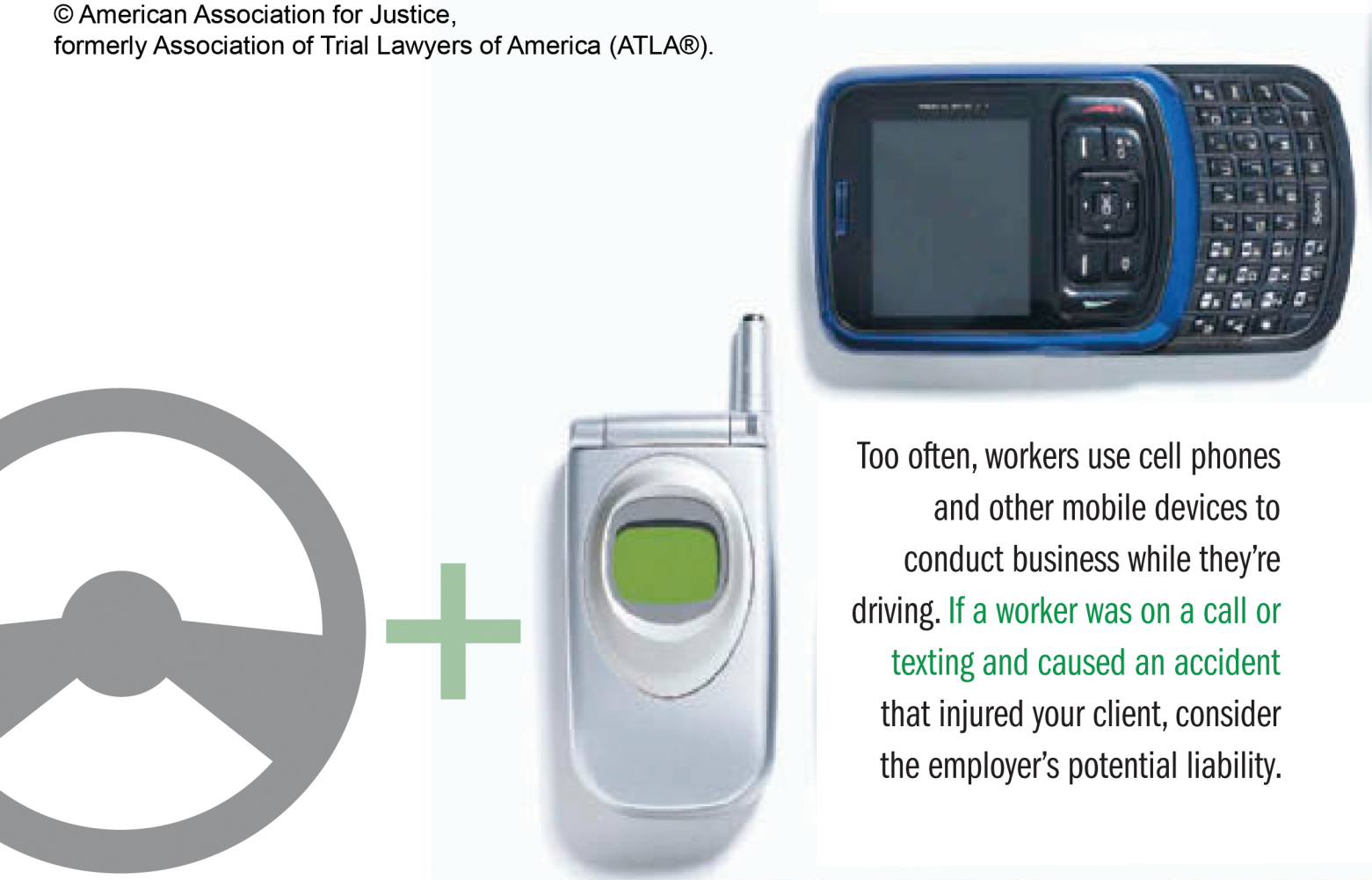

Too often, workers use cell phones and other mobile devices to conduct business while they're driving. If a worker was on a call or texting and caused an accident that injured your client, consider the employer's potential liability.

