“gray area” by prohibiting cell phone use altogether.

Further, even if the CMV driver is in compliance, the issue of whether the use of the phone was a “distraction” will, in most cases, be a question for the jury and, thus, this issue just will create one more fact that must be discounted to show that our driver was doing everything he or she could do.

Although many, many drivers, who would be prospective jurors, use a cell phone while driving whether it be legally or illegally, our experience is that they tend to hold a CMV juror’s hand even if they are not doing the right thing. Cell phones prove to be extremely helpful in the event of an accident or other emergency situations.

PART II of this article will appear in the next issue of the Transportation Law Update.

Gary N. Stewart is a partner in the Commercial Motor Vehicle Section in our Harrisburg office. Gary is admitted to practice in Pennsylvania, New Jersey, Massachusetts, Connecticut, Vermont and Rhode Island as well as before the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania, the District of New Jersey, the District of Massachusetts, the District of Rhode Island, the District of Connecticut and the U.S. Court of Appeals for the First and Third Circuits. He graduated magna cum laude from Widener University School of Law (Harrisburg campus) in 1992. Gary was the recipient of the James C. Crumlish Jr. Award for Excellence in Scholarship and Administrative Law. He received his undergraduate degree from the U.S. Merchant Marine Academy at Kings Point, NY, and holds U.S. Coast Guard professional licenses as Master of Oceans, Steam or Motor Vessels up to 1600 gross tons as well as Chief Officer, unlimited tonnage, all oceans. Gary served as the law clerk for the Honorable Rochelle Friedreich, Commonwealth Court of Pennsylvania in Harrisburg. He has been selected by his peers as a Transportation/Maritime Pennsylvania Super Lawyer in 2012, 2011, 2010, 2009 and 2007.

Gary can be reached at (717) 234-7703 • gstewart@rawle.com

Robert J. Aldrich III, an associate in our Harrisburg office, concentrates his practice in the area of commercial motor vehicle defense. Robert earned his J.D., magna cum laude, from Western Michigan University Cooley Law School in 2013. He served as Senior Associate Editor of the Law Review and the Journal of Practical and Clinical Law. While attending law school, Robert served as a judicial intern for the U.S. Court of Appeals for the Sixth Circuit, the Michigan Court of Appeals, and the Supreme Court of Pennsylvania. He also served as a law clerk for a private law firm in Okemos, Michigan. Robert earned a B.S. degree in Spanish from the Pennsylvania State University in 2009. After law school, he served as a judicial law clerk to the Honorable J. Michael Eakin, Supreme Court of Pennsylvania, from January 2014 through March 2015. He also served as a judicial law clerk to the Honorable Margaretta Parti Worthington, Monroe County Court of Common Pleas, Stroudsburg, Pennsylvania, from September through December 2013. Robert is admitted to practice in Pennsylvania, as well as the U.S. District Court for the Middle District of Pennsylvania.

Robert can be reached at (717) 234-7703 • raldrich@rawle.com
The rule does not require CMV employers and/or carriers during the same time period.

**PENALTIES AND FINES**

Violations of these rules will have consequences for CMV drivers, carriers, and companies. Under the rules, CMV drivers may be fined up to $2,750 for a first conviction. A violation of the cell phones rules is considered a serious traffic violation. Therefore, if a CMV driver is convicted of two violations of the rule within a three-year period, a 60-day disqualification may be imposed, and a 120-day disqualification may be imposed for additional convictions during the same time period.

The rule does not require CMV employers and/or carriers to establish written company policies regarding cell phone use by their drivers, but they are prohibited from allowing or requiring their drivers to use hand-held cell phones. Under the regulations, CMV employers and/or carriers could incur a fine up to an amount of $11,000 per violation as a result of a violation by their driver, regardless of whether a company cell phone policy is in place.

**RECOMMENDATIONS**

As a result of the rules explained above, we recommend that our clients and all CMV carriers and/or companies amend their current policies to ensure compliance with the FMCSA regulations by prohibiting cell phone use in violation of such regulations. Such policies should be strictly enforced in order to deter CMV driver violations.

