A New Source of Collision Evidence: Traffic Signal Data Loggers

The transportation system requires a combination of factors to systematically and efficiently work together to provide for the safe and efficient movement of people, vehicles, and goods. Human Factors, Vehicle Factors, and Environmental Factors are interconnected to accomplish this goal. When one or more of these factors fails, a crash or collision can occur. Investigators can forensically piece together what happened prior to and during a collision by relying on information and evidence obtained which relate to each of the possible areas or factors that can contribute to the cause of the collision. Typical areas of interest from the field of human factors include witness statements and testimony, perception-reaction, visibility, and distraction. Typical evidence from the field of vehicle factors includes damage profiles, mechanical condition, maintenance logs, and event data recorders. Typical evidence from the field of human factors includes witness statements and testimony, perception-reaction, visibility, and distraction. Typical evidence from the field of vehicle factors includes damage profiles, mechanical condition, maintenance logs, and event data recorders.

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Chair Message

Our August 2018 meeting in Chicago was great and wrapped up a successful 2017-18 campaign led by Scott Winstead. Thank you Scott. At the meeting, I took the Chairperson’s gavel, and Heidi Augustsson moved into the Chair-Elect position. We wrapped up the official meeting with an impromptu event at the Cubs game. Before heading to Wrigley Field, we discussed our plans for the busy 2018-19 term. In addition to discussing the 2019 Transportation Megaconference XIV, we focused on several points of emphasis, among them continuing to publish as many newsletters as we can and broadening our social media visibility. To that end, Matt Hefflefinger is wrapping up his successful stint as editor. Thank you Matt. Many Thanks to Teanna Buchner for taking over in the editor’s role. In addition to the newsletter, there are many other opportunities this year and next for continued networking, client-development and fellowship. By way of example: Many of us just returned from a successful (and fun) visit to Northwest Arkansas at which we held a well-attended Committee meeting accompanied by steaks, BBQ and fried catfish. The October TIPS Fall Leadership Meeting is in Florida at the Ritz-Carlton Amelia Island. The semi-annual Mega is in New Orleans in March 2019. The TIPS Section Conference is in New York, NY in May 2019. We have been tasked with putting on a CLE presentation (in conjunction with the Admiralty, Aviation and Space Law Committees) at that New York conference. The working title is “ANATOMY OF AN EMERGENCY RESPONSE BY LAND, SEA, AND AIR: IN-HOUSE COUNSEL, GOVERNMENT, AND INSURANCE IN THE GOLDEN HOUR.” It is shaping up to be a good year, and we are confident that we have the team in place to implement our plans. Thank you for your continued help and support.

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Next Batter Up: Trucking Litigants and the Impact of Electronically Stored Information

Computers and electronically stored information (ESI) have permeated nearly every aspect of our lives. Our perception of whether this is good or bad is dictated by the consequences of the captured act. While other industries have battled ESI disputes for many years, the trucking industry has only recently been called from the sidelines. What originally started with requests for paper logs and other supporting documents for tracking hours for safety purposes, has expanded into plaintiff’s requesting electronic control modules (ECM), e-mails, phone/text message records, documents (both written and native electronic formats), metadata, on-board cameras (both forward facing and inward-facing), and telematics information, just to name a few. Without question, requests for ESI will continuously expand as additional safety systems, such as advanced driver-assistance systems and autonomous semi-trucks, are implemented.

Before discussing the negative impacts these systems have on litigation, it is important to recognize the positive impacts that are often overshadowed. First, the implementation of these systems has reduced the number of severe accidents, and in turn, reduced claims. Second, cost savings and motor carrier safety ratings may increase by preventing hours-of-service and other violations of the Federal Motor Carrier Safety Regulations. Last, but not least, ESI may corroborate the testimony of the driver, thus eliminating the proverbial “he said, she said.” That said, the collection of voluminous amounts of data is fraught with additional cost, inherent risks, and potentially significant consequences in litigation, including spoliation of evidence claims.

Increased Discovery and New Types of Discoverable Material

With increased computer use and the creation of ESI, trucking companies now face increased discovery requests. These requests not only seek traditional discoverable material (i.e., driver logs, DQ files, maintenance records, handbooks, policies, and procedures), but also include new types of discoverable information, commonly referred to as electronic discovery (e-discovery). Simply put, e-discovery seeks information in its unaltered native electronic form. For example, if someone requested this article in its native format, producing it in a paper copy or PDF would be insufficient. Instead, an unaltered copy of it in an electronic Microsoft Word format would need to be produced, including all of the associated metadata.
Strike The Right Balance To Keep A Drug Free Workforce: Recent Challenges To Employer’s Policies

Without question, the trucking industry must do all it can to make sure its drivers are drug free. However, state legislatures around the country have passed medical marijuana statutes making it illegal to not hire or to discharge individuals that test positive for marijuana but hold medical marijuana cards. In regards to testing, employers must establish policies and procedures that recognize the diversity in the work force and the need to be flexible in the types of drug tests it administers to drivers and applicants. Hair testing is very effective in detecting drugs, but should not be used for all applicants and experienced drivers.

