

A Second Look at Cell Phone Liability

A Big Law Firm Pays a Big Price

In the summer of 2003, this firm reported on the growing negative consequences of cell phone use by employees during the course of employment. In that article, we urged our clients to establish procedures and guidelines to alleviate the use of cell phones by employees during the course of their employment.

After many discussions with general counsel and risk managers from companies around the country, it has become apparent that either the message has not been heard or that any efforts to bring change to existing corporate policy has found itself caught in the quagmire of corporate deadlock. Perhaps, the following real life case of corporate cell phone liability will serve as a motivator for those companies that have failed to establish an anti-cell phone or similar policy.

Staying in touch does have its price. Just ask the national law firm of Cooley, Godward. In Yoon v. Wagner, while driving along a state highway, attorney Jane Wagner, a partner at Cooley, was using a cell phone to conduct business for her firm. During her drive, Wagner's car struck a 15 year old girl. Wagner kept driving, having thought that what she struck was a deer. The girl died. According to the wrongful death complaint filed by Yoon's family, the Plaintiff alleged the Wagner had made work related calls from her cell phone around the time of the accident.

Not only did Wagner face civil liability, but also, she faced criminal prosecution. She pleaded guilty to leaving the scene of an accident, and as a result of a felony conviction, she lost her license to practice law. Meanwhile, her employer faced liability as a co-defendant in the ongoing civil case. The family's theory of recovery against the firm pivoted on Wagner's use of her cell phone to conduct business while driving.

A jury returned a two million dollar verdict in the wrongful death case. Prior to trial, the employer's insurer reportedly reached an undisclosed settlement, saving the employer from the prospect of being liable as well. The ramifications of this case reach beyond the verdict, for sure. First, the case establishes that criminal wrongdoing and felony conviction may be a proximate result of improper cell phone use. Second, corporate employers of all kinds need to regulate the conduct of their employees regarding the use of cell phones. The Defendant law firm had no such policy in place, according to sources close to this case. But for the settlement of this case by the firm, a jury may have entered a

verdict in the millions based upon the particular facts, including the fact that Wagner had left the scene of the accident. On the business side of the ledger, Wagner was a promising partner with a growing list of corporate clients. Needless to say, the accident and its fall out caused damage in terms of actual loss to the firm but also to the firm's prestige and reputation. For example, how do you explain to your clients that one of your partners left the scene of an accident? Perhaps, the only legitimate explanation is that Wagner's concentration may have been impeded while using her cell phone.

Until the law becomes more settled, what can employers do to limit their liability? Surely, having a well-crafted and explicit set of policies and guidelines is a good starting point. Making sure that the corporation employees act in a manner consistent with state laws is another as more and more states in one way or another work to legislate penalties in this area. For today's employer, the goal should be to develop policies which minimize the potentially risky use of cell phones while driving. Aside from limiting cell phone use, the most risk-adverse employers may wish to eliminate other ties to employee cell phones. As an alternative to compensation packages for sales personnel and executives that contain cell phone allowances, other forms of incentives could be substituted.

Even employers who do not otherwise encourage cell phone use will benefit from a policy that establishes limits for this increasingly prevalent feature of modern business life-and one that is not going to go away. Employers can and do control the use of alcohol in the workplace, for example. The same care and attention must be paid to the use of cell phones. Those policies should be articulated in such a way as to protect and increase the employer's bottom line. It is imperative that the employer stay in the "driver's seat" on this issue because the actual and consequential costs are too high and going higher.

We have a number of ideas on how to prepare such a policy. For more specific advice, contact us at our office.