

The Smart(phone) Criminal Defense Attorney

By Rob McGuire

As a criminal defense attorney, one of the most difficult and challenging parts of the job is taking your client's position and proving it to the prosecutor, the judge or the jury (or sometimes all three at once). While it is undoubtedly true that every criminal defendant is entitled to the presumption of innocence and it is up to the government to prove the defendant is guilty, a prudent criminal defense lawyer knows that it is a mistake to simply keep one's fingers crossed and hope the government fails.

As my late father used to say: 'Hope isn't a plan.' Most often it can be vital to your client's interests – and their liberty – to formulate and execute a defense strategy that attacks a vital component of the government's theory of the case. In other words, it's not good enough to hope the government can't prove your client was at the crime scene; it's up to you to prove definitely that she *wasn't*. But how do you prove a negative? Or, more directly, how can you prove an alibi for your client?

In days gone by, a defendant would claim that he could not have committed the crime because he was elsewhere. Most often, the defendant was with a family member or romantic interest and that individual would testify to the alibi. Juries traditionally tend to be skeptical of such alibi witnesses; the witness' obvious potential motivation to shade the truth in an effort to help their loved one fed that skepticism. More challenging still, a defendant who claimed he was sitting at home alone when the crime occurred would basically be forced to testify to put his defense in front of the jury.

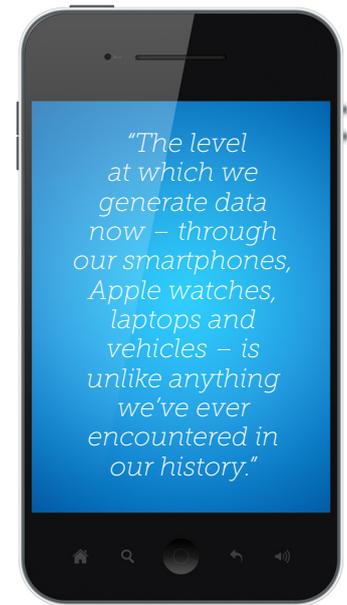
But now, modern technology has a variety of assets that can help the thoughtful criminal defense lawyer in making their best defense; especially since the government has been using this technology already. The level at which we generate data now – through our smartphones, Apple watches, laptops and vehicles – is unlike anything we've ever encountered in our history. That data can go a long way toward placing your client away from a crime scene if you just know where to look.

Social media accounts can often be a treasure trove of potential information that

can effectively locate a defendant. Posts to Instagram or Facebook accounts – even those not belonging to your client but to his girlfriend or family member – can potentially locate people in the wider world (*i.e.*, "I couldn't have committed the crime that night because here's a picture of me and my girlfriend at a dinner in another part of town"). But the gold standard in many alibi cases is cellphone data. Our cellphones are constantly collecting location data about us. Even if we turn off "location services," our phones are constantly connecting with area cellphone towers. This is so when we go to make a call, send a text or download a cat video from the Internet (called "call events") we have service. The cellphone towers pass off our phone's signal when we travel around town. Cellphone companies endeavor to have your call events processed by the tower that is physically closest to you so the signal will be the strongest. However, sometimes the tower closest to you is full with other callers who are already using the tower to process their call or text (think downtown Nashville at 5:30 p.m.). Cell companies then theoretically endeavor to send your call to the *next* closest tower. It's not perfect, of course, but in the vast majority of circumstances when you make a call or send a text the cell tower that is physically closest to you is the one processing your call. If that cellphone tower can be obtained (and if you work quickly, it usually can) you can generally place your client on the map based on that data.

Phones constantly communicate with the Internet and each of those communications is processed by a cell tower. That data, in the hands of a skilled criminal defense attorney, can be the kind of persuasive, scientific proof that a jury will find very compelling on the question of "where were you on the night of April 3?"

While establishing a solid alibi defense will often embrace a lot of the tactics formerly used by criminal practitioners, the explosion of smart phone usage and the data it creates has changed the game considerably. Now, juries don't necessarily have to just analyze a witness' credibility in a vacuum. Juries can consider harder scientific facts to inform whether the witness'



story makes sense. I hope that the use of this technology will aide everyone in the criminal justice system – police, prosecutors, judges and attorneys – to make sure that the *right* person gets prosecuted so that guilty will be punished and the innocent shall not suffer.

Rob McGuire, a certified criminal trial specialist and criminal defense attorney in Nashville, spent over a decade as a prosecutor in Davidson County handling some of the most complex cases pursued by the DA's office. As a gang prosecutor, he routinely worked with federal agents and prosecutors. Now, in private practice, Rob represents clients in criminal defense matters in state and federal court. He is certified as a criminal trial specialist by the National Board of Trial Advocacy and is an adjunct professor of law at Belmont Law School. He lives in Nashville with his two children.

