

Cell Phone Records—A Treasure Trove of Information

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Cell Phone Records—A Treasure Trove of Information

I. Introduction

As the use of cell phones has continued to grow, the records maintained by cell phone companies has become increasingly valuable to litigators. From a personal injury standpoint, cell phone records can be used as evidence of (contributory) negligence. From a fraud standpoint, cell phone records can be used as impeachment evidence and to help insurers win the battle of credibility at trial.

However, in order to properly use this information, a litigator must first have a basic understanding of how cell phones operate within the various cell networks, how to obtain these cell phone records and how to use them at trial.

II. Brief Overview on How Cell Phones Operate

When a cell phone is powered on, it will periodically communicate with the cell phone provider's (*i.e.*: Verizon, Sprint, ATT, etc.) network ("cell network") – regardless of whether it is in use. *In re Application of U.S. for an Order for Prospective Cell Site Location Info. on a Certain Cellular Tel.*, 460 F. Supp. 448, 450 (S.D.N.Y. 2006). When the phone communicates with the cell network, it sends a unique identification number to the network which registers the phone's presence and location on the network ("cell phone signal"). *Id.* This cell phone signal is received by all antenna towers ("cell towers") within the cell network that are in the phone's range. *Id.* Although, the cell phone signal is received by all cell towers within range, the network assigns the phone to the cell tower providing the sweetest signal at that moment. *Id.* When a cell phone is assigned to a cell tower, it is said to have pinged that tower.

Similarly, when the phone is used to make/receive a call the phone is assigned to the cell tower providing the sweetest signal. *Id.* However, if the phone is moving, the cell tower producing the sweetest signal may change. *Id.* In that case, the phone and phone call are re-assigned to the new cell tower that is producing the sweetest signal. *Id.* The re-assignment of phone and call from one cell tower to another overlapping cell tower is called a "hand-off" and is necessary to avoid dropped calls. *Nextel Comm. of the Mid-Atl., Inc. v. Town of Brookline, Mass.*, 520 F. Supp. 2d 238, 242 (D. Mass. 2007).

Cell phone providers document which specific cell tower is pinged by each cell phone on the cell network and save this information in the normal course and practice of their business for billing purposes as well as for tracking call volume by location. *In re Application of U.S.*, 451.

III. Issues Obtaining Cell Phone Records

While most providers will comply with a subpoena for cell phone/cell tower records, there are a few things that a litigator should keep in mind when issuing a subpoena to cell providers.

First, most providers do not maintain cell records longer than one rolling calendar year, *i.e.*: records from June 19, 2013 are deleted from the provider's records database on June 19, 2014. Therefore, it is important to issue a subpoena for cell records as soon as possible.

If possible, litigators should encourage their client's claim representatives to issue spoliation letters to providers as soon as a claim is made in order to preserve these records. Because the providers are not parties to the litigation, they do not have a legal obligation maintain these records; however, it has been our experience that most providers will comply with a spoliation letter.

Second, while most providers do have registered agents to accept service of subpoenas, most providers waive formal service of a subpoena and accept subpoenas via facsimile. This is especially important to remember when coming up against the one rolling calendar year deadline.

Third, while some providers save the tower information used to transmit text messages, others simply save the incoming/outgoing phone numbers involved in the text message. Further, it is universal that providers do not save actual text messages for any longer than seven days and these are generally reserved for law enforcement.

IV. Admissibility and Authentication at Trial

Cell phone records typically face two objections: relevance and hearsay. These objections are surmountable.

Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *See* Federal Rule of Evidence 401. Further, pursuant to Federal Rule of Evidence 403, relevant evidence may only be excluded if its probative value is substantially outweighed by “unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time or needless presentation of cumulative evidence.” Therefore, it is a Rule of inclusion as opposed to exclusion.