**VARIOUS MID-ATLANTIC STATE LAWS**

We surveyed state cell phones laws in Maryland, New Jersey, New York, Ohio, Pennsylvania, and West Virginia.

No state has gone so far as to completely ban all cell phone use by CMV drivers. Therefore, the single-touch rule and the FMCSA regulations described above apply to all CMV drivers in these states. Below is a summary of the respective cell phone laws related to CMV and non-CMV drivers in each state.

In Maryland, all drivers, both CMV and non-CMV, are prohibited from using hand-held cell phones while the motor vehicle is in motion. Therefore, every driver in Maryland must use hands-free options. The same rules apply to all drivers in New Jersey, New York, and West Virginia.

New Jersey contains an exception for two-way radios used by CMV drivers. New York amended its Vehicle and Traffic Law to specifically add the provisions of the FMCSA regulations regarding cell phone use by CMV drivers.

**LEGAL RAMIFICATIONS AND OUR OPINIONS**

In light of the FMCSA regulations and the fact that many states listed above have enacted statutes restricting the use of hand-held cell phones, allegations of negligence per se will arise in cases against CMV drivers and their companies regarding the use of cell phones while driving. Negligence per se is the legal doctrine whereby an act is considered negligent because it violates a statute or regulation — in this scenario, the FMCSA regulations and/or state statutes.

While CMV companies can avoid claims of negligence per se merely by complying with the FMCSA regulations, we expect that allegations of “single touch” and “reaching” rule violations will be hotly contested legal issues. There is a fine line between complying with and violating the FMCSA regulations, as there are a number of scenarios in which a CMV driver may easily violate the “single touch” rule. For example, when a CMV driver receives an incoming call, touching the “accept call” button and then the speaker function could violate the “single touch” rule.

**INDUSTRY RESPONSE**

As a result of this uncertain “single touch” rule, many CMV companies have implemented policies to completely ban the use of cell phone by their CMV drivers in order to ensure safety and avoid liability. For example, at least three of our clients, who are national CMV companies, have a CMV driver policy strictly prohibiting all cell phone use while the CMV is in operation. Some allow blue tooth or one touch use for a limited amount of time per hour.

Due to the practical difficulty in fully complying with the “single touch” rule, we recommend that our clients and other CMV drivers, carriers, and/or companies avoid all cell phone use while the CMV is in operation, except in emergency situations. Proving that one “touch,” as opposed to multiple “touches,” took place may be difficult, as the evidence regarding a CMV driver’s hands-free functions may be difficult to prove if the records show that the driver “was on the phone.” Therefore, cases may become unnecessarily complex and focused on a CMV driver’s hands-free process. As a result, we advise avoiding this...
Pursuant to the rule, “driving” includes not only operating a CMV on the highway but also operating a CMV while temporarily stationary because of traffic, a traffic control device, or other momentary delays. “Driving” does not include when the driver has pulled the CMV to the side of or off a highway and is stationary.

TEXTING
All CMV drivers are prohibited from texting while driving under the rule. The rule does, however, provide for a limited exception to allow CMV drivers to text and/or use a hand-held cell phone if necessary to communicate with law enforcement officials or other emergency services.

APPLICABILITY TO NON-CDL OPERATORS
The rule applies not only to commercial driver’s license (“CDL”) holders, but also anyone driving a vehicle on a highway in interstate commerce if the vehicle (1) has a gross vehicle weight or gross vehicle weight rating of 10,001 pounds or greater; (2) is designed or used to transport more than 8 passengers, including the driver, for compensation; (3) is designed or used to transport more than 15 passengers, including the driver, not for compensation; or (4) is transporting any quantity of hazardous materials requiring placards to be displayed on the vehicle.

PENALTIES AND FINES
Violations of these rules will have consequences for CMV drivers, carriers, and companies. Under the rules, CMV drivers may be fined up to $2,750 for a first conviction. A violation of the cell phones rules is considered a serious traffic violation. Therefore, if a CMV driver is convicted of two violations of the rule within a three-year period, a 60-day disqualification may be imposed, and a 120-day disqualification may be imposed for additional convictions during the same time period.

