

Event Data Recorders - State Statutes and Legal Considerations

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Event Data Recorders (EDR) have become standard on many Ford, Chrysler, Toyota and GM cars and light trucks. In the last few years, the data recorded by EDRs has been found to be of tremendous value when analyzing a crash. The National Highway Traffic Safety Administration (NHTSA) has ruled that with the release of model year 2011 vehicles, all manufacturers must release, by commercial license or other agreement, the hardware and software required to access EDR information from their vehicles if the vehicle is equipped with a recording capability¹.

NHTSA did not mandate that 2011 and later models must have an EDR, only that the required equipment be available to retrieve EDR data and that the information is recorded in specified formats, among other requirements, if an EDR as defined in the rule is present.

The federal rule does not place any restrictions on who may access or use EDR data. Various federal agencies, including NHTSA, have internal regulations regarding access to EDRs for research purposes but these do not apply outside the agency or their contractors.

State Statutes

State legislatures have taken notice of EDRs. Driven by a number of concerns; privacy rights, consumer rights and property rights, twelve states have enacted laws specifically addressing gaining access to EDR data following a crash².

Of the twelve states with EDR statutes, all require the vehicle owner consent to retrieve data, three require consent be in writing, one has time limits on the consent, and one addresses admissibility. They all have an exception where consent is not required when the data is recovered for research purposes and specific identifying information is redacted. For criminal cases, a search warrant overrides the requirements for owner consent.

The first EDR statute was enacted in 2003 by California. This was followed in 2005 by New York, Nevada and Texas and Maine in 2006. These statutes basically require that the vehicle owner's consent be obtained before accessing EDR data.

In 2005 Arkansas passed their EDR statute which is notably restrictive. The registered vehicle owner's written consent is required and if more than one person owns the vehicle then all owners must consent to the data retrieval in writing. The owner of the motor vehicle at the time the data is created retains exclusive ownership rights to the data and ownership of EDR data does not pass to an insurer because of succession in ownership (salvage).

Additionally, the owner's written consent is required for an insurer to use the data for any reason. Consent to the retrieval or use of the data cannot be conditioned upon the

settlement of a claim. Advance written permission to retrieve or use the data as a condition of an insurance policy is prohibited.

The statute effectively prevents an insurer from gaining title to a vehicle that is a total loss due to a crash, assuming ownership of the EDR data record and then using it in litigation or claims processing without the consent of whoever owned the vehicle at the time of the crash. It also overrides any "cooperation clause" that may exist in an insurance policy. The Arkansas statute also declares EDR data as "private".

In the same year, North Dakota passed their EDR statute. Similar to the Arkansas statute, ownership of EDR data remains with the owner of the vehicle at the time the data record is created and may not be retrieved without the owner's permission.

Colorado passed their EDR statute in 2006. In this case, there are time limits between acquiring consent and recovering the data; the owner's consent must be obtained within the preceding 30 days. Colorado also specifies that EDR data is the "personal information of the vehicle owner".

New Hampshire enacted their statute where EDR data ownership does not transfer with the transfer of a vehicle to salvage. Instead of a privacy issue, this statute refers to EDR data as private property.

The Virginia statute states that ownership of the EDR module and data survives the salvage transfer of ownership of the vehicle as long as the EDR is not separated from the vehicle. As in the Arkansas statute, consent cannot be conditioned upon an insurance cooperation clause as advance written permission to access EDR data prohibited.

In 2007, Connecticut and Oregon enacted their EDR statutes. Connecticut requires the owner's consent while Oregon requires the consent of all registered owners if more than one. Connecticut prohibits the alteration or deletion of EDR data, or the deliberate destruction of an EDR unless a reasonable amount of time is provided for the police to obtain a search warrant. While Connecticut does not address the issue, in Oregon EDR data ownership does not transfer with the transfer of a vehicle to salvage.