Bad = Call

By || **Ira H. Leesfield and Mark A. Sylvester**

Cell phones and driving don't mix, and the research proves it. Many studies—including some published by the *New England Journal of Medicine* and the *British Medical Journal*—report that talking on a cell phone while driving substantially increases the dangers of driving.[1] Drivers who use cell phones have slower reaction times, and more accidents, than drivers who are legally drunk.[2] Compounding the danger is the ever-growing number of people in the United States who use cell phones, which rose from 40 million in 1996 to over 276 million in 2009.[3]

Cell phones have expanded the temporal and geographic scope of employees' jobs. More people than ever use them to conduct business while driving—and they're not just making phone calls. People use their cell phones to receive and send documents, e-mail, and text messages, and to perform research. They can work anywhere, anytime—but if they do all this while they're driving, they run the risk of hurting or killing someone.[4]

Several cases from around the counry indicate an emerging trend in the law regarding employer responsibility for injuries caused by employees who use their cell phones to conduct business while driving.

- In 1999, a Smith Barney investment broker was using his cell phone to make "cold calls" when he drove through a red light, striking and

RYAN MCVAY/GETTY IMAGES

killing a young man on a motorcycle. Smith Barney settled the lawsuit for $500,000.[5]

- In 2001, a Florida jury found an Arkansas lumber company liable for $21 million in damages after the company's salesperson injured the plaintiff in an automobile collision while making a cell phone call between sales appointments.[6]
- In 2004, a Virginia attorney hit and killed a teenage girl at 10:30 p.m. while using her cell phone to conduct firm business. Phone records from the attorney's firm reportedly showed that she was making work-related calls at the time of the accident. According to the attorney, she never saw the girl and thought that she had hit an animal. The law firm ultimately settled with the victim's family for its role in the case; a jury rendered a wrongful death verdict against the attorney and she was disbarred.[7]
- In 2007, International Paper Co. settled a personal injury lawsuit for $5.2 million with an Atlanta woman who lost her arm after being rear-ended by one of the company's employees. The employee reportedly was driving 77 mph and using her company-issued cell phone at the time of the accident.[8]

If your client was injured by somebody who was distracted because he or she was using a cell phone to conduct business while driving, two theories of liability can apply.

Respondeat superior. Before the advent of cell phones, common law typically held that an employee driving to and from work, to and from lunch, or otherwise not engaged in traditional business-related activities was not acting in the course and scope of employment. As such, the employer could not be held liable under the doctrine of respondeat superior for accidents caused by the employee during those time periods.

As the cases above show, the law is changing. Now an employer may be liable even if the employee was driving his or her own car or making a work-related call outside of regular business hours.

Direct negligence. In addition to being vicariously responsible, an employer may be directly negligent for the employee's actions. An employer has a duty to exercise reasonable care for the safety of the public whenever its employees are acting within the course and scope of their employment.

A direct negligence claim against an employer would be appropriate in the following situations:

- The employer encouraged or expected the employee to use a cell phone for work-related purposes while driving.
- The employer knew, or should have known, that employees were using their cell phones while driving for work-related purposes and failed to act affirmatively to stop the conduct.
- The employer failed to adopt and implement policies banning the use of cell phones and mobile devices for work-related purposes while driving. Even where such policies exist, you should investigate and determine whether the employer adequately communicated this policy to its employees; provided adequate training, instruction, and supervision regarding the policy; and took adequate steps to prevent employees from using cell phones for work-related purposes while driving.

Investigation and Discovery

A claim against an employer will succeed only if you can prove that the driver was on the cell phone when the accident occurred, that the driver was using the cell phone for work-related purposes, and that the use of the cell phone caused or contributed to the accident.

You can get most of the evidence you need through formal discovery after the lawsuit is filed; however, it doesn't hurt to try to gather as much information as possible beforehand. Try to get the following as quickly as you can:

The police report. In some jurisdictions, police reports have a box that the officer will check if a cell phone was being used at the time of the accident.

