

# Will Data from Vehicular Electronic Device Recorders Find a Common Place in Litigation?

By Erica M. DiRenzo

The growth of technology has provided valuable new resources for obtaining information which can potentially be used in the litigation process. From the disclosure of a business' electronic files to the disclosure of an individual's Facebook posts, the use of mainstream technology seems to eventually trickle down to an issue which has to be addressed by the courts. One piece of technology that seems to be extremely slow to trickle down into the courts is the use of data obtained from electronic data recorders ("EDR") in automobiles. However, with Federal legislation regarding the accessibility of EDR data, which came into effect on September 1, 2012 and additional legislation going into effect on September 1, 2013, will we see this trickle develop into a flood?

For our purposes we will use the term EDR, which can be used to describe many different devices, including Sensing and Diagnostic modules ("SDM"), or commonly known as "black boxes." In fact, in any one vehicle there may be multiple different EDRs. The National Highway Traffic Safety Administration ("NHTSA") defines EDR as "a device installed in a motor vehicle to record technical vehicle and occupant information for a brief period of time (seconds, not minutes) before, during and after a crash."<sup>1</sup> Thus, the term EDR can be used to describe different devices that record information such as pre-crash vehicle dynamics, driver inputs, vehicle crash signatures, restraint usage/deployment status and post-crash data.

While this may all sound high-tech and revolutionary, the fact is EDRs have been in use since the early 1970s.<sup>2</sup>

## Electronic Data Recorders

If your vehicle has airbags, you have at least one EDR. EDRs originated with the airbag, which was introduced by the automotive industry in the early 1970s.<sup>3</sup> Airbag computers found in all vehicles store the following data parameters: fault codes, deployment timing, deployment logic, seat belt status, airbag warning light status, airbag warning light history and delta-v (the change in the vehicle's velocity over time).<sup>4</sup> Other computerized systems within a vehicle that may contain crash-related data are the Anti-Lock Braking Unit, Powertrain Control Module, Electronic Brake Traction Control Module and the Body Control Module.

It makes sense that in order for an airbag to deploy at the appropriate time, the data used to initiate the airbag deployment needs to be constantly monitored. This data is not only monitored, but it is stored and capable of be-

ing retrieved. Therefore, it comes as no surprise that the wealth of information that can be retrieved from any one EDR has found its way into the litigation process.

## Admissibility in Trial

Courts have been rather quiet on the introduction of EDR data at trial. However, the few appellate courts that have addressed the admissibility of EDR data have upheld trial court decisions allowing the data to be introduced into evidence.<sup>5</sup> Various issues have arisen regarding the use of EDR data in both criminal and civil cases, including reliability, accuracy and constitutionality. Despite those issues, most courts, including those in New York, still allow the admission of EDR data into evidence at trial.<sup>6</sup>

In the only published New York appellate case on this subject, the Appellate Division, Fourth Department upheld the lower court's decision denying defendant's motion for a *Frye* hearing with respect to the admissibility of EDR data from defendant's automobile.<sup>7</sup> See *People v. Hopkins*, 46 A.D.3d 1449 (4th Dep't 2007). According to the Fourth Department, a *Frye* hearing is not necessary, as a court can rely on previous court rulings wherein a scientific procedure has been proven to be reliable. The Fourth Department determined that the lower court's reliance on previous decisions, which admitted EDR data into evidence "as generally accepted as reliable and accurate by the automobile industry and the [National Highway and Traffic Safety Administration]," was not an error.<sup>8</sup>

If EDR technology has been around for over 40 years and the EDR data can provide reliable information on an automobile crash that the courts are allowing at trial, why haven't we seen a proliferation of civil cases involving the use of EDR data? The reason may be related to the accessibility or lack thereof of EDR data.

## Data Retrieval

The format in which the EDR data is saved depends on the manufacturer of the vehicle. In 2000, General Motors, followed by Ford, publicly released their EDR formats, which led to data retrieval software being developed and made available for sale to the public.<sup>9</sup> An investigator with this software could read the data from the EDR at the scene of the accident using a laptop computer or by downloading the information to be reviewed at a later time. The data appears in a graphical format.

Most automakers viewed their EDR formats as proprietary and refused to release this information.<sup>10</sup> Conse-

quently, only the vehicle manufacturers could access the EDR data for their vehicles. In these cases, an attorney for both the plaintiffs and/or the defendants would need to request the raw data directly from the manufacturer and hire an expert to review and interpret the data.