The rule does not require CMV employers and/or carriers to establish written company policies regarding cell phone use by their drivers, but they are prohibited from allowing or requiring their drivers to use hand-held cell phones. Under the regulations, CMV employers and/or carriers could incur a fine up to an amount of $11,000 per violation as a result of a violation by their driver, regardless of whether a company cell phone policy is in place.

RECOMMENDATIONS
As a result of the rules explained above, we recommend that our clients and all CMV carriers and/or companies amend their current policies to ensure compliance with the FMCSA regulations by prohibiting cell phone use in violation of such regulations. Such policies should be strictly enforced in order to deter CMV driver violations.

VARIOUS MID-ATLANTIC STATE LAWS
We surveyed state cell phones laws in Maryland, New Jersey, New York, Ohio, Pennsylvania, and West Virginia.

No state has gone so far as to completely ban all cell phone use by CMV drivers. Therefore, the single-touch rule and the FMCSA regulations described above apply to all CMV drivers in these states. Below is a summary of the respective cell phone laws related to CMV and non-CMV drivers in each state.

In Maryland, all drivers, both CMV and non-CMV, are prohibited from using hand-held cell phones while the motor vehicle is in motion. Therefore, every driver in Maryland must use hands-free options. The same rules apply to all drivers in New Jersey, New York, and West Virginia.

New Jersey contains an exception for two-way radios used by CMV drivers. New York amended its Vehicle and Traffic Law to specifically add the provisions of the FMCSA regulations regarding cell phone use by CMV drivers.

In Ohio and Pennsylvania, non-CMV adult drivers are permitted to use hand-held cell phones while driving. Local municipalities in Ohio, however, are permitted under state law to enact their own cell phone restrictions, and at least six (6) cities have passed their own laws banning the use of hand-held cell phones. Also, in Ohio, there is a complete ban on the use of cell phones, hand-held or hands-free, for drivers under the age of 18. Regarding CMV drivers, the Pennsylvania Motor Vehicle Code has been amended to add the specific provisions of the FMCSA cell phone regulations.

INDUSTRY RESPONSE
As a result of this uncertain “single touch” rule, many CMV companies have implemented policies to completely ban the use of cell phones by their CMV drivers in order to ensure safety and avoid liability. For example, at least three of our clients, who are national CMV companies, have a CMV driver policy strictly prohibiting all cell phone use while the CMV is in operation. Some allow blue tooth or one touch use for a limited amount of time per hour.

Due to the practical difficulty in fully complying with the “single touch” rule, we recommend that our clients and other CMV drivers, carriers, and/or companies avoid all cell phone use while the CMV is in operation, except in emergency situations. Proving that one “touch,” as opposed to multiple “触ches,” took place may be difficult, as the evidence regarding a CMV driver’s hands-free functions may be difficult to prove if the records show that the driver “was on the phone.” Therefore, cases may become unnecessarily complex and focused on a CMV driver’s hands-free process. As a result, we advise avoiding this
“gray area” by prohibiting cell phone use altogether.

Further, even if the CMV driver is in compliance, the issue of whether the use of the phone was a “distraction” will, in most cases, be a question for the jury and, thus, this issue just will create one more fact that must be discounted to show that our driver was doing everything he or she could do.

Although many, many drivers, who would be prospective jurors, use a cell phone while driving whether it be legally or illegally, our experience is that they tend to hold a CMV juror to a “higher” standard even though this may not be legally permitted. We cannot change the way they feel about this and in our present society the use of cell phones when driving is a “hot topic.”

Accordingly, we have seen an increase in requests for cell phone records from opposing parties and now routinely request these records from our driver at the outset as well as any other drivers.

We do not, however, recommend banning CMV drivers from having cell phones in the tractor with them. Cell phones are useful while the CMV is not in use or is lawfully pulled to the side of the road. Further, cell phones prove to be extremely helpful in the event of an accident or other emergency situations.

PART II of this article will appear in the next issue of the Transportation Law Update.