The relevance of cell phone records will differ from trial to trial as demonstrated more fully below, in Section V. However, if a litigator were attempting to use cell phone records in a personal injury trial he would likely argue that the cell records are relevant to that litigation because they show that the plaintiff was talking on her cell phone at the time of the accident which distracted her and caused her to be contributorily negligent.

Conversely, if a litigator were attempting to use cell phone records in a fraud trial, she could argue that the phone records are relevant because the records show that the cell towers pinged are in a different part of town than where the accident occurred; therefore, an alleged guest passenger could not have been at the scene of the MVA.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *See* Federal Rule of Evidence 801(c). Pursuant to Federal Rule of Evidence 802, hearsay is not admissible; however, as seasoned litigators are well aware, there are several exceptions to the Hearsay Rule.

The exception applicable to cell phone records is Federal Rule of Evidence 803(6), which is commonly referred to as the Business Records Exception. It states, in pertinent part, that any records a business keeps in the regular course of its business are not subject to the Hearsay Rule so long as they are authenticated by the custodian of records or a certification that complies with Federal Rules of Evidence 902(11), 902(12) or a similar statute. *See* FRE 803(6). Because cell phone providers keep the records litigators seek for billing purposes as well as for tracking call volume by location, cell phone records routinely meet the criteria listed in the Business Records Exception to Hearsay.

V. Uses of Cell Phone Records at Trial

A. Use of Cell Phone Records in a Personal Injury Trial

As noted above, cell phone records are becoming increasingly popular litigation tools in the arena of personal injury/negligence based trials.

One possible use of cell phone records in this arena is to prove a plaintiff's contributory negligence. This was an issue in a recent trial in New York, *Miller ex rel. Miller v. Lewis*, 963 N.Y.S. 2d 837 (Sup. Ct. 2013). In *Miller*, the plaintiff, a pedestrian, was struck by a truck and sued both the driver and his employer. *Id.*, 838.

The defendants argued that the plaintiff was on her cell phone at the time of the accident, causing her to be inattentive and/or fail to observe traffic conditions, which raised issues of comparative negligence. *Id.*, 839. In order to establish that the plaintiff was on her cell phone, defendants cross-referenced the plaintiff's cell phone records against an eye-witness' cell phone records and the 911 records pertaining to this accident. *Id.*, 837.

The plaintiff's cell phone records showed that she received a call at 11:01:01 AM and that this call lasted until 11:06:33 AM. *Id.* The eye-witness was the first person to call 911 and her cell phone records, while not as detailed as the plaintiff's, showed that she called 911 at 11:07 AM. *Id.* The 911 records, which were also not as detailed as the plaintiff's cell phone records, showed that the eye-witness' 911 call was received at 11:08 AM. *Id.*

Therefore, the defendants were able to argue that the plaintiff's phone call ended not because she hung up her cell phone, but rather because she was involved in the accident. *Id.*, 839. Despite the plaintiff's various objections, the defendants were permitted "to present evidence of the plaintiff's cell phone records and then to further argue that such cell phone use might have led to inattentive or distracted behavior to the extent contributory negligence was possible." *Id.*, 842.

While the defendants were prohibited from asking witnesses about cell phone use causing inattentiveness while walking the streets, they were permitted to present general evidence that inattentiveness in any manner, including cell phone use, can constitute negligence. *Id.*, 842-843.

Further, during voir dire, the defendants were allowed to inform the prospective jurors that the defendants would present circumstantial evidence of the plaintiff's cell phone use at the time of the accident and then question the prospective jurors as to whether they could conclude that the plaintiff was negligent based upon that circumstantial evidence.

B. Use of Cell Phone Records in a Fraud Trial – A Hypothetical

Assume that an 18-wheeler driver is involved in a disputed liability accident. The claimant vehicle sustained minimal damage and only contained a driver; no passengers. Also, there were no witnesses to the accident.

The 18-wheeler driver and claimant driver agreed that no one was injured and each leave the scene. A few days later, the trucking company and trucking insurer receive notice of this claim. However, in addition to the claimant driver, there is now a guest passenger claimant and independent witness. Also, when the claim is submitted to the insurer, it learns that the claimant driver and guest passenger went to the police station and reported the loss as a hit and run.

