



# Ohio Prosecuting Attorneys Association

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House Bill 355  
Opponent Testimony  
April 10, 2018

Chairman Manning, Vice-Chair Rezabek, Ranking Member Celebrezze and members of the House Criminal Justice Committee, thank you for the opportunity to provide opponent testimony on House Bill 355, a bill to create a new criminal offense of “sexting” and to authorize courts to permit first time offenders charged with “sexting” to enter a diversion program.

It is important to first point out that prosecutors already can and regularly do grant diversion to juveniles who are engaged in sexting. While this committee is undoubtedly aware of the handful of high profile cases that have garnered media attention due to some tragic consequences we want to make sure that you are also aware that diversion is the preferred and even common practice for prosecutors in sexting cases, even under current law. Our opposition to the bill stems not from the fact that the bill provides another avenue for diversion but rather from the new criminal offense of “sexting.”

While we recognize that the goal of this bill is to provide prosecutors with an additional option when considering charges in a sexting case we have three important concerns. First, the bill, in reality, will reduce prosecutor options when more serious behavior with a higher degree of criminality is involved. As you are all aware, the creation of a new specific offense, the elements of which overlap substantially with more general existing offenses cause problems for prosecutors due to the fact that rules of statutory construction and caselaw dictate that specific offenses prevail over general offenses when the specific offense was more recently adopted. Our great concern with House Bill 355 then is that a court of appeals will find that the new prohibition on possession or distribution of “sexually explicit digital material” covers essentially the same conduct as pandering obscenity involving a minor, pandering sexually oriented material involving a minor, or the illegal use of a minor in nudity oriented material. Were this to happen, eighteen year old adults and juvenile offenders alike could be subject at most to a misdemeanor and eight hours of community service even if their conduct rises to the level of the more serious offenses. While I appreciate the amendment that was added to the bill in an effort to address this concern, if we could avoid the implications of R.C. 1.51 by adding such language we would not need R.C. 1.51 at all.

Second, I think there is a misconception that prosecutors’ only option under current law when dealing with sexting is to charge a juvenile with a felony offense for which they will be subjected to sex-offender registration and notification requirements. I want to bring to the committee’s attention R.C. 2907.31 prohibiting disseminating matter harmful to juveniles. This section prohibits directly selling, delivering, furnishing, disseminating, providing, exhibiting, renting, or presenting to a juvenile or a group of juveniles

any material or performance that is obscene or harmful to juveniles. Material is “harmful to juveniles” if it represents nudity, sexual conduct, sexual excitement, or sado-masochistic abuse. Division (D)(1) of this section goes on to state that a person may violate this section “by means of an electronic method of remotely transmitting information if the person knows or has reason to believe that the person receiving the information is a juvenile or the group of persons receiving the information are juveniles.” If the material disseminated is “harmful to juveniles” the penalty is a misdemeanor of the first degree. While this section may not have been intended to address sexting between juveniles, it clearly prohibits that behavior and provides prosecutors with a low level offense nonetheless.

Finally, I want to remind everyone that sexting is not necessarily victimless. During proponent testimony several weeks ago, Judge Tornichio mentioned the case of a young woman from Cincinnati who was the victim of sexting and who eventually committed suicide after being bullied and harassed over the sext. I say this only to point out that for every high profile case about the negative effects on someone accused of sexting, there is an equally sad story about a victim whose life was irreparably changed. Tragedies exist on both sides of this and we think everyone should be aware of that given that this seems to be driven primarily by the high profile stories of those who are accused.

Ultimately, our concern is that House Bill 355 as written will unintentionally limit prosecutors’ ability to deal with more serious situations when those situations arise. The high profile cases are, we feel, ultimately outliers. Sexting is much more widespread than these high profile cases suggest and the fact that it is not in the news more often suggests that prosecutors by and large are handling cases with appropriate discretion. The tragic stories that we are all aware of are undoubtedly a reason for us to educate our members about sexting and what a prosecutors options are, they are not a reason to tie the hands of all of the prosecutors in the state who have and are handling these situations appropriately.

Thank you, again for the opportunity to testify on House Bill 355. I would be happy to answer any questions you might have.