

ELECTRONIC Discovery

A SPECIAL REPORT

GPS — the plaintiffs' lawyer's friend

BY J. KENT EMISON

Even without the recently enacted federal and state rules related to electronic discovery and case precedent interpreting them, the e-discovery landscape for trucking litigation was poised for a sea-change in 2011 with the passage of new safety standards for the industry. With the addition of new messaging systems and trip recorders, electronic control modules and satellite tracking equipment, e-discovery has become a "brave new world" for lawyers bringing suit against a trucking company or defending one against a claim.

In the trucking industry, e-discovery rules can affect the entire gamut of commercial carriers. The safety features and technology used in today's trucks will continue to increase the burden on the e-discovery process in these lawsuits — as opposed to the process in recent years, when a paper format was more common.

The trucking industry has undergone noteworthy regulatory changes, which have eventuated new e-discovery issues. In 2010, the Federal Motor Carrier Safety Administration (FMCSA) launched the



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Compliance, Safety, Accountability program to toughen safety requirements for commercial motor carriers. This was done to hold trucking companies to a higher standard, and one result is an enhanced ability to gather data during discovery.

And there are a large number of sources of electronically discoverable information to be found within a trucking company. Most commercial carriers use satellite tracking and monitoring devices on trucks to track loads, trailers and trucks. This is particularly true of large, national outfits. These satellite systems allow quick communication with drivers, but a lot of the electronic information that is transmitted is discoverable evidence in litigation.

One of the more common examples of these satellite systems would be Qualcomm Inc.'s computer hardware, which is installed on a tractor truck and communicates with satellites in orbit around the planet. In addition to allowing truckers and dispatchers to send text messages about their trips in quick fashion, these systems also allow drivers to record their driving time and submit driving log information that in the past would have been done via paper logs.

It's worth noting that these new satellite systems may yield higher volumes of discoverable data, but also lead to third parties possessing some of those data. For instance, with the monitoring of the engine and of the truck's performance done via satellite, the satellite-monitoring companies that the carrier engages convert the raw data they receive from satellites and send them electronically to the dispatch center of the carrier. They are delivered in a readable form, but the unadulterated original information remains on the satellite's networks and servers.

ELECTRONIC CONTROL MODULES

Because of this increased amount of data,

commercial carriers now store countless documents electronically. Most modern trucks are equipped with electronic control modules (ECMs). These are built into the engine of a truck and capture onboard information from the truck during accidents. These tools capture facts relevant to a lawsuit including engine revolutions per minute, mileage, speed and braking times.

Since the ECM is easily corruptible and the Qualcomm data can be purposely destroyed, plaintiffs' lawyers need to issue a preservation letter promptly when they file a lawsuit. Data from ECMs must be preserved, and any improper attempt to download the information may corrupt all data. The codes to interpret the ECM data must be obtained in discovery.

To that end, an effective preservation letter would include language such as the following, requesting "all records and information (however stored) relating to any driving performed by the driver of the truck (the 'Subject Driver') covering the 180-day period before the crash. This includes but is not limited to all driving logs, trip reports, vehicle inspections, fuel receipts, scale tickets, reimbursement receipts or records, bills of lading, freight manifests, loading tickets, shipping documents, records of communication, dispatching notes or records, vehicle location information, payroll records and information, etc."

The letter should include requests for "any onboard recording device, satellite data, computer data, communication records, tracking device information, etc." In addition, plaintiffs' lawyers should request the preservation of all rapid deceleration reports and all results of a Qualcomm communication device (or similar device) that was involved in the accident. Failure to execute this promptly will jeopardize much relevant data that could be discovered.

NEW REGULATIONS

In the specific handling of e-discovery in trucking cases, new regulations deal with the use of electronic onboard recorders, pre-employment screening and FMCSA safety reporting.

The biggest changes in this area may involve the regulation of safety reporting. These have had significant implications for the e-discovery process. Safety concerns involving trucking companies now fall under the aegis of the FMCSA's Safety Measurement System — which, according to the FMCSA's Web site, uses a motor carrier's data from roadside inspections, including all safety-based violations, state-reported crashes and the federal motor carrier census to quantify performance. Lawyers still have to submit Freedom of Information

Act requests to get this information, and information about cargo-related trucking companies will not be made public. See <https://csa.fmcsa.dot.gov/faqs.aspx?role=mc>.

This new system is designed, according to the FMCSA, to "identify high-risk motor carriers for priority intervention" and "identify motor carriers with patterns of on-road performance and compliance issues for intervention." The Safety Measurement System now grades the trucking company in seven areas that the U.S. Department of Transportation has decided are key to preventing crashes, based on the federal motor carrier safety regulations and prolonged analysis of crash statistics. These seven items are called BASICS — behavioral analysis and safety improvement categories — and determine a trucking outfit's safety rating. These discoverable criteria are fatigued driver, driver's fitness, use of controlled substances or alcohol, vehicle maintenance, unsafe driver, crash indicator and cargo-related problems. See <http://csa.fmcsa.dot.gov/about/basics.aspx>.

Although these data certainly are discoverable, carriers can see an inventory of their safety violations and crashes and request corrections to their data. When reviewing this information, one should keep in mind that each carrier is evaluated by its individual Department of Transportation number, and this number can change when a carrier changes hands. This means that during the e-discovery process, plaintiffs' lawyers should determine as early as possible whether the company's fleet has been merged with another and whether the new company dropped the old number. This would excise information from the trucking company's safety profile.

Additionally, the new pre-employment screening program is designed to help trucking companies screen job applicants for safety violations. This program is operated by the FMCSA, but it is voluntary and not part of the FMCSA program. Companies can pay a small fee for online access to information the agency has about a driver's history, including three years of inspection data and five years of crash data. This information is not available to the public and is available only for pre-employment screening.

Another aspect of drivers' history from an e-discovery perspective: Individual drivers will be notified by mail if a notice of violation or a notice of claim has been filed against them. Carriers and the public are not informed about these notices, but individual drivers can ask for their own records at any

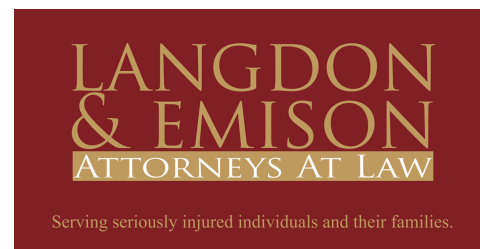
time, so these can be requested from the drivers in interrogatories and requests for production.

Another change that affects e-discovery is the increased use of electronic onboard recorders. These digital log books are less susceptible to driver cheating than paper logs are. In April 2010, the FMCSA called for all carriers that had a single compliance review that showed a 10% violation in their inspected logs regarding hours-of-service regulations to install recorders on their vehicles. Document production of this electronically stored data is necessary during e-discovery in trucking litigation, and the recorder's audit trail should be included, identifying any changes to the driver's log and when they were made. Since driver fatigue can cause a crash, these new laws are designed to limit the hours a driver can be on duty, driving, as well as the total on-duty time for a set period. 49 C.F.R. 395.3 (2010).

The process of gathering and producing boxes of paper logs and maintenance documents is shifting to an electronic management (and production) of those records. And large, national carriers are not the only carriers affected by e-discovery changes. Small, regional trucking companies may not have high-tech satellite equipment, but they still will use cellphones or personal GPS tracking systems.

It is now required that a trucking company and its lawyers preserve all relevant data that an adverse party might seek as discoverable. It is important for both lawyers and trucking companies to identify and preserve potentially relevant electronic information as early as possible in litigation.

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