Medical Marijuana and the Trucking Industry

State legislatures throughout the United States have been passing laws to permit and regulate the use of marijuana for medicinal purposes. The National Conference of State Legislatures, State Medical Marijuana Laws, reports that 29 states have “comprehensive public medical marijuana and cannabis programs,” and an additional 16 states have more limited programs that allow for the use of low THC, high cannabidiol products for particular medical reasons.

These state statutes provide a range of rights and remedies to medical marijuana users. All protect qualified users from state criminal prosecution; others provide protections in employment. Nine states have passed medical marijuana laws that include explicit anti-discrimination protections from adverse employment actions. A number of state cases and a federal district court have determined that certain federal statutes do not bar these state law protections.

The federal Controlled Substances Act, 21 U.S.C. Section 801, (CSA) classifies marijuana as a Schedule I substance. This classification means that Congress has decided that marijuana has no medicinal value. The Act makes it illegal to distribute, manufacture, and possess with the intent to distribute or manufacture marijuana. 21 U.S.C. Section 841(a). In 2001, the United States Supreme Court determined that a California voter initiative which permitted patients or their primary care givers, who possessed a physician’s medical approval, to cultivate and possess marijuana for the patient’s medical needs. The Court determined that there is no medical necessity exception defense to the manufacture and distribution of marijuana.
Congress had determined that it had no medical benefit per the CSA. *United States v. Oakland Cannabis Buyer’s Coop*, 532 U.S. 483 (2001). This decision did not end the cannabis litigation.

In August 2017, the United States District Court for the District of Connecticut considered whether the CSA, and certain other federal statutes, precluded the enforcement of a Connecticut law that prohibited employers from firing or refusing to hire an individual that used marijuana for medicinal purposes. The court concluded that the answer was no. *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F.Supp. 3d 326. The district court discussed the Supremacy Clause of the United States Constitution, which states, “the Laws of the United States… shall be the supreme Law of the Land.” It considered whether the CSA was an obstacle to Connecticut’s medical marijuana law as it applied to the employment protections the law provided to medical users. The court determined that the CSA does not make it illegal to employ marijuana users. Further, it did not purport to regulate employment practices in any manner. It also contains a provision that explicitly indicates that Congress did not intend for the CSA to preempt state law unless there was such a conflict that the two could not stand together. The court allowed a physician permitted medical marijuana user (who suffered from PTSD) to continue her suit against a long term medical care employer that terminated her for a positive drug test.

Likewise, the Supreme Court of Massachusetts determined that an individual that suffered from disease, a debilitating medical condition under Massachusetts’s medical marijuana law, was entitled to protection and accommodations, even in the face of the CSA. The court reasoned that the employee’s possession of medical marijuana in violation of Federal law does not make it *per se* unreasonable as an accommodation. The only person at risk of Federal criminal prosecution for possession was the employee, not the employer. The court continued its discussion to other federal statutes, including transportation. “We recognize that transportation employers are subject to regulations promulgated by the United States Department of Transportation that prohibit any safety-sensitive employee subject to drug testing under the department’s drug testing regulations from using marijuana.” See 49 C.F.R. Sections 40.1(b), 40.11(a). *Barbuto v. Advantage Sales and Marketing, LLC*, 78 N.E.3d 37, 48 (Mass. 2017).

To that point, the court noted the United States Department of Transportation, DOT “Medical Marijuana” Notice, updated June 20, 2017. Although not discussed by the court, the Notice provides that “Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use ‘medical marijuana’. . . . It remains unacceptable for any safety-sensitive
employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana.” In short, even if a driver has a valid medical marijuana card he or she is still subject to discharge even in states with the most pro-marijuana statutes.

Future considerations. Voters in a majority of the states have determined that marijuana has medical value to the citizens of those states. Medical care practitioners in those states prescribe marijuana for their patients, affirming that the drug has medical value. As the stigma and potential misconceptions of the value of medical marijuana are rejected in the states, it can be assumed that those changes will be reflected in Congress as representatives from the states reflect their states changed attitudes. The CSA’s listing of marijuana as a Schedule I drug and having “no medical benefit” is of congressional making and can be changed by that body. However, unlike alcohol intoxication, science, politicians, and regulators have yet to determine what constitutes marijuana impairment. Until that is done, changes in current DOT regulations is highly unlikely.

