

## Proposed New Jersey Legislation Seeks to Protect Privacy Interests in Motor Vehicle's "Black Box" Data

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In past investigations into automobile collisions, drivers often faced little challenge to their claims that they adhered to speed limits but somehow lost control of the car, that they applied their brakes but could not slow down in time, or that they steered to avoid animals who invariably left no footprints as they scampered away leaving twisted metal and carnage in their wake. In the absence of full scale accident reconstruction investigations, such assertions could not be scientifically proven or dispelled, and accident causation was often left to a battle of credibility between biased and fallible "eye-witnesses." Times have changed. Few drivers realize that today, even when they are alone in their vehicles, they travel with an ever-present eyewitness to their driving – the car itself.

With the advent of airbag safety systems in the 1970s, auto manufacturers seeking to understand and improve the effectiveness and utility of this new safety technology began to analyze data from embedded computer systems that capture vital information about automobile functioning and driver activity related to airbag deployment. The offspring of "flight data recorders" or "black boxes" in the airline industry, automobile event data recorders ("EDRs") monitor and record various data points related to the operation and function of the vehicle prior to and at the time of any crash. This data includes information related to speed, acceleration, braking, lights, turn signals, and seatbelts and has now become a critical – and sometimes definitive - tool in accident investigations.

With the National Highway Traffic Safety Administration now requiring this technology in almost all newly-manufactured vehicles, legislation recently introduced in New Jersey would protect the vehicle owner's privacy in the data contained within these devices unless compelled by a warrant in criminal investigations or by court order in civil cases. This legislation would also make it illegal for anyone, including a driver or owner, to destroy or alter the data in the aftermath of an accident. Although New Jersey's appellate courts have not yet ruled on the scientific reliability of these devices, data from EDRs is increasingly used in litigation and prosecutions arising out of automobile collisions. Therefore, this proposed bill takes steps to begin to control when and how the information can be obtained.

### HOW DOES AN EDR RECORD DRIVING INFORMATION?

An EDR records in a continuous loop of up to twenty-second intervals (depending on the manufacturer), recording over itself until it encounters a "deployment event" or "near deployment event" significant enough to "awaken" the air bag device. When such an event occurs, the EDR freezes and stores the information leading up to any collision significant enough to trigger the airbag or alert the recorder to store the data.

The data stored by the EDR is fairly easily retrieved through use of a computer software program or crash data retrieval system ("CDR"), which downloads the information. Prior to 2000, the CDR software programs were proprietary to the manufacturer, but many of the retrieval programs are now publicly available, allowing anyone, including police and private experts, to extract the information. The EDR data is then analyzed and compared to the physical evidence related to the triggering event for accuracy.

### WHO OWNS THE DATA AND HOW HAVE NEW JERSEY COURTS HANDLED THE RETRIEVAL OF EDR EVIDENCE?

The growing desire to utilize EDR information in accident reconstruction immediately prompted questions regarding who owns the data stored in an EDR and, in turn, how the data may be obtained and for what purpose. The prevailing view, however, including that of the National Highway Transportation Safety Administration (NHTSA), places propriety rights in the hands of the vehicle's owner. The next question then becomes whether the owner has a reasonable expectation of privacy in the data and, if so, how that privacy interest can be protected from those seeking to obtain that information.

The only reported New Jersey decision on the subject of event data recorders, *State v. Shabazz*, 400 N.J. Super. 203 (Law. Div. 2005), recognized a privacy interest in EDR data. The *Shabazz* court upheld the extraction of that information by law enforcement pursuant to a search warrant and permitted its use against a defendant automobile owner/driver in a vehicular homicide trial. Given that New Jersey's Constitution demands exigent circumstances to conduct warrantless automobile searches, the prevailing practice among law enforcement in this State has been to seek warrants to extract the data. The pending legislation would mandate this practice, leaving no room for doubt that the data belongs to the vehicle's owner and that the police may not access this information in the absence of a warrant based on probable cause to believe that criminal activity has occurred. Similarly, the new bill would authorize civil litigants to pursue such information through court order only, giving the vehicle owner notice and the opportunity to challenge the request in appropriate circumstances.

#### ARE THESE DEVICES RELIABLE AND ADMISSIBLE AS EVIDENCE IN COURT?

Although the proposed legislation clarifies basic issues related to ownership and access, experienced litigators understand that the admissibility of EDR data in litigation presents many challenges and its admissibility at trial is never a foregone conclusion. While EDR evidence has been held reliable by courts in other jurisdictions, complex admissibility questions have not yet been decided by New Jersey's highest courts. Experienced litigators understand the complex and critical challenges that arise in seeking to admit or exclude EDR evidence in criminal and civil trials arising out of automobile collisions. Even if a court finds EDR technology to be generally reliable, the specific device and data sought to be used in each individual case must also be scientifically sound in order to be used as evidence in a criminal or civil trial.

The power and impact of EDR evidence upon a jury cannot be overstated. This data may prove incredibly useful or conversely devastatingly harmful to a driver accused of wrong doing or an individual harmed as a result of a traffic collision. Jurors often defer to scientific evidence, viewing it as somehow infallible and superior to other evidence. Thus EDR evidence can be an invaluable asset or devastating threat in accident-related litigation. Choosing an attorney and experts who understand EDR technology and the law related to its admissibility can make all the difference.

#### **Practice**

- Criminal Defense