The police report may also list a cell phone number for the driver. With this, you can perform an online search to determine the cell phone provider from Web sites such as www.intellius.com. With that information, you can try to get the cell phone records—but without a subpoena, your chances are slim.

The report will list any passengers that were in the defendant driver's vehicle. Try to contact them to ask if the driver was using a phone and who he or she was communicating with.

Employment information. You may be able to determine the employer of the defendant driver through the police report or your own investigation.

The following should be obtained through formal discovery channels such as interrogatories, requests for production, subpoenas, and depositions:

- Cell phone numbers and provider names for every cell phone in the possession, custody, or control of the driver on the date of the accident.
- Phone records from the cell phone provider, including records of all incoming and outgoing calls, texts, and e-mails. Some providers keep records for a short time, so it is imperative to issue these subpoenas as soon as possible.
- The employer's billing records for the employee's cell phone use.
- The identity of the person who

paid for the cell phone and the cell phone plan. If it was the employer, you can use this to establish your case for both direct and vicarious liability.

- Names of the recipients of all calls, e-mails, and text messages that were transmitted around the time of the incident. Contact those people to ask if the calls were business-related.
- Information from company employees about whether their coworkers typically conduct business on their cell phones while driving.
- Any policies related to employee use of cell phones, in particular while driving. Discovery should include finding out when and how employees are instructed or trained on the policy.
- The identity of any witnesses, passengers, bystanders, or coworkers whose testimony might be helpful.

Anticipating Defenses

Assuming you can prove that the driver was using a cell phone at the time the accident occurred, the defendant employer is sure to raise several affirmative defenses in its response:

- The driver was not in the course and scope of employment at the time.
- The driver violated the employer's policies on cell phone use.
- The use of the cell phone did not cause the accident.

As for the first defense, discovery—especially of the cell phone records—can show that the driver was using the cell phone for business-related purposes when the accident occurred.

The second defense should not affect the vicarious liability count against the defendant: If business was being conducted, the employer is vicariously liable, period. This defense principally applies to the direct negligence claim—but it's not a strong defense.

Even if the employer had a policy that banned the use of cell phones for business-related purposes while driving, dig a little deeper to find out more. Did other employees routinely engage in this practice, despite the policy? If so, the defendant will be hard-pressed to argue that it didn't know this was taking place. The "ostrich with its head in the sand" is never a good defense. If the employer knew that its employees were engaging in this practice, and if the employer did nothing further to deter it, the defense should not stand.

Also, how did the employer train, instruct, and supervise its employees on its cell phone policy? Is a 100-page policy manual with one line that says "Don't use cell phones while driving" adequate?

The last defense addresses causation. The defendant is likely to argue that the plaintiff cannot prove that using a cell phone is causally related to the accident. To counter this defense, you can bring out research studies that show how using a cell phone affects driving ability.

For instance, the Insurance Institute for Highway Safety found that people who talk on cell phones while driving are four times more likely to get into crashes that cause serious injury than people who don't.[9] Several studies have shown that the human brain is incapable of fully concentrating on both driving and talking on a cell phone, because those two tasks require the resources of several identical areas of the brain.[10]

One researcher found that "when people talk on the phone, they are doing more than simply listening. The

A claim will succeed only if you can prove that the driver was on the cell phone when the accident occurred, that the driver was **using the cell phone for work-related purposes**, and that the use of the cell phone contributed to the accident.

words conjure images in the mind's eye, including images of the person they are talking to," decreasing reaction time.[11] Others have found that it doesn't matter if the driver is using a handheld or a hands-free phone—both are equally distracting.[12] A human factors expert should be able to elaborate on these studies and tie them to your case.

You should also elicit testimony from the defendant driver to support causation. For instance, the driver might testify that he or she didn't see the other car or didn't see the light change from green to red.

Witnesses, including passengers in the vehicle, may also help. If a passenger saw the traffic signal or the other vehicle approaching, but the driver on the cell phone did not, a juror could conclude that the driver was distracted by use of the cell phone.