Therefore, while there might be masses of information available on a car crash, accessing the information has been extremely difficult, if not impossible. However, this is due to change under Federal regulation 49 C.F.R. Part 563, which is entitled "Event Data Recorders."

#### 49 C.F.R. 563

In June 2004, NHTSA published proposed rules on EDRs.<sup>11</sup> The final regulations were later adopted in August 2006 as 49 C.F.R. 563.<sup>12</sup> All vehicles, with some very limited exceptions, manufactured on or after September 1, 2012 (vehicles manufactured in two or more stages have until September 1, 2013) must be in compliance with 49 C.F.R. 563.<sup>13</sup>

Notably absent from the regulations is any requirement that vehicles actually be equipped with any EDRs. Given the fact that virtually every vehicle currently being manufactured has some type of EDR, a mandate requiring EDRs was likely determined to be unnecessary.

What the regulation does mandate is adherence to uniform, national requirements for EDRs concerning the collection, storage and retrievability of data. Additionally, the regulation also "...specifies requirements for vehicle manufacturers to make tools and/or methods commercially available so that crash investigators and researchers are able to retrieve data from EDRs."<sup>14</sup> 49 C.F.R. 563 is meant to allow, in part, easy accessibility to EDR data regardless of the make and model of the vehicle.

49 C.F.R. 563 requires manufacturers to ensure, by licensing agreements or other means, that a tool that is capable of accessing and retrieving the data stored in the EDR is made commercially available.<sup>15</sup> Furthermore, this tool is to be made available to the public no later than 90 days after the first sale of the vehicle.<sup>16</sup>

There are no provisions regarding the price of this software, however, but it appears that by 2013, anyone who has purchased the tool made available by the manufacturer will be able to retrieve and read the data from EDRs without the help of the manufacturer or possibly even an expert.

## Conclusion

With EDR data set to be easily accessible and retrievable pursuant to 49 C.F.R. 563, EDRs will likely become a regular source of information to be used in litigation. The ease of retrievability, coupled with the fact that EDRs provide valuable crash information which is deemed reliable and admissible by the courts, will likely cause a flood of this type of evidence in the very near future.

## Endnotes

1. Event Data Recorders, 69 Fed. Reg. 32,942 (proposed June 14, 2004) (to be codified at 49 C.F.R. pt. 563).
2. Karl A. Menninger, II, *Data and Voice Recorders in Airplanes, Motor Vehicles and Trains*, 84 Am. Jur. Proof of Facts 3d 1, at § 10 (Originally published in 2005).
3. John Buhrman, *Riding with Little Brother: Striking A Better Balance Between the Benefits of Automobile Event Data Recorders and Their Drawbacks*, 17 Cornell JL & Pub Pol'y 201 (2007) at p. 5.
4. See Menninger, *supra* note 2.
5. See Buhrman, *supra* note 3.
6. See Menninger, *supra* note 2, at § 10; Marjorie A. Shields, *Admissibility of Evidence Taken from Vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "Black Boxes,"* 40 A.L.R.6th 595 (originally published in 2008).
7. *People v. Hopkins*, 46 A.D.3d 1449, 1450, 848 N.Y.S.2d 460 (4th Dep't 2007).
8. *Id.*, citing *People v. Christmann*, 3 Misc. 3d. 309, 315, 776 N.Y.S.2d 437 (Justice Court of Village of Newark, Wayne County 2004), citing *Bachman v. General Motors Corp.*, 332 Ill. App. 3d. 760, 768, 766 NE2d 262, 272 (4th Dist. 2002).
9. See Event Data Recorders, *supra* note 1; in 2000 Vetronix released its Crash Data Retrieval ("CDR") tool for sale to the public. The CDR tool is a software and hardware device that allows someone with a computer to communicate directly with certain EDRs and download the stored data.
10. Transportation Research Board of the National Academies, *Use of Event Data Recorder (EDR) Technology for Highway Crash Data Analysis*, December 2004.
11. Event Data Recorders, 69 Fed. Reg. 32,942-32,943 (proposed June 14, 2004) (to be codified at 49 C.F.R. pt. 563).
12. 49 C.F.R. pt. 563 was later amended in January 2008 and then again in August 2011.
13. 49 C.F.R. pt. 563.3.
14. 49 C.F.R. pt. 563.1.
15. 49 C.F.R. pt. 563.12.
16. *Id.*

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