



# Between the Lines

## Mark Your Calendars

**NHTSA Drive Sober or Get Pulled Over Crackdown**  
December 13 – January 1, 2014

**National Association of Prosecutor Coordinators Winter Meeting**  
Austin, TX  
December 9 – 11, 2013

**Transportation Research Board Annual Meeting**  
Washington, DC  
January 12 – 16, 2014

**National Sheriffs' Association Winter Conference**  
Washington, DC  
January 20 – 25, 2014

**Upcoming NDAA Courses**  
for a listing of all upcoming NDAA courses, please go to:  
[www.ndaa.org](http://www.ndaa.org)

*Between the Lines* is published by the National District Attorneys Association's National Traffic Law Center. Items may be reprinted if properly attributed. Please provide copies of any reprints to the National Traffic Law Center. For questions or other inquiries, contact the National Traffic Law Center at 703.549.9222 or [trafficemail@ndaa.org](mailto:trafficemail@ndaa.org).

## Uncharted Territory: The Anatomy of a Texting While Driving Vehicular Homicide Case

By Tara Jenswold<sup>1</sup>

*Part 2 of an article that appeared in Between the Lines Vol. 20, No. 6 (December 2012)*  
[http://www.ndaa.org/pdf/BTL%20Vol20\\_No6.pdf](http://www.ndaa.org/pdf/BTL%20Vol20_No6.pdf)

**P**art one of this article included 19-year-old Stephanie Kanoff's version of the events that lead to the death of 21-year-old Dylan Elefson. She stated that, while driving home from work, she swerved to avoid another vehicle and struck and killed Elefson. There was no evidence that Kanoff consumed any alcohol or ingested any drugs. However, the investigation revealed that in the four minutes prior to the crash, Kanoff was continually texting and making calls on her cell phone while driving. Emily Thompson, Assistant District Attorney for Dane County, and I ultimately charged Kanoff with homicide by negligent operation of a motor vehicle. Though the charge was not unique in operating a motor vehicle while intoxicated (OWI) cases, this case would set precedent in Wisconsin because we based the charge solely on texting or manipulating a cell phone while driving. The challenge was we had to convince a jury that texting while driving, not OWI, constituted criminally negligent conduct.

While most cases are resolved short of trial, some cases are almost guaranteed to go to trial from the moment a charging decision is made. Not only was this a case of first impression, it also had a sympathetic defendant so it was ripe for trial. Therefore, we had to consider early in the case whether we needed an expert who could explain the dangers of texting or ma-

nipulating a phone while driving. On the one hand, common sense dictates that texting while driving was dangerous. Distracted driving, and specifically texting while driving, was certainly a buzz topic at the time with public service announcements warning against the dangers proliferating the airwaves. On the other hand, we were not sure relying on common sense would be enough for jurors to convict in this case because no one had tried a case of criminal negligence based on texting or manipulating a cell phone while driving alone. To convict Kanoff of criminal negligence, the jury would have to conclude that manipulating her cell phone while driving created an unreasonable and substantial risk of death or great bodily harm. Common sense certainly suggests that such conduct is dangerous but we had to convince a jury that Kanoff's behavior created a substantial risk of death.

Since no one had ever litigated a case like this before in Wisconsin, we drew upon our experience prosecuting impaired driving-related vehicular crimes. In those cases, we knew that jurors used common sense and personal experience to determine that operating a motor vehicle while intoxicated or impaired was dangerous and resulted in crashes. Nevertheless, we still often presented expert testimony regarding the effects of alcohol or drugs on a person's ability to operate a vehicle safely. Experts tell the jury how driving impaired makes crashes more likely.

<sup>1</sup> Tara Jenswold, Deputy Attorney General and Traffic Safety Resource Prosecutor for the State of Wisconsin. Ms. Jenswold and Emily Thompson, Assistant District Attorney for Dane County, WI prosecuted this case.

If we often provided expert testimony to juries in impaired driving vehicular homicide cases, why would we not do it in this case? Ultimately, we determined that the jury should have more than just personal experience and common sense to rely upon. We wanted the jury to hear from an expert that research and data also dictate that manipulating a cell phone or texting while driving is dangerous and can create a substantial risk of death. This would take an expert that truly understood the dangers of texting and driving.

We began our search for an expert by contacting other prosecutors around the country who specialize in vehicular crimes. We learned that Dr. Sheila Klauer, a Research Scientist from the Virginia Tech Transportation Institute, had performed extensive research on distracted driving, including serving as the project manager of the 100 Car Naturalistic Driving Study,<sup>2</sup> a groundbreaking project that captured real time data and video of drivers in the seconds leading up to crashes or near crashes. The purpose of the study was to assess which secondary driving tasks most increased the risk of crashes or near crashes. We contacted Dr. Klauer who agreed to review the case and testify at trial.