This version of events is inherently inconsistent with the 18-wheeler driver's version of events regarding not only who was a participant in the accident but also regarding whether anyone witnessed the accident. Therefore, the insurer's claim representative issued a spoliation letter to the cell phone provider for the claimant, the guest passenger and independent witness.

After the lawsuit was filed, the defense attorney issued a subpoena to the cell phone provider for the claimant, the guest passenger and the independent witness seeking, among other information: billing records, detailed call logs, detailed text message logs, detailed data logs, and cell tower locations.

The cell phone records contain detailed call logs which reveal not only the calls that the claimant driver, guest passenger, and independent witness completed with their respective cell phones but also reveal which cell phone tower(s) were pinged to begin and end the phone calls.

A review of the claimant driver's records revealed that he used his phone both shortly before and after the accident and his cell phone records confirmed that the towers his phone pinged were the towers closest to the scene of the accident.

The independent witness' phone records revealed that he too made calls around the time of the accident; however, his phone consistently pinged cell towers that were located in a different part of town than the accident occurred. Therefore, it was determined that he could not have been at the scene of the accident.

However, the guest passenger did not make/receive any phone calls around the time of the accident. Fortunately, the subpoena issued to the cell phone providers also requested detailed text message log and a review of the guest passenger's text message log revealed that around the time of the accident, he was consistently sending/receiving text messages.

Unfortunately, the guest passenger's cell provider did not save the cell tower information pertaining to his text messages; however, further analysis of the text message records indicate that he and the claimant driver were exchanging text messages immediately before and after the accident. Under cross-examination, the guest passenger was unable to explain why he and the claimant driver would be exchanging text messages if they were the only two occupants of the same vehicle.

Therefore, analysis of the cell tower records revealed:

1. The cell tower closest to the accident;
2. That the claimant driver pinged the cell tower closest to the accident;
3. That the independent witness consistently pinged a cell tower in a different part of town from the scene of the accident;
4. That the guest passenger was exchanging text messages with the claimant driver at the time of the accident.

Appendix 1 is a list of cell phone providers' contact information, Appendix 2 is a sample spoliation letter to cell phone providers and Appendix 3 is an example of how these records can be used to establish the location of people, and prior relationships.

1. Special Concerns with Cell Phone Records in a Fraud Trial

When using cell phone records in a fraud trial, it is especially important to form an action plan that incorporates the use of cell phone records. This makes the deposition of all parties and witnesses even more important than usual if a litigator is planning on using a deponent's cell phone records against that deponent at trial.

First, the litigator must be sure to have the deponent commit to all of the details of his version of events under oath, especially as it pertains to a timeline. This is important because with that deponent's cell phone records the litigator will be able to track the deponent's movements on the date of loss by time and cell tower location.

Second, the litigator must have the deponent commit to having his cell phone on his person or in the near vicinity at the time of the alleged incident. If the deponent attempts to qualify his answer by testifying that he generally keeps his phone on his person or in the near vicinity but not always, it is extremely important for the litigator to follow up by asking whether the deponent had his cell phone on him on the date of loss, at the time of the alleged incident. If the litigator does not lock the deponent into this testimony, the

deponent may attempt to testify that his phone was not on his person at the time of the alleged incident when questioned at trial which will substantially diminish the usefulness of cell phone records at trial.

Finally, it is important to remember that the main purpose in obtaining cell phone records in a fraud case is to impeach a party/witness; therefore, it is important to withhold cell phone records as impeachment information until after that party/witness has given his deposition.

VI. Conclusion

With the popularity of cell phones continuing to grow, the records documenting their use continue to become a valuable tool in the seasoned litigator's toolbox.