**Drug Testing and the Trucking Industry**

On December 4, 2015, the Fixing America’s Surface Transportation Act (FAST Act) was signed into law. Among its provisions, the Department of Health and Human Services was to establish guidelines for hair follicle drug testing by December 4, 2016. To date, HHS has yet to establish those guidelines. In April of this year, it appeared that progress was being made, but no guidelines have been issued. As it stands, urine testing remains the only federally approved testing method.

Hair follicle testing has been championed by many in the industry due to the reduced cost of testing and because of its extended look into the history of potential drug use of a candidate. Generally, a urine test provides a 2-5 day window, while a hair test can provide a 90 day window.

Currently, some companies rely on urine testing alone, but others have urine and hair testing for driving candidates. Challenges to hair testing have come from varied minority communities.

The National Minority Trucking Association reports that of the 3.5 million truck drivers in the United States, 1.5 million are minorities. As demand for new drivers increases, minorities are increasingly entering the profession. In addition, employers seek to retain experienced drivers. Recent court cases and EEOC settlements point to the need for those wishing to hire and retain minority drivers to have flexibility when it comes to the types of drug testing used on minority drivers and candidates.
Race-Based Challenges to Hair Follicle Testing

A recent decision from the United States District Court of Appeals for the First Circuit revived a lawsuit filed by 9 police officers, a cadet, and a 911 operator. *Jones v. City of Boston*, 752 F.3d 38, 41 (1st Cir. 2014). All are African American. All tested positive for cocaine after a hair follicle test was administered by the Boston Police Department. This was the second time the first circuit found that the hair follicle test had a statistically disparate impact on African American officers in violation of Title 7 of the Civil Rights Act of 1964.

Title 7 prohibits employers from utilizing “employment practices that cause a disparate impact on the basis of race” unless those practices are justified by business necessity. A disparate impact claim can succeed even when the employer did not intend to discriminate against persons in a protected class. The Boston Police Department’s officers and cadets had been subject to annual hair follicle drug tests. When the testing agency reported that a sample tested positive for cocaine, a physician chosen by the department checked to see if the individual had been administered certain medications during a medical procedure. If not, the individual could elect to have a “safety net” test of a different hair sample. The safety net tests were much more sensitive than the initial tests in detecting the presence of cocaine and its chemical by-products.

The plaintiffs challenged the reliability of hair testing. They pointed out that the federal government has refused to authorize hair testing in drug screening of federal employees and employees of private industries for which the government regulates drug testing. The plaintiffs argued that black individuals have higher levels of melanin in their hair and that causes cocaine and cocaine metabolites to bind to the hair at higher rates. If someone snorts or smokes cocaine, its “aerosolized powder” will deposit on any nearby surface, including the hair of non-users. These deposits cannot be distinguished from the effects of actual use by current hair testing methods.

The plaintiffs also pointed to statistics kept by the department over a seven year period. The statistics showed that out of 4,222 blacks that were hair follicle tested, 55 were positive. In comparison, of the 10,835 whites being tested, 30 were positive. This resulted in a standard deviation of 7.14. The court acknowledged Mark Twain’s quip that there are three kinds of lies: lies, damned lies, and statistics. However, the statistical analysis provided by plaintiffs provided to the court that “we can be almost certain that the difference in outcomes associated with race over that period cannot be attributed to chance alone.” *Jones*, 752 F.3d at 45.
The court then discussed whether the testing was job related. The court readily agreed that the hair test was job related because abstention from drug use was an important element of police behavior and that having a work force that did not consume drugs was a legitimate business need for the department. It noted that there was no reason why a test need be anything near 100 percent reliable—as few tests are—to be job related and consistent with business necessity. However, the plaintiffs’ disparate impact claim would survive if they could show that an alternative test would decrease the chances of impacting innocent officers. The plaintiffs suggested that those who had a positive hair follicle test go through a series of random follow up urinalysis tests in order to reduce the number of experienced officers being terminated and recruits being denied the opportunity of joining the force. The court found that a jury could agree with that approach and ordered that the suit go forward.

Religious Challenges to Hair Follicle Testing

In a charge filed with the U.S. Equal Employment Opportunity Commission (EEOC), four East Indian Sikh applicants challenged J.B. Hunt Transport, Inc.’s drug testing policy. The policy required applicants to provide a hair sample for follicle testing. One of the five Articles of Faith for a Sikh is to maintain uncut hair. The Sikhs sought a religious accommodation, but were denied by J.B. Hunt. Though other testing methods were available, J.B. Hunt elected to require hair follicle testing, arguing that hair follicle testing was more accurate— and therefore more likely to assist in the company’s compliance efforts in having a drug-free driver force— than other methods.