The Oregon statute has a specific exception for search warrants in criminal cases overriding a lack of owner consent. In civil matters, an extremely high standard is set for a court to order data retrieval over the objection of the owner. Specifically, a hearing must be held with thirty days advance notice to the owner of the vehicle and an order may be issued " ... only if the court determines the data is necessary to reconstruct the accident and an accurate and timely determination of the facts of the accident cannot occur without the data." As EDR information is supplemental to any collision analysis, it may not be possible to meet this requirement.

Apart from the specific declaration in the Arkansas statute that EDR data is "private," the Arkansas, North Dakota, New Hampshire, Virginia and Oregon statutes all refer to EDR data as property with the same ownership rights as tangible property.

While only a few states have EDR specific statutes, all fifty states have computer trespass statutes that may be applicable to EDR data recovery. Most of these statutes are remarkably similar in construction, definitions and terminology. Computer trespass

laws are criminal statutes providing penalties ranging from a fine to prison time dependent upon a large variety of circumstances.

As an example, Florida, which does not have an EDR specific statute, has a computer trespass statute³ that defines a “computer” as “an internally programmed, automatic device that performs data processing.” By any interpretation, an EDR fits within this broad description.

The element of the offense in the Florida statute is “Whoever willfully, knowingly, and without authorization accesses or causes to be accessed any computer, computer system, or computer network; commits an offense against computer users.”

Considering the various EDR specific and computer trespass statutes, it is in the best interests of the EDR technician or analyst, in civil matters, to exercise demonstrable due diligence by obtaining authorization before attempting to recover EDR data. In some states, a review of the applicable statute will identify the authorized individual. In states that do not specifically identify who is authorized to provide consent it would be sufficient to obtain the consent of the current owner or their legal representative.

Any such consent should be documented, identify the vehicle by identification number and the current owner of the vehicle and data. It is good practice to identify applicable statutes, by citation, to the legal representative when requesting consent. The authorization should allow recovery of the EDR data, retrieval of the EDR modules should that be necessary, and address the continuing utilization, release and ultimate disposition of the EDR data and modules.

There is the federal Computer Fraud and Abuse Act [18USC1030] but it is only applicable to what it narrowly defines as a “protected computer”. This is primarily computers owned by the federal government or those used for financial transactions and interstate communications.

For criminal cases it may be prudent to obtain a search warrant, where feasible, before attempting to download EDR data. This is particularly true for those states that have an EDR statute and provide a specific exception for obtaining EDR data with a search warrant when the owner’s consent is not provided.

Examination of the cases that resulted in the “vehicle exception” for searches finds they all involved contraband, such as drugs or weapons, that could be readily seen and identified. The seizure of these items was to protect the evidence and provide for safe handling.

EDR evidence cannot be obtained without special equipment. Providing the vehicle is properly secured, there is little chance for the data to be lost, corrupted or altered. A conclusive determination that EDR evidence even exists, allowing that a record may not be created in a crash vehicle with an EDR for a variety of reasons, cannot be made until access is gained to the data file.

That a data record exists in a digital form, even when that evidence is seized from an individual, may require a search warrant to examine the contents of the device. Specifically, in *US v. Park*⁴ the court held that while a cell phone of a suspect may be

seized incident to arrest, accessing the data records within the cell phone required a search warrant.

Case Law

The first instance where EDR evidence was introduced was in 2002, *Colorado v. Cain*⁵. This was a felony vehicular assault case and the defendant was acquitted by the jury.

Since then, EDR evidence has been accepted by the courts in nineteen states⁶ and twice by the federal courts. There have been five appellate decisions upholding EDR evidence, two in Illinois and one each in Florida, Massachusetts and Ohio. While most state trials involving EDRs were criminal cases, the two federal cases and ten state cases were civil matters.

The first Florida case, *Florida v. Walker*⁷ involved a two vehicle head-on collision and the defendant was charged with two counts of Vehicular Homicide. At issue was the defendant's speed and in which lane the collision occurred. Neither the state nor defense were aware the defendant's vehicle had an EDR until after charges were filed and the vehicle had been released for salvage. The state became aware of the EDR when defense counsel was informed by their accident reconstructionist and a pre-trial disclosure was filed.

