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## Auto Law

### The Use of Technology in Your Auto Law Case

#### SUBMITTED BY THE DUFFY LAW FIRM

*Special to the Legal*

There are different forms of technology that might assist you in your auto case. Some may have been generated within the vehicle as a consequence of an accident. Some may have been created during the investigation by the reporting officers. Some may have been generated professionally by a consultant or expert. Some may simply be coincidental. Any of these may be potentially helpful in proving to the fact finder the important and essential parts of your case.

#### VEHICLE-GENERATED TECHNOLOGY

Most vehicles these days, cars and trucks alike, have some form of electronic device to record accident-related information. The vehicle device is often triggered with a hard brake, but the information is perishable, and may be erased with just three more hard brakes. With a hard brake (considered a “nondeployment event,” as the airbag did not deploy), the computer will often store 60 seconds of preceding-brake activity, such as acceleration, braking, cruise control, RPMs, throttle percentage, vehicle speed and additional information. It might be critical evidence showing that an operator who claims he was driving 50 mph prior to the accident and was accelerating and decelerating with traffic was actually driving 75 mph and had his vehicle’s cruise control activated.



#### TOM DUFFY'S FIRM

*obtained an \$11.4 million jury verdict in an auto accident case featured in The Legal Intelligencer's "Top Pennsylvania Verdicts & Settlements of 2013" report. Visit [duffyfirm.com/news](http://duffyfirm.com/news) to read about the case.*

Deployment events, such as head-on collisions, may record seat-belt usage within the vehicle, as well as airbag codes. As you likely see when you turn on the ignition of your car, the airbag light illuminates, and then, after about five seconds, stops illuminating. What just happened? It just ran a self-diagnostic, and information about the airbag was recorded. If the light does not stop illuminating, that might be a sign of a fault, and faults will be recorded electronically. So, if you have an airbag case and the system is downloaded, it might very well show whether there was a fault with the deployment system, as well as provide you with other crash-related data and diagnostic information, such as the deployment event and speed of deployment.

While it may be difficult to contradict the electronic data from a vehicle, the data is not always what it seems, and may require forensic analysis to link triggering and other events to the crash events. You can be sure that the vehicle manufacturer, if it has an interest in the litigation, will have a savvy witness interpreting every microsec-

ond contained within the data. I have seen one witness from a large vehicle manufacturing company embrace the data when he believed it supported operator error but downplay the data when he believed it supported vehicle failure, indicating it was not reliable to determine crash dynamics but was merely for quality control. Some companies either claim they do not have downloadable information or that the program to download the information is proprietary, and only they can download it.

Additionally, the information must be downloaded immediately after the accident or it could be forever lost. Some consultants can download this information, but it typically requires special equipment, cables and programs. Usually some information, if requested timely (which might be the day of, or within days of, the accident), can be obtained. It is not uncommon, especially in truck accidents, for the trucking company to want to get its asset back on the road as soon as possible. An evidence preservation letter should be immediately issued insisting that the vehicle not be moved or touched, so that information may be downloaded.

If there is to be a challenge to the information, file a motion in limine. Do not wait until the witness who either downloaded the information or is relying upon it is prepared to testify. The information is too complex and

might require an evidentiary hearing, as in *Commonwealth v. Safka*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 441, 14-15 (Pa. County Ct. 2012), *aff'd* 1312 WDA 2012 (June 2, 2014). The information is scientific evidence and must pass muster, as in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *Commonwealth v. Rodgers*, 413 Pa. Super. 498, 605 A.2d 1228 (1992).

In *Safka*, a case of first impression, Pennsylvania joined a number of states, including Arizona, California, Florida, Georgia, Illinois, Michigan, Missouri, New Jersey, New York, Ohio and South Carolina, that have admitted properly authenticated evidence from event recorders. In *Safka*, the Superior Court, in an unpublished memorandum opinion authored by Judge Jack A. Panella, held that black-box data is not novel, and thus passes *Frye* muster. The court provided a detailed history of the technology, noted that the technology was supported with proper authentication at trial and held that the trial judge did not abuse his discretion in admitting the evidence. While it is an unpublished opinion, it will likely be cited often on the admissibility of this evidence in the future.

The vehicle may also have a GPS system that documents where it was at any given moment, or may identify violations of regulations. By way of example, commercial driver's license drivers are regulated by the amount of hours they can drive. Some systems will automatically flag an entry and report back to the employer when the driver's service time exceeds the permissible hours. Such entries might directly contradict the driver's written logs, and may support a claim of negligent supervision. A driver and his employer will be hard pressed to argue the driver was within hours when their own computer shows otherwise. This could be a critical issue, especially if there were a concern the accident occurred due to driver fatigue.

## AFTER THE ACCIDENT

After the accident, the police may respond with a "total station." If you

ever receive a police report with a diagram that uses precise measurements (fractions of inches), it is likely that a total station was used. If you subpoena the department for the police report, you will likely not get the electronic data. You will need a very specific request for that information, and sometimes it lies in a particular officer's computer. The total station provides exact measurements to points of interest in an accident, including debris fields. If you have ever seen an accident where the police spray paint circles or other markings on the road to identify debris or other material evidence, and a total station has been used, in your subsequent efforts to recreate the accident, the total station electronic data may prove invaluable to evaluate speeds, points of impact and the like. For example, the total station may identify the impact point of a motorcycle accident and the resting place of an ejected rider. The distance the rider was ejected may then allow you to calculate the speed of the motorcycle (although if a rider has a lower torso or hip injury, such may be indicative of the rider getting caught up on the handlebars, thus affecting the calculation). If this data is available, get it and supply it to your consultant.

## DO IT YOURSELF

Maybe there is no black box, GPS, computer log or total station, although if you dig enough, some of this evidence is likely to exist. You may need to hire someone to assist with your trial proofs. You might want to create an animation to demonstrate how you contend the accident occurred. It needs to be authenticated pursuant to Pennsylvania Rule of Evidence 901, but animations are admissible, if properly authenticated, to demonstrate the accident.

In *Commonwealth v. Serge*, 586 Pa. 671, 896 A.2d 1170 (2006), the court held that a computer-generated animation, or CGA, should be treated equivalently to any other demonstrative exhibit or graphic representation and, thus, a CGA should be admissible if it satisfies the requirements of Pa. R. Evid.

401, 402, 403 and 901. CGAs can be helpful to prove or disprove something of significance, but authentication is key. CGAs can be expensive, so you don't want them precluded at trial because they are not properly authenticated. If a company separate from your testifying consultant is preparing the CGA, have your consultant and client work with you on the CGAs to ensure they are supported by the evidence.

## LOOK AROUND

In addition to the potential wealth of information that might exist in vehicles, or created by the police after the accident, or created by your consultant, don't forget to look for some key evidence that might demonstrate exactly how the accident happened: videos. I have seen videos from police cruisers, the Turnpike Commission, in-bus cameras and company security cameras, to name a few sources that showed either exactly how the accident occurred, or the exact vehicle positions and debris fields following the accident. Immediately after an accident, go to the site, canvas the area, look for cameras, look for banks, liquor stores and gas stations, which are constantly running security cameras, and make requests for preservation of videos, as sometimes they are overwritten relatively soon if nothing important to the owner occurred.

Sometimes you have to work harder to make your job easier. Turn over stones, download the vehicles, canvas the neighborhood, depose the officer and retain the consultant. It might turn your case from a two-version accident to one inescapable conclusion. •