

CLM 2016 Atlanta Conference
May 19-20, 2016 in Atlanta, Ga

On the Record: The Value of Cell Phone Records in Suspicious Claims Investigations

I. Cellular Data Analysis & How it Works

Cellular data analysis is the process of collecting, analyzing and presenting the approximate location of a cell phone or other cellular device based on data obtained from the wireless company.

Mobile phones are continuously, passively monitoring signals from proximate cellular towers. When a telephone exchange or other communication transaction it made, a communication data record is generated and kept for various periods of time by each cell provider.

In addition to providing each phone number called and received for the given period of time, the communication data records identify originating and terminating cell towers, the longitude and latitude coordinates pertinent to each call, and a tower sector for each call. It is the combination of this information that allows for analysis and plotting of the cellular device's "historical geographical movement." i.e., that cell phone's whereabouts at any given date and time.

II. Cell Phone Records from an SIU Perspective

An insurance company has a right and an obligation to investigate a claim to protect itself and its policyholders from false or invalid claims. And that an insured is obligated to cooperate with the insurer and comply with reasonable requests per the terms of their insurance policies.

Is Your Request Reasonable?

"Reasonable" varies from claim to claim. What is reasonable in one claim, may not be for another. As such, in order to avoid potential pitfalls remember to try to avoid the "fishing expedition. To avoid accusations of a "fishing expedition," establish how the records are relevant and reasonably necessary to process or investigate the claim and always write it down. Your claim file should be as thorough and complete as possible in an effort to defeat any potential future bad faith claims. Insureds may attack their insurers' requests for documents as intimidation tactics, purposefully onerous, or irrelevant. It is essential to know why you want these records and it is important to document those reasons.

Asking the Right Questions

Once you've determined it's reasonable to request the records, the most important thing is to be proactive. Try and get as much information as possible about an insured's cell phone records before making the actual request for any physical documents. That means you need to ask the right questions. During the course of your investigation (preferably in a recorded statement) always ask for the insured's cell phone number now and at the time of the loss, their provider now and at the time of the loss, and the named account holder now and at the time of the loss. Remember that if the named account holder is someone other than the insured, inquire as to their relationship. Additionally, inquire whether the insured had the cell phone on their person at the time of the loss. You should further inquire about the insured's cell phone activity before and after the loss and ask about the insured's general cell phone habits.

All of these questions will make you an informed observer when reading the call detail records (the records that show time/date of calls) and reviewing the cellular data analysis regarding the insured's movement throughout the time of the loss. It will also prepare you to anticipate or refute the insured's excuses/explanations for the finding of contradictions between the records and any previous reporting/statements.

III. Requesting/Obtaining Cell Phone Records

Since 1996, federal communications laws have required telephone companies to protect the confidentiality of telephone calls. Under the law, carriers are obligated to ensure that Customer Proprietary Network Information is not disclosed to third parties without consent. (Telecommunications Act of 1996, 47 U.S.C. §§151 et seq.). In addition, every cell phone provider has in place their own internal policies stating that they will not release cell phone records without their customer's written consent and proper legal process.

From the Insured

Because a customer's written consent is required, you must obtain an authorization to release records. The authorization should state the number for which records are being sought. Additionally, make sure there is a date range specified in the release to avoid an overbroad request.

Make sure your authorization is signed by the ACCOUNT HOLDER. If this person is different than the insured, the insured must make efforts to obtain a signed authorization from the account holder per the cooperation clause of the insurance policy.

Lastly, almost every cell phone provider now demands that the signed authorizations be notarized. Many will reject the subpoena if the accompanying authorization is not notarized because they cannot "verify that it was in fact their customer who agreed to release this information."

From the Court

As previously mentioned, cellular telephone carriers now require a subpoena to release account holder records. A subpoena cannot be issued unless there is an active court case number. We obtain a case number in the first party context prior to any kind of arbitration or litigation with a petition.

Certain cellular telephone companies are refusing to comply with a subpoena and produce cellular telephone records. The cellular companies have advised that they require a court order before they will produce the cellular records. A motion to compel compliance with the subpoena is generally required to obtain a court order. Some courts will also grant a court order based on an ex parte application.

