



## STRATEGIES TO AVERT RISK IN THE CONNECTIVITY AGE

# THE GOOD, BAD AND UGLY OF MOBILE PHONE DATA

Bryan E. Stanton and Jake Pipinich | Pierce Couch Hendrickson Baysinger & Green

In modern American society, mobile phones have become a pervasive facet of everyday life and the trucking industry is no exception. As cell phones become increasingly ubiquitous, they present both challenges and benefits when defending trucking accident cases. To properly prepare the defense of any trucking accident case where mobile phone usage is at issue, it is important to have a general understanding of the technology and how it might be able to help or hurt the company and driver.

A mobile phone is, more or less, a two-way radio that communicates with towers in order to connect with the traditional telephone system. The phone uses radio waves to connect to a cell tower radio antenna and subsequently into the standard land line telephone system. For a mobile phone to make or receive a call, it must have at least two

types of radios built into the phone: a receiver radio, and a transmitter radio, both of which must work. A cell tower on the other hand is a radio antenna that processes phone calls, data transmission and text messages and then routes these communications through the land-line telephone system.

How and when mobile phones communicate with cell towers is of particular significance to legal cases involving trucking accidents. In Global System for Mobile Communication networks – a system used by over 6 billion people including AT&T/T-Mobile users – once a cell phone is turned on it will periodically “ping” the local tower with the strongest signal to maintain its registration and enable the phone to receive incoming calls. In Code Division Multiple Access networks, including Sprint/Verizon users, the cell phone itself sends out signal

strength messages to surrounding cell towers to find the best signal. These registration signals themselves are not currently billable/traceable interactions, but in some cases a properly worded subpoena may be able to identify the towers used and the beginning and end of each call as the call is “handed” between towers. Call detail records and latitude and longitude coordinates for cell towers comprise cell site location information that can be analyzed to show the cell towers and cell sectors used, which in turn, will show the general (but not exact) location of a cell phone.

Obtaining information from mobile phones and their phone carriers or being prepared to be confronted with this information is critical in analyzing or defending a modern trucking accident case. Generally, mobile phones and the carrier will record

and maintain the date, time and duration of phone calls, data transmissions and text messages. The carrier will also have a database that shows or identifies all of the cell towers within a specific network. In short, the location of the towers used during a call can be used to plot out approximate locations of a truck driver at the beginning and end of each cell phone call while a vehicle is in transit. These locations can be compared to the driver's log book entries and will often show inconsistencies or falsifications in the log books, or, at minimum, minor deviations about a driver's precise location during a trip that resulted in an accident.

Aside from the more obvious example of a driver simply not being anywhere close to the location indicated in the logs, there are other less obvious avenues for call/text/data information to critically impugn a driver. 49 C.F.R. § 392.3 prohibits driving while fatigued, even if a driver is otherwise compliant with the HOS regulations. If a driver is routinely operating a cell phone, i.e., receiving texts, calls or making data transmissions long into the night and is routinely only getting 3-4 hours of sleep, a claim that the driver was fatigued and thus in violation of 392.3 and/or 395.3 is almost certain.

49 C.F.R. § 392.80 prohibits texting while driving. Despite this prohibition, detailed wireless carrier data combined with cell tower data can be used to show that a vehicle was moving while text messages or data transmissions were being sent or received. With regard to 49 C.F.R. § 392.82, which prohibits the use of hand-held mobile telephones while operating a CMV, even if such devices are being operated via Bluetooth or hands-free, the totality of the moving vehicle, potential log contradictions, fatigue and the distraction of device usage is unlikely to be viewed with favor by a fact finder at trial.

A properly worded Subpoena and data collection practice by a plaintiff counsel may be able to find (1) whether the driver had been using a phone late into the night causing fatigue or possibly creating a HOS violation; (2) whether the driver was talking, texting, emailing or using an app at the time of the accident (or immediately before); (3) whether the driver regularly used the phone, talked, texted or watched videos; (4) approximation data showing where the driver was at different times and possible log book violations/contradictions; and (5) texts/emails between the driver and his employer/trucking-company among others. In cases where detailed data downloads have been performed, forensic data analysts have found drivers who were watching pornography, browsing social media, watching

Netflix, using dating sites or texting at or immediately before an accident. Even more troubling, there have been instances where messages were sent from a dispatcher instructing a driver to keep driving in violation of HOS regulations.