The EEOC found reasonable cause to believe that J.B. Hunt failed to accommodate the Sikhs’ religious beliefs and effectively failed to hire a class of individuals due to race, national origin, and religion in violation of Title 7 of the Civil Rights Act of 1964. The EEOC believed that alternate testing methods were a reasonable accommodation for the Sikhs, even if marginally less accurate than hair follicle testing. Hunt agreed to pay $260,000 and extend unconditional offers of employment to the complainants. In addition, it agreed to designate an EEOC consultant, develop written policies and procedures and conduct training for all employees participating in the hiring, compliance, and grievance process.
Conclusion

These cases highlight the need for trucking companies to balance their responsibilities of keeping a drug-free driver corps while also respecting the rights of diverse applicants and employees. Though hair follicle testing is common in the industry, it is important to note that there are some situations where trucking companies need to be flexible in its use.
evidence from the field of environment factors consists of weather, lighting, roadway geometry, traffic control devices, roadside barriers, and physical roadway evidence including tire friction marks, gouges, furrows, and vehicle rest positions.

15 percent of all collisions occur at signalized intersections – what about evidence from the traffic signal itself? Historically, the extent of data capable of being collected from a traffic signal has been limited to the duration of different phases (i.e. red, yellow, green) – which offers some insight, but alone is usually insufficient for answering the ultimate questions such as “Who ran the red light?” This has begun to change as a new source of evidence, providing valuable information about the traffic signals and the collision event, has started to emerge.

Traffic signals are designed to provide information to motorists to designate the right-of-way through an intersection. Traffic signal programming is typically based on two types: pretimed or actuated. A pretimed traffic signal uses pre-determined durations of each phase without variance. This less technical traffic timing is mostly outdated, but can still be found in use at many signalized intersections in central business districts.

Actuated signals offer traffic-adaptive variance of signal durations based on current traffic demands. The goal of the signal timing plan is to move as many vehicles through the intersection as efficiently as possible by adjusting the phasing and duration of movements within the pre-specified programming. Modern actuated traffic signals are complex, highly sophisticated, and are constantly monitoring the presence of vehicles stopped at the intersection, the introduction of vehicles approaching the intersection, and the speed and expected arrival of vehicles at the intersection, all to provide the most intelligent and efficient signal indications possible. Rather than basing signal indications off of pre-determined values for a predicted volume of traffic, the signal is analyzing the actual traffic and adjusting accordingly.

Given that these signals are constantly thinking and evaluating durations, phases, and essentially calculating their next move, sensors have been involved in collecting information for many years. However, with improved technology in data storage and recording hardware, traffic signal designers and operators have realized the value of recording the determinations of these signals and have developed high definition data recording devices called data loggers. Data loggers are event-based recording devices that collect and digitally record high-resolution data from traffic signal hardware. They can record both input data, such as a detector capturing presence of an approaching vehicle or a pedestrian activating a pushbutton; and output data such as a specific signal phase change or pedestrian walk signal. Like
many other sources of collision evidence, this source of data was not originated to serve accident reconstructionists — but obviously can be gathered and interpreted to effectively increase the amount of information known about a collision event at a signalized intersection. Several case studies are presented to illustrate the concepts:

**CASE STUDY 1:** A tractor-trailer is making a left-hand turn from eastbound to northbound. A pedestrian was crossing the north leg of the intersection from west to east when struck by the front of the tractor.

The tractor-trailer driver stated that he made the turn during a protected eastbound left-turn phase green arrow. The pedestrian stated that he was crossing the intersection during a WALK signal indication. The two statements are mutually exclusive since the eastbound left-turn arrow and the pedestrian WALK symbol across the northern leg of the intersection were conflicting movements and would not be allowed by the intersection controller logic to be illuminated at the same time. Based on an engineering observational study of the intersection, it was determined that the pedestrian WALK symbol does not automatically appear, and will only turn on if the pushbutton is pressed. The information presented thus far is what collision investigators have historically had available. Some inferences can be made such as “If the pedestrian pushed the pushbutton, he would have received a WALK symbol,” however, this information alone does not answer the ultimate question about which statement is correct.
Traffic signal data logger information now provides the specific information that was previously undocumented, as it tells us exactly what the signal was doing and what was called for. The police reported time of the crash was 11:01 a.m. and the police arrival to the scene was reported as 11:05 a.m. The traffic signal data logger information indicated that an eastbound left-turn arrow was provided for eastbound vehicles at 11:01:02 a.m. until 11:01:12 a.m. The traffic signal data logger information indicated that the northern crosswalk push button was pushed at time 10:14:32 a.m. (45 minutes before the collision) and was serviced with a WALK symbol at time 10:15:36 a.m. The next time the northern crosswalk pedestrian pushbutton was pushed was at time 11:23:58 a.m. (23 minutes after the collision) which was serviced with a WALK symbol at 11:24:14 a.m. The traffic signal data logger provided clear evidence that the tractor-trailer did receive a left-turn arrow and that the pedestrian did not have a WALK symbol, as he had not activated the pedestrian pushbutton signal. The pedestrian was not permitted to be crossing the intersection at this time, as the pedestrian signal remained a solid “Don’t Walk” symbol throughout the time that the pedestrian was in the intersection.