Whether a litigator is using cell phone records to argue that a plaintiff was distracted by her cell phone call and thus contributorily negligent or to argue that a guest passenger was not actually in a claimant vehicle at the time of an accident, cell phone records will undoubtedly be one of the litigator's most compelling pieces of evidence.

Appendix 1

It should be noted that cell phone providers will not accept authorizations, and will not issue records without a subpoena.

Also, the providers vary in their retention periods – with some providers retaining records for only 90 days, 6 months or up to 1 year. Thus, it is best to issue a spoliation letter and/or subpoena as soon as you know the provider information.

CELL PROVIDER CONTACT INFORMATION

AT&T Custodian of Records

Custodian of Records

P.O. Box 24679

West Palm Beach, FL 33416

Facsimile: (888) 938-4715

Sprint Corporate Security

Custodian of Records

6480 Sprint Parkway

Overland Park, KS 66251

Telephone: (800) 877-7330

Facsimile: (816) 600-3111

T-Mobile Subpoena Compliance

Custodian of Records

4 Sylvan Way

Parsippany, NJ 07054

Telephone: (937) 292-8911

Facsimile: (973) 292-8697

Verizon Legal Compliance

Custodian of Record

TXD01613

P.O. Box 1001

San Angelo, TX 76902

Telephone: (888) 483-2600

Facsimile: (888) 667-0028

Cellular South/C-Spire Wireless

Custodian of Records

1018 Highland Colony Parkway

Suite 700

Ridgeland, MS 39157

Telephone: (601) 355-1522

Facsimile: (601) 487-7517

Appendix 2

It should be noted that cell phone providers will not accept authorizations, and will not issue records without a subpoena.

Also, the providers vary in their retention periods – with some providers retaining records for only 90 days, 6 months or up to 1 year. Thus, it is best to issue a spoliation letter and/or subpoena as soon as you know the provider information.

SAMPLE SPOILATION LETTER

Via Facsimile (888) 938-4715

AT&T Custodian of Records

P.O. Box 24679

West Palm Beach, FL 33416

RE:

To Whom it May Concern:

I write to you on behalf of XXXXXXXXX in my capacity as their attorney regarding the claim number referenced above.

Please be advised that via this correspondence, AT&T is placed on FORMAL NOTICE that any and all information in AT&T'S possession, however stored and in whatever form, regarding the account activity and cellular phone tower "ping" information (hereinafter, "Information", which term is more fully defined below), regarding the AT&T cellular numbers listed below, between **date and date**, may be and/or is evidence material to the referenced claim and litigation regarding the same.

Pursuant to applicable state and federal law, AT&T has or may have a CIVIL DUTY, to preserve all applicable Information in its possession and/or control, and State Farm requests that AT&T take all necessary action to ensure it preserves all applicable Information in its possession and/or control.

"Information" as the term is used in this letter, shall refer to the following:

All records and data, in whatever form, related to the cellular/wireless phone numbers:

1. (XXX) XXX-XXXX
2. (XXX) XXX-XXXX

for the time period **date** through **date**, including but not limited to the following:

- 1) Cell sites(s) activations(s) regarding each call to and from the Phone;
- 2) Each Number(s) dialed from the Phone;
- 3) Each Incoming number(s) from call to the Phone;
- 4) Duration of each call to and from the Phone;
- 5) All alpha-numeric message(s) and text messages send to and from the Phone;
- 6) Subscriber(s) Electronic Serial Number (E.S.N.), and billing information for the Phone, or, telephone number(s) revealed from these record(s);
- 7) The identity and location (including street address and longitudinal and latitudinal coordinates) of first and last cellular tower handling each call to and from the Phone (*i.e.*, the cellular towers sometimes referred to in industry jargon as the "First Cell" and "Last Cell.");