Defense counsel, and more importantly the company/driver, must be prepared to preserve the cell phone itself and must be prepared to deal with data/information requests to the cell carrier for detailed usage information on the phone and the location of cell towers. Just as truck litigation counsel are told to ensure that the truck remain off and not re-started until an accident re-constructionist can download ECM data, a similar practice is advisable with regard to cell phones, i.e., that they remain off until downloaded by a digital forensic analyst, to avoid spoliation issues – especially in high damages, multiple fatality cases where the plaintiff counsel can justify the expense of trying to collect this data.

Plaintiff counsel are sending information preservation letters almost immediately that include cell phone data and the cell phone itself to the (1) driver, (2) trucking company, (3) insurance company, (4) phone carrier and (5) defense counsel. These letters typically request that the phone remain off until it is analyzed. The next step is for the plaintiff counsel to send out requests for temporary restraining orders and/or an injunction in an attempt to preserve this potential evidence. In the unfortunate event that the mobile phone itself is “damaged,” “misplaced,” or “corrupted,” and the cell log and data within the phone unavailable, spoliation claims with potential adverse inferences will necessarily follow.

Company policy and common sense can, however, go a long way to preventing the potential problem posed by adverse cell phone evidence. Simply requiring that a cell phone be placed in airplane mode from dock-to-dock will cut cell and data transmissions. During this time while no information is transmitted, the towers will not record data or call logs and no potentially adverse information will be produced. This method is advisable, but not perfect, as the Federal Communications Commission requires that wireless telephone companies be able to locate a cell phone when it dials 911 independent of any GPS capability within the phone itself. In some cases law enforcement personnel, via court order, can triangulate a cell phone via the E911 system required by the FCC; however, this situation is rarely applicable to typical trucking accident litigation.

Drivers must be informed that any billable transaction on a cell phone (even with

“unlimited” plans) creates a backlog of data in both the phone and with the carrier and its network that can be used in litigation. Best practices include either turning a cell phone's “airplane mode” function on or simply turning the phone off while in transit. Otherwise, all of this potential evidence will be logged. Further company policy and drivers themselves must be educated to the fact that even while stopped or “off the clock,” cell phones continue to create data that can be used to show potential HOS violations, fatigue, or rest violations or patterns of such conduct leading up to an accident or, worse yet, company-wide failures to put properly rested drivers on the road. In the age of the “Reptile Theory,” a pattern of fatigued drivers getting on the road presents a potential nightmare scenario for a trucking company.

Considering all of the “connected” devices and consumer products, such as smart watches, fitness trackers, cell phones and tablets, combined with more traditional QUALCOMM devices, the company and defense counsel must be aware that the conveniences presented by these devices also come with a potential burden. Savvy plaintiff counsel are lining up to collect this information and try to wedge in a creative theory of liability based on the contemporary issues posed by such data. In sum, while connected devices are in use and moving through the cell tower network, big brother is watching and prepared to tell a tale if the right questions are asked.



*Bryan E. Stanton is a partner at Pierce Couch Hendrickson Baysinger & Green in Oklahoma City. He focuses his practice in the area of commercial trucking defense, including claims for wrongful death.*

*He is a member of USLAW, DRI, TIDA, TLA, and OADC. Bryan can be reached at bstanton@piercecouch.com, or 405-552-5289.*



*Jake Pipinich is a senior associate at Pierce Couch Hendrickson Baysinger & Green in Tulsa. He focuses his practice in the area of transportation and trucking defense and is a member of the firm's rapid-response accident team. Jake is a member of USLAW, DRI and OADC. He can be reached at jpipinich@piercecouch.com, or 918-583-8100.*

*He is a member of USLAW, DRI and OADC. He can be reached at jpipinich@piercecouch.com, or 918-583-8100.*