**CASE STUDY 2:** Two bicyclists were traveling westbound and making a left-turn towards southbound. A dump truck was traveling eastbound through the intersection when it collided with the bicyclists.

The bicyclists stated they made their left-turn during a left-turn arrow and that the dump truck driver ran the red light. The dump truck driver stated he was proceeding through the intersection on a green signal. The two statements were mutually
exclusive since the westbound left-turn arrow and the eastbound through signal were conflicting movements and would not have illuminated at the same time. The bicyclists were equipped with multiple GPS devices. Through a timing verification process, it was determined that both the GPS data and the traffic signal data logger data were synchronized to Coordinated Universal Time (UTC). The GPS data indicated that the bicyclists began their left turn at 6:12:15 a.m. The traffic signal data logger indicated that the bicyclists’ westbound left-turn arrow had been red since 6:11:15 a.m. until 6:14:02 a.m. and that the dump truck’s eastbound through movement was illuminated with a solid green signal indication from 6:11:18 a.m. until 6:13:34 a.m. Based on the available information, it was conclusive that the dump truck did have a green signal and that the bicyclists made their left-turn while facing a red arrow.

**CASE STUDY 3:** A sedan was traveling southbound through an intersection. A tractor-trailer was northbound turning left towards westbound.

The sedan driver stated that the southbound signal was yellow as he traveled through the intersection. The tractor-trailer driver stated that he was waiting for a gap in traffic to turn left. The northbound signal was originally a green ball, which then changed to yellow and then red as he was making the turn. A witness stopped at the intersection going eastbound stated that the collision occurred as the eastbound signal changed to green. Early impressions of the crash would suggest that the tractor-trailer driver failed to yield right-of-way to the through sedan.

The traffic signal data logger indicated that the southbound signal had an adaptive all-red clearance interval. An all-red clearance interval is the period of time following a
phase’s yellow change interval but prior to the next phase’s green interval. An all-red clearance interval serves as additional time for all vehicles to clear the intersection prior to the next movement receiving a green. An adaptive all-red clearance interval is capable of recognizing a vehicle that may be running a red light and extending the all-red clearance to accommodate a red-light running vehicle prior to giving a green signal to others. In this case, the signal recognized that the sedan was going to be running the red light based on its approach distance and speed, and thus extended the all-red clearance interval to the maximum of 3 seconds. In combination with the collision reconstruction, it was determined that the tractor-trailer began to make its left-turn at approximately the same time its signal changed from yellow to red, while the sedan entered the intersection 2 seconds after its signal changed to red. The sedan had sufficient time to have stopped at the stop bar in response to the yellow and red southbound signal change intervals, but instead continued through the intersection at speed even though it entered past the stop bar well after its signal had changed to red. The traffic signal data logger served to provide a full understanding of the vehicle movements relative to the signal status, which was not as simple as the initial impressions of a failure-to-yield left turn issue.

Although currently only a small percentage of signals feature the discussed data logger technology, it is clear that this is the inevitable future of traffic signal systems. In a time where collision related second by second event-data recorder from vehicles has become common place, and even dash camera or other surveillance footage has become increasingly prevalent, traffic signal technology is catching up. Traffic signal data loggers can now provide collision investigators sub second-by-second information about a traffic signal’s inputs and outputs such as signal demand and signal color indication.

The Society of Automotive Engineers (SAE) technical paper 2018-01-0527 provides further detail and information regarding this topic.

*The authors of this paper are employees of Focus Forensics with offices in Minneapolis, Salt Lake City, West Palm Beach, Chicago, and Tampa. We are Professional Engineers specializing in the field of Transportation Safety Engineering, and we are often involved in fully reconstructing commercial motor vehicle collisions and other types of collision events and analyzing the Transportation Engineering aspects of collisions such as traffic signals, roadway design, and work zone temporary traffic controls.*
would show when it was created, when it was modified, when it was accessed, who created it, the file size, and the number of versions.

In most litigation settings, e-discovery seeks the following: emails, phone/text message records, and Microsoft Word, Excel, and PowerPoint documents. In trucking litigation, however, litigants not only seek the aforementioned, but also request telematics information, ELDs, ECM data, on-board cameras (both forward facing and inward-facing), cell phones (both company issued and the driver’s personal phone), and current and prior generations or versions of handbooks, policies, and procedures, in their original electronic form, including the associated metadata. While the impact of each document request differs, the plaintiff’s goal remains the same, to highlight a pattern of negligence and/or indifference, especially on the institutional side, in order to increase damages.