- 8) Subscriber(s) E.S.N., and billing information for any other cellular/wireless telephone(s) also on the Phone's account, or, that may be identified from these record(s);
- 9) All evidence which shows the location of the phones associated with these numbers, when each was used to make or receive calls on **date** and **date**. This request includes, but is not limited to all records which show which cell phone towers were accessed or "pinged" for each such call;
- 10) An engineering map; showing all cell-site tower location(s), sectors, and orientation(s). And, a list of any and all applicable cellular site(s)' number(s), location(s), address(es), latitude and longitude of any said site(s). Also, that cellular site(s)' list(s) latitude(s) and longitude(s), be provided in electronic format;
- 11) Should this cellular/wireless, Mobile Identification Number (M.I.N.)/E.S.N., or combination, be changed by the subscriber(s) during the course of this order, this request will apply to any new M.I.N./E.S.N.;
- 12) That, with applicable format(s), that the provider(s) supply upon specific request(s) International Mobile Subscriber Identity (I.M.S.I.) and, International Mobile Equipment Identity number (I.M.E.I.), when applicable, and also will provide Temporary Mobile Subscriber Identity number (T.M.S.I.) information as often and/or frequent as it should change, if applicable and upon specific request(s);
- 13) That all call detail, subscriber, numeric message(s), alpha-numeric message(s), and any related record(s) and/or access be provided, upon specific request of specific data from specific time period(s) with the confines of this request, in an electronic format specified. Also, that the record(s)/date be forwarded;
- 14) This request will apply to the actual physical analysis by agent(s)/officer(s)/designee(s), as necessary for the collection of said data, and/or information, of the actual telecommunications device (cellular phone, pager, etc.), itself, associated with the number(s), account(s), etc. which is the target of this request;
- 15) This request will apply to any and all company(ies) which may provide and/or carry wireless/telecommunication service(s) for the target mobile number(s). This may be required because of number portability and/or if the original carrier is modified due to roaming and/or other consideration(s)/reason(s);
- 16) You are requested to produce a map showing "call processing handovers" for the day, time and phone at issue.

This request to preserve Information applies to any and all company(ies) which may provide and/or carry wireless/telecommunication service(s) for the target mobile number(s). this may be required because of number portability and/or if the original carrier is modified due to roaming and/or other consideration(s)/reason(s).

Please be advised that AT&T may incur civil liability under state and federal law should it fail to preserve the Information specified in this NOTICE.

Appendix 3

Example of Use of Cell Phone Technology to Fight an Insurance Fraud Claim at Trial.

XXXXXXXXXX

Explain towers, pings, downloads, etc.

Towers emit signals.

Cell phone should ping tower with “sweetest” signal. 99.9 percent of the time this is the closest tower.

When cell phone hits tower, the tower downloads the information. Usually every hour but no more than 24 hours, towers transfer data to re poll station.

Re poll station simultaneously sends data to network.

Network puts data on a magnetic tape and coordinates data with billing department.

If cell records show different towers, that means the phone is moving.

Fact that phone pings different towers in close time frame indicates phone is moving.

XXXXXXXXXX

Review SDT Return of Cell Provider Tower Records

Exhibit 1 *in globo*

Ex 1 Pages 1-3 – REQUESTED INFORMATION AND SUMMARY

Ex 1 Page 4 – CERTIFICATION – TRUE AND ACCURATE RECORDS

Ex 1 Pages 5-9 – EXPLAIN HOW TO READ AND INTERPRET RECORDS

Ex 1 Pages 10-13 – LIST OF SWITCHES ON NETWORK

Ex 1 Pages 14-25 – SUBSCRIBER RECORDS FOR 3 PHONE NUMBERS

XXXXXXXXXX

###.###.4383 – Mom

Ex 1 Page 26 – Text records

XXXXXXXXXX

###.###.4773 – Son

Ex 1 Pages 27-32 – Text records

XXXXXXXXXX

###.###.4383 – Mom

Ex 1 Pages 33-36 – Mom call records

XXXXXXXXXX

###.###.4773 – Son

Ex. 1 Pages 37-47 – Son call records

XXXXXXXXXX

###.###.4780 – Dad

Ex. 1 Pages 48-49 – Dad call records

XXXXXXXXXXXX

Ex 1 Pages 50-62 – CELL TOWER SITE FOR REPOLL 559

Ex 1 Pages 63-76 – CELL TOWER SITE FOR REPOLL 97

NEW ORLEANS/KENNER 1

XXXXXXXXXXXX

USE OF CELL RECORDS TO ESTABLISH LOCATION OF WITNESSES, WHETHER WITNESSES ARE MOVING, PRIOR RELATIONSHIP BETWEEN WITNESSES AND WITNESS CREDIBILITY