At trial, Dr. Klauer testified to her vast experience in the field of human factors, including the results of the 100 Car Naturalistic Driving Study. While the 100 Car Study did not specifically capture data on texting while driving (the data was captured in 2003-2004, before texting was prevalent), Dr. Klauer explained that the results were still relevant to the case at hand. She indicated that two of the top five risky tasks identified were reading and manipulating or dialing a phone, both of which are required for texting. Texting is a visual manual task, meaning it requires both eyes off the road, as well as some physical manipulation with the hands. Such tasks dramatically increase the risk of crash or near crash when performed behind the wheel, according to Dr. Klauer. Dr. Klauer also told the jury that anytime a driver's eyes are off the roadway for any two out of six seconds, the risk of crash is double that of an alert driver. She went on to testify that inattentive drivers look up and down but don't scan the roadway, and that 90 percent of crashes and near crashes involve drivers who were looking away from the forward roadway just prior to crash. Dr. Klauer further testified that drivers 18 to 19 years old were five times more likely to be involved in an inattentive related crash.

Ultimately, Dr. Klauer opined that Kanoff's behavior was consistent with that of an inattentive driver in the seconds leading up to the crash. Dr. Klauer concluded that Kanoff was not efficiently or effectively scanning the roadway at the time she hit Elefson, and that if Kanoff had been attentive to the driving task, the crash would not have occurred.

In addition to Dr. Klauer, we called Trooper Ryan Zukowski of the Wisconsin State Patrol's Technical Reconstruction Unit as an expert in crash reconstruction. Trooper Zukowski testified that Kanoff's minivan was traveling between 25 and 29 miles per hour when it hit Elefson's car. Before hitting Elefson's car, the minivan hit Elefson, throwing him onto the windshield and dragging him underneath it for 88 feet. When interviewed immediately after the crash, Kanoff maintained that she slammed on the brakes with both feet when she saw Elefson. However, Trooper Zukowski testified that he found no evidence of pre-impact braking or any evasive maneuver on Kanoff's part. He stated that the claim of braking was not consistent with the fact that the minivan traveled

88 feet before it came to a stop, and that if Kanoff slammed on the brakes as she claimed, Elefson would not have been dragged that distance. Finally, he testified that there was no physical evidence on scene that suggested that another car was traveling in front of Kanoff as she claimed.

Since this was a case about texting and cell phone manipulation, the cell phone evidence was vital to the case. We needed to find a way to present the cell phone texting and calling evidence effectively to the jury. To do that, we first needed to understand what evidence we had and what it meant. During the pretrial investigation phase, detectives had reviewed the contents of Kanoff's cell phone and taken screen shots of the text messages. Detectives also downloaded information from the cell phone using the UFED Cellebrite System. Finally, we subpoenaed the service provider records from Sprint Corporation.

At trial, the screen shots of the text messages made for great demonstrative evidence. We enlarged the photos to poster size prints and presented them to the jury. To show when the texting occurred, we introduced the service provider records, which indicated to the second when texts were sent and received. However, the Cellebrite report gave us some of the most damaging evidence because it provided the contents of the text messages and broke the activity down into second increments. Unfortunately, the service provider records and Cellebrite Report were lengthy and confusing. Therefore, we organized all the phone activity into one spreadsheet. This allowed us to present all the phone activity to the jury effectively and helped the jurors to understand the extent of Kanoff's phone activity, succinctly and comprehensively.

In addition to presenting the calling and texting activity, we also wanted to provide the jury with Kanoff's actual cell phone. Unfortunately, police never took Kanoff's phone as evidence (they searched it with her consent) and it was no longer available. So, we subpoenaed a technician from a local retail outlet of Sprint Corporation and had him bring a cell phone identical to the one used by Kanoff. Kanoff owned an LG slide phone, which required considerably more manipulation to use than the newer model touch screen phones. It required two hands to compose a text message. It also required a considerable amount of manipulation to alternate between texting and making calls. This was significant since the evidence showed Kanoff had done this in the moments leading up to the crash. The phone was especially difficult to manipulate while driving and we were able to demonstrate that for the jury through the technician.

Using the phone, the technician testified to its features and demonstrated to the jury how a person would go about composing a text message or placing a call. We specifically asked the technician to show the jury what it would take to do exactly what Kanoff did in the moments leading up to the crash — alternating between composing text messages, receiving text messages, and placing calls. This allowed the jury to see the phone up close and visualize what Kanoff was physically doing in the moments leading up to the crash.

The defense contended that the State had not proved beyond a reasonable doubt that Kanoff was texting or manipulating her phone at the time of the crash. According to the defense, the crash was unavoidable. The defense contended that the crash happened not because Kanoff was texting, but because Elefson was in the

2 U.S. Department of Transportation. *The 100-Car Naturalistic Driving Study*. By Dingus, Klauer, et al. Three Part Series. Virginia: National Technical Information Service, April 2006. (National Highway Traffic Safety Administration Bulletin DOT HS 810 593). <http://www.distraction.gov/research/pdf-files/the-100-car-naturalistic-driving-study.pdf> (accessed 10/3/2013).

middle of the road, and the driver of the car in front of Kanoff left her no time to avoid striking Elefson. In short, the defense argued that the crash was the fault of everyone except Kanoff.