**Emails, Text Messages, and Electronic Versions of Corporate Documents**

The increased use of email and text message can play a significant role in assessing liability and damages. While email and text messages are convenient, their increased use can create nightmares for litigants, especially if the author is careless or short-tempered. Not only can they be used to question the credibility of a witness, but depending on the issue, can also establish a history of safety practices and a company’s knowledge of a particular issue sufficient to justify a claim for punitive damages.

Emails can also be a treasure trove of information. For example, if several emails are circulated with attached revisions to a particular policy, not only is the email retrievable, but each revised copy of the policy is retrievable. While this may seem innocuous, the different versions may not only illustrate the company’s thought process and knowledge of a particular issue, but they reduce a witness’s flexibility when testifying.

It is no surprise that plaintiffs are increasingly requesting these types of materials. As a result, it is critical for motor carriers to ensure employees are properly trained on email and text message use.

**Telematics, Cameras, ELDs, and ECMs**

The use of telematics, on-board cameras, ELDs, and ECMs creates a unique opportunity for all parties, and their importance cannot be overlooked. On one hand, this information can completely exonerate the innocent, and on the other, can
illustrate the severity of an accident and culpability of the respective parties. In terms of ESI, the identification, collection, preservation, and production can be a minefield.

Turning first to identification, the challenge is not usually focused on what type of equipment the subject tractor-trailer may have, but more importantly, the location of the data, scope of data in existence, the owner and/or custodian of the data, who has access to the data, and has the data ever been accessed in the past. Some of these may seem obvious, such as the event data on the ECM, which simply needs to be downloaded. The same cannot necessarily be said for ELDs, telematics systems, or videos. There are several questions to ask when trying to identify all the data involved:

- **What kind of data is involved?** While ELDs are mandatory, the use of dash cam video and telematics are not. Consequently, the amount and type of data in each case may vary.

- **Where is the data located?** Some data can or must be accessed locally on the truck, while other data will also exist on computers or servers owned by the company or the “cloud” depending on the fleet management software or the use of third-party vendors.

- **How can the data be accessed and who owns the data?** Depending on the relationship between the company and the driver, and the type of data involved, this may be a relatively simple question. However, if a third-party fleet management vendor is hired, the answer may not be as clear, especially if it is in the cloud and accessible to the company, but not located on their servers. The answer may further depend on the fleet management contract and state law.

- **How long is the data saved and/or accessible?** Again, this will depend on the owner of the equipment, location of the data, and the type of data involved. For example, FMCSA regulations require ELD data be preserved for six months, while there is no requirement for dash cam video. Accordingly, dash cam video could vary significantly depending on the size of the memory card and loop (approx. 6-10 hours) or if it is retained and accessible through a fleet management vendor (could be accessible to company for as long as 90 days).

The importance of identifying the information early cannot be emphasized enough. Even if something is inadvertently destroyed, a party’s diligence in attempting to identify and preserve information may illustrate their good faith and reduce the spoliation claims from intentional spoliation to negligent spoliation, thereby reducing
the sanctions imposed. See Fed R. Civ. P. 37(e) (distinguishing between sanctions imposed for intentional deprivation versus failing to take reasonable steps to preserve, akin to a negligence standard).

Once the data has been identified, the next step is to collect and preserve it. The first thing to do is disable any auto-deletion features. By way of example, some fleet management vendors may only save crash video for 100 hours. Depending on the severity of the incident, however, preservation steps may be necessary to avoid a spoliation claim in the future. As expected, determining when and what should be preserved is not always clear and the case law noted below provides little insight to these questions. Nevertheless, it is important to be proactive. Actions taken to identify and preserve information may eliminate and/or reduce the potential for sanctions.

In ILWU-PMA Welfare Plan Bd. of Trs. v. Connecticut Gen. Life. Ins. Co., 2017 WL 345988, the California court found that the company was negligent in properly preserving their ESI. In that case, the defendant was owned by a parent company. The parent company sold off one of its other entities. The entity that was sold possessed computer servers that stored some of the defendant’s ESI. After the sale, the defendant attempted to retrieve some of its ESI from the party who had bought the servers. However, despite an agreement in the contract for sale prohibiting destruction of information on the servers, the purchasing party had deleted the ESI the defendant needed. The court determined that defendant should have done more to retain its ESI before the sale. However, it did not believe the loss of the information was intentional and only imposed monetary sanctions.