The intact vehicle was retrieved from salvage and the EDR was downloaded. The EDR evidence indicated the defendant was not speeding at the time of the collision. The court admitted the EDR evidence over the state's objection and the jury found the defendant not guilty.

There have been a number of Frye, Daubert and Richardson (Texas) hearings associated with criminal trials involving EDR evidence. Basically, these hearings are used to determine whether scientific evidence produced by an expert witness is valid and admissible in court. In every instance, EDR evidence was found to be admissible.

In the Florida appellate case, *Matos v. Florida*,⁸ the conviction was upheld and EDR evidence found to be admissible. The appellate opinion includes an analysis on a Frye issue. An Illinois appellate court, in *Bachman v. GM*,⁹ also found that EDR data acquisition is not new or novel and meets the Frye standard for admissibility.

EDR evidence was not admitted in two instances, once in Massachusetts and once in Louisiana. In both cases the evidence was not found to be technically deficient but the EDR records, non-deployment files, were found not to be associated with the case at hand.

In *Massachusetts v. Wilson*¹⁰ the prosecution wanted to present EDR evidence, aware it was not associated with the crash, only to show the jury the police had conducted a thorough investigation. The court denied the motion.

In the Louisiana civil case, *Vailes v. Desoto Parish*,¹¹ the non-deployment file in the EDR from the plaintiff's vehicle indicated a speed above the speed limit immediately before the recorded event. The defense held that the high speed recorded by the EDR, and supported by their accident reconstructionist's analysis of the physical evidence, was the

pre-eminent contributing factor to the crash. A test of the EDR module, setting a new non-deployment event record and ignition cycle count, found the recorded event was not related to the fatal crash. The court issued a protective order excluding the introduction of EDR evidence.

Changes to existing state statutes, the creation of new EDR statutes and relevant case law decisions are inevitable as EDRs become a more common tool aiding in the analysis of traffic accidents. It is important that anyone retrieving EDR data be aware of the current applicable laws and court decisions.

Footnotes

1. Code of Federal Regulations, 49 CFR 563.
2. Twelve states have EDR specific statutes as of Nov. 8, 2007.
3. Florida State Statutes, Title XLVI Chapter 815
4. US Dist. Ct., N. Dist. of California, US v. Edward Park, et al, CR 05-00375 SI.
5. Colorado v. Cain, 1st Dist. Ct., 01 CR 967.
6. Nineteen states have accepted EDR evidence as of Nov 8, 2007.
7. Florida v. Walker, 20th Cir., 00-002866CF RTC
8. Matos v. Florida, 899 So. 2d 403
9. Bachman, et al, v. General Motors Corp. et al, Illinois App. Ct., 4th Dist., 4-01-0237
10. Massachusetts v. Wilson, Hampden Superior Ct., 04-1228.
11. Vailes v. Desoto and Caddo Parish Commissions, Louisiana 11th Dist. Ct., 66-452B.

Note: The full text of all state EDR statutes, a collection of EDR case law summaries and the full text of appellate court decisions on EDR cases is available at www.harristechnical.com/cdr.htm. This web site is updated as new information is received.

States with EDR statutes as of Nov. 8, 2007:

Arkansas Code 27-37-103
California Code 9950-9953
Colorado Statutes 12-6-4
Connecticut Public Act 07-235*
Maine Statutes 29A-1-17-3
New Hampshire Statutes 357-G
New York Laws 4A16 416-B
Nevada Statutes 484.638
North Dakota Code 51-07-28
Oregon Revised Statutes 644
Texas Statutes 547.615
Virginia Code 46.2-1088.6

*Enacted in 2007, to be enrolled in the state statutes in 2008

State courts that have accepted EDR evidence as of Nov 8, 2007:

Arizona
California
Colorado
Florida
Georgia
Hawaii
Illinois
Maine
Massachusetts
Michigan
Nevada
New York
Ohio
Pennsylvania
South Carolina
South Dakota
Texas
Wisconsin
Virginia

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