To bolster her theory, Kanoff called two expert witnesses, a professor and an engineer. The first witness, a professor from the University of Wisconsin-Madison, was an expert in radio wave technology. The purpose of his testimony was to suggest that the State's timeline of Kanoff's phone activity was unreliable. The professor testified that there were many variables that could affect cell phone technology, including atmospheric conditions, the presence of sky scrapers, and problems with the phone itself. While the professor had an impressive resume and was clearly intelligent, we were able to limit the impact of his testimony. On cross, we got the professor to concede that his only experience working with actual cell phones was in the 1980s and that the technology had substantially changed since then. We also minimized the professor's testimony by pointing out that the only documentation of reported problems with Kanoff's model of phone came from his review of online chat room conversations. He acknowledged that he had no idea who the people were who reported the problems, and that he had no way to ensure the veracity of the claims made online. Furthermore, he agreed that there were no skyscrapers in Madison or any atmospheric conditions the day of the crash that could have affected Kanoff's ability to send text messages.

The defense also called an engineer as an expert in crash reconstruction. The purpose of his testimony was two-fold. First, he contended that Kanoff did brake prior to impact, contrary to Trooper Zukowski's opinion and second, he would demonstrate how Kanoff had to swerve to avoid another vehicle. The engineer testified that his examination and analysis of the bumpers of both vehicles revealed evidence of weight shifting, which was the result of braking on Kanoff's part. While his conclusion seemed plausible, on cross examination the engineer admitted that he had done his analysis after the crash, with damaged vehicles (a topic of inquiry suggested to us by Trooper Zukowski). Elefson's rear bumper area had significant damage from the impact and had shifted downward post crash. The engineer conceded that in order for his analysis of bumper heights to be accurate, he should have used a vehicle that did not have rear end damage. Confronted with information, the engineer admitted that his analysis was not necessarily accurate, and that his claim of pre-impact braking was questionable.

The engineer also testified about Kanoff's claimed that a silver car made a sudden lane change right in front of her, leaving her

no time to react to Elefson. The defense presented no physical evidence or witness accounts to support this claim. Nonetheless, the engineer prepared a report and diagram outlining a scenario consistent with Kanoff's claim. The diagram showed a car traveling in front of Kanoff and depicted the car making a sudden lane change, leaving no time for Kanoff to avoid Elefson. On cross, we got the engineer to concede that the theory was based entirely on statements of the defendant. He further conceded that he made a number of assumptions in creating the scenario, the most important one being that the car had even existed in the first place. By pointing out that the engineer's entire reconstruction of the crash was based on the statements of the defendant and not any physical evidence, we were able to limit the effect of his testimony.

In closing, we recalled what the jurors had told us during voir dire. Many of the jurors admitted to texting while driving but said they only did it while stopped at stoplights or on quiet streets with little traffic. Remembering that, and keeping in mind the "there but for the grace of God go I" phenomenon, we tried to find a way to differentiate between the jurors' habits and Kanoff's conduct leading up to the crash. We argued that Kanoff did not just send one text while stopped at a red light and she was not on a quiet street. Rather, Kanoff was continually manipulating her phone while driving her 4,000 pound minivan down a busy street in central Madison. She placed two calls to her mom, two calls to her boyfriend, composed a 108-character text message to her manager, read an incoming text from her manager, and then composed a text to her boyfriend in the three and one-half minutes leading up to the crash. We also asked the jurors to remember the demonstration of the Sprint technician who showed how Kanoff had to manipulate her phone by taking her hands off the wheel and her eyes off the road. We emphasized that Kanoff was fixated on her phone instead of watching the road and traffic around her, and that was criminally negligent conduct. Had Kanoff been alert and paying attention, she would have seen Elefson in his neon clothing, or his car with the hazard lights on, and she would have moved over, like every other driver. Had that phone not been in Kanoff's hand, Elefson would still be alive. Finally, we asked the jury to hold Kanoff accountable for taking Elefson's life.

After deliberating just two hours, the jury found Kanoff guilty of homicide by negligent operation of a motor vehicle. Kanoff was subsequently sentenced to a three-year prison sentence, with one year of initial confinement and two years of extended supervision. She was also ordered to perform community service by speaking to youths about the dangers of texting while driving.



**Contact Us**  
**National Traffic Law Center**  
*National District Attorneys Association*  
99 Canal Center Plaza  
Suite 330  
Alexandria, VA 22314  
703.549.9222

**Joanne E. Thomka**  
Program Director  
703.519.1645  
jthomka@ndaa.org

**Duane M. Kokesch**  
Senior Attorney  
703.519.1641  
dkokesch@ndaa.org

**Kristen K. Shea**  
Senior Attorney  
703.519.1644  
kshea@ndaa.org

**Brittney D. Wilson**  
Program Assistant, Paralegal  
703.519.1695  
bwilson@ndaa.org