In contrast, if the court finds the loss of ESI is intentional, the court can impose more drastic sanctions. Under those circumstances, they can include instructing the jury to presume the “lost” information was unfavorable to the party who “lost” it, dismissing the case or granting a default judgment in favor of the requesting party. In O’Berry v. Turner, 2016 WL 1700403, 2016 U.S. Dist. LEXIS 55714, the United States District Court for the Middle District of Georgia found that while the trucking company did not “intentionally” destroy the records, they did “intentionally” fail to put a better system in place for preserving the records, which was enough for the court to impose a serious sanction (instructing the jury that it must presume that the lost information was unfavorable to the trucking company). The court reached this conclusion after establishing the following facts during an evidentiary hearing: 1) following a traffic accident, the plaintiff sent the defendant trucking company a preservation letter; 2) trucking company printed out one paper set of the electronic driver logs from its vendor; 3) it was later discovered that the paper copy had been lost in an office move; and 4) the electronic records were no longer available from
the vendor. As a result of this failure to preserve, the court found that the trucking company’s practice of simply printing one paper set of the records was not a reasonable enough step to preserve the information.

While the trucking company in *O’Berry* was initially diligent in their efforts, the case serves as a painful reminder that a trucking company must not do the bare minimum, such as just printing out one paper set of electronic driver logs. While hindsight is always 20/20, *O’Berry* teaches us that preservation of the *original data* is critical for multiple reasons. Not only does it preserve the associated ESI and metadata in its native form, but if that had been done in *O’Berry*, the plaintiff would not have been able to show they were prejudiced because another copy could have been made readily available. Consequently, *O’Berry* instructs that not only must the trucking company ensure its local data is preserved, but it must also undertake reasonable efforts to have data preserved that is stored off-site by a third-party vendor.

To only further blur the lines, another recent spoliation case was decided by the United States District Court for the Northern District of Alabama. In *Barry v. Big M Transportation, Inc.*, No. 1:16-cv-00167-JEO, 2017 WL 3980549, 2017 U.S. Dist. LEXIS 146691 (N.D. Ala. Sep. 11, 2017), plaintiffs were seriously injured after an accident. Following the accident, the truck was towed from the scene and within the next 48 hours was driven from the tow yard back to Big M. The law enforcement officers who wrote the accident report indicated the accident was caused by the Barrys’ improper parking. Less than a month later, Big M received a letter from the Barrys’ attorney requesting that Big M preserve the data from the truck. By that point, the truck, which had already been selected for sale *before* the accident, had undergone repairs from the accident. Three days after receiving the preservation letter, the truck’s buyer took possession, without the data being downloaded. Plaintiffs subsequently filed a motion seeking spoliation sanctions for the failure to preserve the truck’s ECM data. In response, Big M argued the reporting law enforcement officers indicated that the Barrys were at fault for the accident. Accordingly, litigation was not reasonably foreseeable. Further, Big M was of the understanding that once their truck was removed from the scene and driven back to its business, the black box data would have been overwritten. So, even if they had complied with the preservation letter, there would have been no usable date to retrieve. (As it turned out, even Big M’s own expert did not agree with its assessment of whether the data would have been overwritten.) Ultimately, the court found Big M guilty of spoliation because it should have reasonably foreseen that litigation would ensue from such a serious accident. Further, the court believed Big M should have at least attempted to comply with the preservation letter before releasing the truck to the buyer. Interestingly, the court did not impose the severe sanctions reserved
for those who intentionally deprive their opponent of ESI. The court acknowledged that even though Big M’s actions were technically intentional (it was no accident that they refused to comply with the preservation letter), the actions were not taken with the intent to deprive the Barrys of the information. Rather, the court believed that Big M’s reasons for failing to preserve the evidence were at least plausible; while the ESI would have been helpful to the Barrys, the lack of the ESI did not cripple their ability to prove their case. In the end, as a sanction, the court decided it would allow the Barrys to point out that Big M failed to preserve the ESI and that the parties could then make arguments to the jury as to why the evidence was not maintained and what inferences should be drawn.

The takeaway is that trucking companies need to address ESI identification, preservation, and collection early and often. It is insufficient to merely work with legal counsel, experts, and vendors to develop plans and procedures. Those plans also need to be continually revisited and redeveloped with the understanding that more and more sources of ESI are becoming available, that litigation can spring from many different types of occurrences, and that the courts will be looking for parties to take reasonable steps to ensure that ESI is properly collected and maintained. This in turn helps with the another minefield – data unknowingly created.

Another area ripe for ESI discovery disputes is data that was unknowingly created. As technology companies advance and try to anticipate the needs of the trucking industry by offering new products, those technologies are likely going to create and collect new ESI data unbeknownst to the motor carrier. The question becomes whether that additional ESI is discoverable even though the motor carrier did not subscribe to or utilize those options. For example, while ELDs are not yet required to track and document a driver’s speed, hard brakes, or exact location through GPS tracking, there is other electronic software that can provide this data. This information can then be integrated with other useful fleet management tools such as analytics software designed to identify changes in driving patterns, provide real-time alerts, and recommend ways to address possible safety concerns. By creating and collecting data beyond the scope of regulations, motor carriers risk being exposed to broad discovery requests seeking information they would not otherwise normally possess. This was precisely the case in Smith, et al v. Burch Corporation, (Civil Action File No. 14EV000522C, Order March 5, 2015 [St. Ct. Ga. 2014] where the Georgia state court compelled the non-party provider to produce the reports that the defendant did not subscribe to, even though the Georgia Civil Practice Act did not require parties to generate documents that did not previously exist.
Increased Costs and Importance of Proportionality