From the Service Provider

The subpoena for business records is the specific discovery tool utilized when a party in a case is seeking the production of documents from a non-party. Serving this subpoena obligates the party to appear, testify and produce whatever documents or things are specified in the subpoena, and to appear in any proceedings to enforce discovery. Thus, once the cellular telephone carrier is served with the subpoena, they are within the purview of the court, and must abide by that subpoena. Though many jurisdictions require that the subpoena be personally served. Most, if not all, cell phone providers accept service via facsimile, and some will even accept service by e-mail. Make sure to include the authorization (as previously discussed).

Additionally, a good rule of thumb may be to send out a Notice to Consumer, though only California has this specific requirement. It states that because cell phone records are considered to be "personal records," California imposes an additional requirement upon the party serving the subpoena: a "Notice to Consumer" must be properly served on the individual whose records are being sought to allow the individual whose records are being sought an opportunity to object to the subpoena, on privacy rights or otherwise. (See California Code of Civil Procedure section 1985 et seq.) Though your jurisdiction may not require a Notice to Consumer with certain conditions, it may still be a good rule of thumb to copy the insured on any subpoena or correspondence you're sending the cell phone provider in order to keep them apprised of the status of the investigation and whatever information you're seeking. Some providers will take it upon themselves to advise their customer of the request and give them an opportunity to object. This opportunity to object is not sent out until the subpoena is being processed, however, which could be weeks after it'd been served. Thus, by sending your own Notice to Consumer it can save you the additional, unnecessary expenditure of time because the cell phone provider will see that their customer was already advised of the request before processing, but did not elect to object to request.

IV. Interpreting Cell Phone Records

One can interpret records on their own. There is often a key that accompanies the records that will describe the differing columns of information and how to read them. Most records are relatively straight forward when looking toward the call detail information. The columns are generally labeled outgoing/incoming calls with their respective dates and times. This will tell you with whom the insured was conversing, how long, and when. As such, this information can be used to concretize a timeline surrounding the loss as well as aid in identifying the names of individuals who may have information concerning the loss. These records can further reveal pertinent information such as whether creditors were pursuing your insured around the time of the loss, which can be particularly relevant if there is a financial motive to bring an invalid claim.

Tower records are bit more difficult to understand, but it is far from impossible. Sometimes, there will be longitude and latitude coordinates or delineating letter/number combinations to reflect the tower from where that call/text “pinged” off of. You can plot these yourself using either the key provided by the cell phone provider or with basic internet mapping software, such as google maps.

Expert Analysis

An attorney or a claims adjuster is not a cellular analyst or expert in this capacity. Thus anything you find could likely not be testified to in court, since you would have no true degree of scientific certainty. However, a rudimentary reading of the records may be beneficial if you’re not sure whether you want to incur the expense of an analyst at that point in the claim investigation. If you do chose to use an expert, however, he/she will be able to use their knowledge, training, and expertise to create maps with the insured’s cell phone geographical history. Such analysts could also be tendered as experts in Cellular Data Analysis in both Criminal and Civil proceedings.

Effectively Using Cell Phone Records in Examination under Oath

Records can reveal a deviation in the insured’s patterns or in an insured’s behavior. Finding anomalies or discrepancies between the cell phone records and the insured’s reporting supports a request that the insured submit to an examination under oath. But these records are equally as important during the examination under oath. It is strategic to have the insured go through who he/she called by memory, then ask the insured to whom each number pertains. If you gathered any information from an expert, ISO search, or reverse look up, present them with your findings and ask them to explain. Similarly, if you have plotting/mapping that contradicts the insured’s version of events, ask him/her if he/she ever went to the locations reflected on the map before revealing the expert findings. Once the analysis is reviewed, make the insured explain why he/she did so and why he/she initially failed to report those movements.

V. Putting it All Together

Real world examples of auto and property claims investigations revealing (1) the reasonable need for cell phone records, (2) the efforts and obstacles faced in obtaining the records, (3) the use of said records throughout the claims investigation, and (4) the ultimate righteous denials for material misrepresentation(s).