in case of emergency or to report a dangerous road condition to police or 9-1-1.

SANTA CLARA COUNTY BAR ASSOCIATION

Proponent's heart tugging and emotional argument is, unfortunately, just that – emotional. We all have anecdotes about people driving while talking on the phone. Mine involves someone with a “Hang up and Drive” bumper sticker who was making an illegal turn while talking on the phone. But an illegal turn is illegal whether one is on the phone or not. Reckless driving is illegal whether you're on the phone or not.

Cell phones, like anything else, can be used with common sense or irresponsibly. Therefore,

anecdotes are irrelevant. What is relevant is an AAA Foundation for Traffic Safety study (Phase I in 2001 and Phase II in 2003) that showed that using or dialing a cell phone was the source of distraction in just 1.5 percent of the crashes studied and created an “Adverse Vehicle Effect” (e.g. encroachment into another lane, sudden braking) in fewer instances than eating, drinking and changing radio stations. In fact, the study shows that having small children in a car is the second most distracting and dangerous factor of all, after lighting or extinguishing cigarettes.

Our delegation hopes that even those who feel some degree of regulation of cell phones is necessary would agree that not distinguishing between hands on and hands off cell phones makes no sense. Talking on a hands off cell phone is less distracting than talking to passengers as you don't turn your head to look at the person on the other end of the line. In addition, the punishment, without regard for whether the use of the cell phone caused an accident or even resulted in a traffic violation, is overkill.

For these reasons, Santa Clara County Bar Association opposes Resolution 3-14-04.