The 800 pound gorilla of ESI, and electronic discovery (e-discovery) in general, is cost. For this reason, under Federal Rule of Civil Procedure 26(b)(1), costs must be proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. That said, the failure to produce ESI due to the proportional needs of the case is difficult to establish and courts typically require its production so long as it is relevant. This is particularly true where it is the injured plaintiff submitting the request to the defendant trucking company.

While the proportional needs vary case to case, so do the costs. These costs can include, but are not limited to, attorney’s fees, ESI vendor’s fees, other expert fees (i.e., forensic analysts or engineers), storage fees, and expenses related to the production itself. Because the costs can vary greatly, it is important to identify early the type of ESI present and retain the appropriate experts to collect and preserve the information. This brings us to another unintended consequence of ESI — the increased use of ESI vendors.

Increased Use of ESI Vendors

While the use of ESI vendors in e-discovery is associated with additional cost, in reality, their retention increases efficiency. An ESI vendor not only possesses the knowledge and expertise to ensure proper collection and preservation of ESI, but also affords litigants the ability to quickly cull through large amounts of data and eliminate duplicate or irrelevant documents. This is particularly important for certain types of ESI such as email and shared documents, are becoming increasingly important in trucking litigation. For example, imagine the costs saved after the de-duplication process reduces the number of emails and documents needing review from 30,000 to only 15,000 by simply clicking a button. Likewise, searches can be performed which allow hundreds of emails or documents of a similar nature to be reviewed and categorized with the click of a few buttons. None of these economical features are available in traditional paper based discovery. Consequently, while it is true that ESI adds costs, those costs can be minimized through the use of third-party vendors.

Increased Importance of Document Retention and Preservation

Vast amounts of ESI will also impact retention and preservation policies for motor carriers. As the volume of ESI increases, the risk of spoliation also increases because there is a greater chance of oversight. As a result, it is imperative for motor carriers
to know what systems exist, what ESI is being generated, and have policies and procedures to ensure that all ESI is correctly identified, collected, and preserved.

Not only will there be more information to identify, collect, retain, and preserve, but as suspected, costs of doing so can add up over time. This is particularly true with respect to video from on-board cameras, which can be expensive to store. This raises additional questions regarding retention policies and the length of time information will be retained. Every motor carrier should have a retention policy detailing the length of time that ESI will be retained and ensure compliance with the policy.

Conclusion

While the goal of using technology in the trucking industry is to improve safety, the fact remains that its use will also have significant, unintended consequences in litigation. This will be particularly true for handling suits against smaller fleets who may not have the resources or be as well positioned to handle these issues as their larger counterparts. Fortunately, as the entire industry is transformed, it is likely that third-party vendors will continue to expand their services by offering new devices and data storage to ensure compliance with regulations. While ESI will impact how attorneys litigate claims, if fleets (big and small), are adequately prepared and understand the importance of ESI, being called into the e-discovery game should not become a daunting task.

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## Calendar

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<td>November 7-9, 2018</td>
<td><strong>Fidelity &amp; Surety Law Fall Conference</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>Ritz Carlton Philadelphia Philadelphia, PA</td>
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<td>January 16-18, 2019</td>
<td><strong>Fidelity &amp; Surety Law Midwinter Conference</strong></td>
<td>Juel Jones – 312-988-5597</td>
<td>Hilton San Diego Bayfront San Diego, CA</td>
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<td>January 17-19, 2019</td>
<td><strong>Midwinter Symposium on Insurance and Employee Benefits</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>Hyatt Regency Coral Gables, FL</td>
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<td>January 23-27, 2019</td>
<td><strong>ABA Midyear Meeting</strong></td>
<td>Arthena Little – 312-988-5672</td>
<td>Las Vegas, NV</td>
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<td>April 4-5, 2019</td>
<td><strong>Motor Vehicle Products Liability Conference</strong></td>
<td>Janet Hummons – 312-988-5656 Danielle Daly – 312-988-5708</td>
<td>Hotel Del Coronado Coronado, CA</td>
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<td>April 5-6, 2019</td>
<td><strong>Toxic Torts &amp; Environmental Law Conference</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>Hotel Del Coronado Coronado, CA</td>
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<td>May 1-5, 2019</td>
<td><strong>TIPS Section Conference</strong></td>
<td>Janet Hummons – 312-988-5656 Speaker Contact: Arthena Little – 312-988-5672</td>
<td>Westin NewYork Times Square New York, NY</td>
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