

Feb 14, 2011 **“The Risks of Careless “Black Box” Retrieval Policies.”**
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Loss of EDR, or “black box” data, is one of the biggest problems in trucking accident litigation today. While the market for EDR monitoring software has exploded in recent years, accident experts and attorneys are finding that much of this technology is incorrectly downloaded, analyzed and stored, creating legal and financial risks that can threaten the very existence of the company that makes use of it.

Much of the problem can be attributed to the increasing complexity of the software and the seemingly non-stop updates and improvements that accompany it. Every week brings a new press release touting amazing new products and advances in “black box” monitoring. Because of this, even the largest trucking companies are finding it difficult to stay current regarding the procedures necessary for data preservation and often cut corners, rely on insufficiently trained employees or ignore the situation altogether.

Adding to the difficulty is that few companies rarely have policies in place—or policies that are actually implemented—relating to data collection in the event of a serious accident. Logging systems, protocols for creating back-up files and the designation of employee data custodians often exist only in theory.

This “black box” data is vital to attorneys because it collects precise and objective information relating to a particular event—such as a trucking accident—and is crucial in providing unbiased information about what actually happened, as opposed to what participants and witnesses believe they saw. With current technology, almost every element of an accident can be recorded: fuel consumption, heavy braking, excessive speeding, excessive RPM, sudden accelerations, engine throttle, change in velocity and seat belt use, in addition to seated driving time and time between crashes.

The financial ramifications of neglecting this technology can be severe.

For example, in a lawsuit involving an accident that resulted in two women becoming quadriplegics, a California trucking company was found liable for \$20 million by a jury due to the loss of EDR data. At trial, the judge allowed a jury instruction of “willful destruction of evidence”, as there were no records or explanation regarding what occurred to the data beyond the vague recollections of some front-office employees.

The company claimed that they had downloaded the relevant data from the truck in question, but no one could remember specifically who did it or how or where it was

stored. Not only was there no formal logging or maintenance policy in place regarding accident-related data, the employees claimed that since “our driver did nothing wrong” there was no reason to give it priority or special handling. The jury disagreed.

In another lawsuit also concerning a fatal truck accident, one of the trucks involved had an EDR unit that needed to be activated by the dealer from whom the truck was purchased. Unfortunately, neither the fleet owner nor the driver in question was aware of this, and vital data was never collected which could have easily exonerated the driver.

Even where truck drivers have a basic understanding of different “black box” models and procedures, they rarely know how many or what models exist on each truck. For example, older trucks have EDR systems that can and will be erased if the damaged truck is moved, so immediate downloading is necessary before third parties—such as the police—insist that the damaged vehicles be towed or removed from the highway. Truck drivers who routinely drive newer trucks may not be aware of potential data loss.

These situations could be avoided if trucking companies implemented firm policies regarding the handling and preservation of EDR data, but accident data preservation is often neglected for the more immediate, day-to-day technological concerns of the company, such as storage of daily driver logs, emission data and delivery documents. As a result, mastering and maintaining data from “event specific” technology is unfortunately given a low priority.

What can truck companies do to protect themselves? At a minimum, the following protocol should be implemented:

- Select a designated data person (DDP) to assume responsibility in the event of a serious crash. This person will have responsibility for all accident data retrieval, storage and record keeping.

- Next, only allow a fully trained expert to download the data. Many trucking company employees believe that downloading accident data is no different than downloading general maintenance data, similar to what a truck mechanic might do during routine maintenance. But after an accident has occurred, additional types of data suddenly become relevant and need to be included in the analysis, and deciding what additional data to include is usually beyond the knowledge of even the most tech-savvy trucker .

- Specify the procedures to be followed by the DDP, especially regarding the downloading of data. Scenarios where an outside expert may be called should be clearly described and understood.

- Record the number and type of “black boxes”, video cameras and satellite tracking devices on each truck, along with specific instructions for data retrieval from each.

- Note which devices have third-party data storage, how long the data is stored and how it can be accessed.

-Specify how many back up copies will be made and stored in-house, and most importantly, where they will be stored.

-Create a logging system for the data, with all relevant factors (time, place, driver) clearly noted.

Implementing policies such as these and ensuring that they are enforced, can easily make the difference between a complete defense verdict and a seven figure jury award with adverse, if not catastrophic, consequences for a company's "bottom line". It is therefore more than worthwhile for trucking companies to take appropriate steps to keep pace with this variable and constantly evolving technology.