Exhibit 2 *in globo*

Maps of cell site locations for Re-Poll 97

COMPARE TO SOURCE DOCUMENTS – EX 1

FAIR AND ACCURATE REPRESENTATION OF WHAT IS IN SOURCE DOCUMENTS EX 1

XXXXXXXXXXXX

EX 2 PAGE 1 – cell towers Re-Poll 97 SE LA and SW MS

EX 2 PAGE 2 – same info, Greater New Orleans area

EX 2 PAGE 3 – same info, New Orleans, Jefferson Parish and surrounding areas

XXXXXXXXXXXX

EX 2 PAGE 4 – TOWERS BY PLAINTIFFS’ HOUSE.

###.###.4383 – Mom

EX 2 PAGE 5 – TOWER PINGED BY MOM 7/11-12/08

XXXXXXXXXXXX

###.###.4773 – Son

EX 2 PAGE 6 – TOWERS PINGED BY SON 7/11-12/08

EX. 2 PAGES 7-21

7	Son	Tower 097 – 3559 Peters Rd
8	Son	Tower 039 – 2525b Mathis Ave
9	Son	Tower 313 - 2539 Manhattan Blvd. #100
10	Son	Tower 717 – 51 Fairfield Dr.
11	Son	Tower 058 – 401 Whitney Ave.
12	Son	Tower 014 – 3210 Old Behrman Hwy
13	Son	Tower 093 – 3501 Kabel Dr.
14	Son	Tower 455 – 2200 Thayer St.
15	Son	Tower 711 – 1310 Sunset Ave.
16	Son	Tower 055 – 315a Julia Street
17	Son	Tower 103 – 300 Canal Street

18	Son	Tower 086 – 9000 W. St. Bernard Hwy.
19	Son	Tower 502 – 147-C Keating Dr.
20	Son	Tower 715 – 5636 Douglas Street
21	Son	Tower 101 – 519 Orange Street

XXXXXXXXXX

###.###.4980 – Dad

EX 2 PAGE 22 – TOWERS PINGED BY DAD 7/11-12/08

EX 2 PAGES 23-28

22	Dad	Sprint Towers pinged by Dad
23	Dad	Tower 093 – 3501 Kabel Dr.
24	Dad	Tower 455 – 2200 Thayer Street
25	Dad	Tower 086 – 9000 W. St. Bernard Hwy
26	Dad	Tower 097 – 3559 Peters Rd.
27	Dad	Tower 340 – 1940 A Industrial Blvd.
28	Dad	Tower 502 – 147-C Keating Dr.

EX 2 PAGE 29-33

29	Sprint Towers pinged by plaintiffs
30	Sprint Towers near plaintiffs' residence
31	Sprint Towers in area of accident
32	Sprint Towers near 4 th District
33	Sprint Towers in FQ
34	Sprint Towers near River Oaks Dr. – friend's house

35	Sprint Tower pinged by Mom 7/12/08, 3:21:06 to Son
36	Sprint Tower pinged by Son 7/12/08, 3:21:06 call from Mom

37	Sprint Tower pinged by Mom 7/12/08 3:24:40 call to Son
38	Sprint Tower pinged by Son 7/12/08 3:24:40 call from Mom

39	Sprint Tower pinged by Dad 7/12/08 0:09:47 call to Son
40	Sprint Tower pinged by Son 7/12/08 0:09:47 call from Dad