These days, it's worth pursuing cell phone use in any case involving motor vehicle accidents. The possibility that the driver was distracted by talking, e-mailing, or texting is increasingly likely. And all too often, the employer either encouraged or ignored this behavior.

The importance of investigating cell phone use and employer liability transcends your individual case. Many people are unaware of how dangerous drivers can be when they're distracted by their cell phones. Too many employers have been lax about instituting or enforcing bans on their employees' use of cell phones while driving, choosing productivity over safety—with results that have proven deadly. Litigation can exert pressure on these companies to insist on stricter cell phone policies and make the roadways safer for everyone.

Ira H. Leesfield is a partner in Leesfield & Partners in Miami. He can be reached at leesfield@leesfield.com. Mark A. Sylvester is also a partner in the firm. He can be reached at sylvester@leesfield.com.

Notes

1. *See e.g.* Suzanne P. McEvoy et al., *Role of Mobile Phones in Motor Vehicle Crashes Resulting in Hospital Attendance: A Case-Crossover Study*, 331 Brit. Med. J. 428 (2005); Donald A. Redelmeier & Robert J. Tibshirani, *Association Between Cellular-Telephone Calls and Motor Vehicle Collisions*, 336 New Eng. J. Med. 453 (1997).
2. David L. Strayer & Frank A. Drews, *Multitasking in the Automobile*, in *Attention: From Theory to Practice* 121, 131–32 (Arthur F. Kramer et al. eds., Oxford U. Press 2006), www.psych.utah.edu/AppliedCognitionLab/WickensChapterFinal.pdf.; *see also* Kate Barrett, *Texting while Driving: Transportation Secretary Advocates Ban*, ABC News (Aug. 4, 2009), http://abcnews.go.com/Travel/Politics/story?id=8246302&page=1.
3. Cellular Tel. Indus. Assn., *US Wireless Quick Facts*, CTIA.org, www.ctia.org/advocacy/research/index.cfm/AID/10323.
4. *See* Robert S. Nelson, *Eyes and Ears on the Road: Employees' Hands Should Be on the Wheel*, Workforce Mgt. Online (Oct. 2006), www.workforce.com/section/03/feature/24/55/31/index.html.
5. *Roberts v. Smith Barney, Inc.*, 1999 WL 33236939 (E.D. Pa. 1999); *see also* Terry Carter, *Crash Course for Business: Companies Can Be Liable for Accidents Resulting from Job-Related Cell Phone Use*, 85 ABA J. 40 (Aug. 1999).
6. *Bustos v. Leiva*, No. 01-13370-CA-30 (Fla. Cir. Dec. 14, 2001); *see also* Matt Sundeen, *Cell Phones and Highway Safety: 2006 Update*, Natl. Conf. State Legislatures (Mar. 2007), www.ncsl.org/print/transportation/2006cellphone.pdf.
7. *Yoon v. Wagner*, No. 24892 (Va. Cir. Oct. 7, 2004); *see also* Nelson, *supra* n. 4.
8. *Ford v. McGrogan*, No. 2006-CV-113602 (Ga. Super.Ct. Feb. 13, 2008).
9. *See e.g.* McEvoy et al., *supra* n. 1; Redelmeier & Tibshirani, *supra* n. 1, at 456.
10. *See e.g.* Strayer & Drews, *supra* n. 2, at 131.
11. Matt Richtel, *Drivers and Legislators Dismiss Cell Phone Risks*, N.Y. Times (July 19, 2009), http://community.nytimes.com/comments/www.nytimes.com/2009/07/19/technology/19distracted.html?sort=highlights (citing Prof. Steven Yantis, Dept. of Psychol. & Brain Scis., Johns Hopkins U.).
12. *See e.g.* McEvoy et al., *supra* n. 1; Redelmeier & Tibshirani, *supra* n. 1, at 456; *see also* Mark A. Hofmann, *Multitasking by Drivers Raises Liability Concerns*, Bus. Ins. (Aug. 24, 2009), www.businessinsurance.com/article/20090823/ISSUE01/308239993.