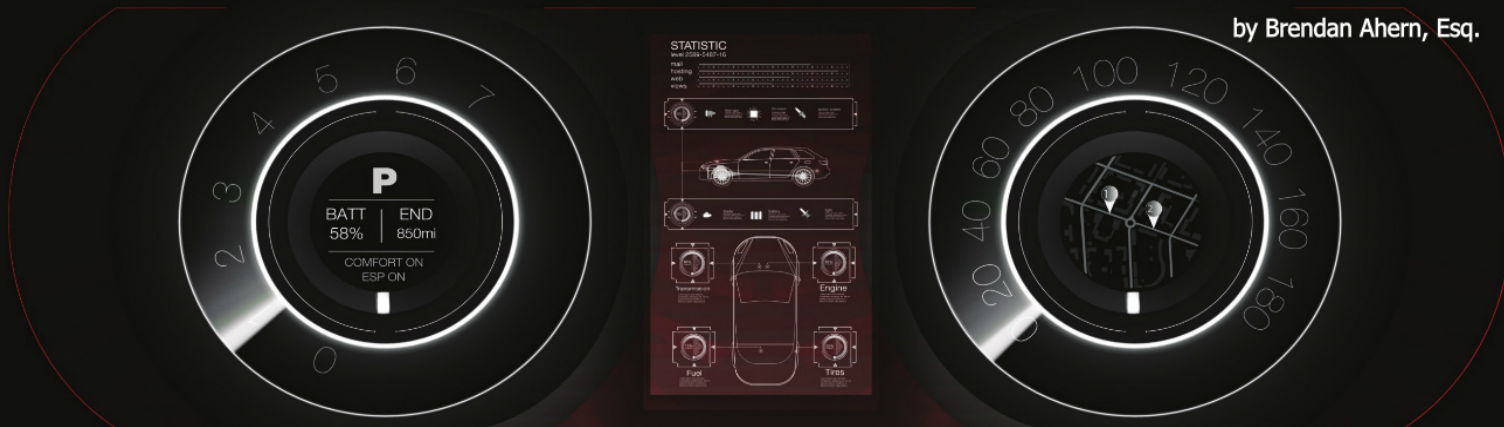


DASHBOARD CONFESSIONS

by Brendan Ahern, Esq.



Your Car May Be A Cooperating Witness

Prosecutors, criminal defense attorneys, personal injury attorneys, and other legal practitioners often do not consult a key witness – one that has a great memory and is willing to tell it all.

Experienced investigators and attorneys are just beginning to realize the depth of information that a vehicle's infotainment and other in-vehicle information systems (IVIS) are willing to share. Technology and tools exist that may enable you to "identify, acquire, and analyze critical information stored within the [IVIS] to uncover key evidence that determines what happened, where it occurred, and who was involved."¹ These digital witnesses never invoke their right to counsel and never forget what has been shared with them.

The emerging accessibility of IVIS data will have an increasingly significant impact in a variety of legal practice areas including motor-vehicle-related personal injury and wrongful death actions, products liability claims against vehicle manufacturers, matrimonial litigation where phone history and GPS location may be relevant, and a sweeping array of criminal investigations including homicides, narcotics and human trafficking, and white-collar crime.

Who, What, Where, When, and How?

With the proliferation of smartphones as well as advanced computer systems in the dashboards of our cars, an IVIS increasingly "collect[s] and store[s] a vast amount of user-related data such as recent destinations, favorite locations, call logs, contact lists, SMS messages, [social media feeds], pictures, videos, and a history of virtually everywhere the vehicle has been."² "Many systems record events such as when and where a vehicle's lights are turned on, which doors are opened and closed at specific lo-

cations, and even where the vehicle is when Bluetooth devices connect."³ As our phones and vehicles become smarter, the depth and breadth of their memories continually expand.

In what will invariably contribute to the expansion of available data, on November 15, 2021, the Infrastructure Investment and Jobs Act⁴ was signed into law, containing provisions that will require additional technology systems in motor vehicles. The National Highway Traffic Safety Administration (NHTSA) was directed to study and promulgate regulations requiring automated driver monitoring systems and autonomous driving features in cars newly manufactured as early as 2026, to reduce crashes caused by impaired, distracted, and negligent drivers, as well as protect against "automation complacency" and expected misuse of the technology.⁵ Examples of technology being considered include interior cameras and sensors focused on the eyes of the operator to ensure the operator's eyes are open and properly on the road, other monitoring of driver engagement, and autonomous driving features such as automatic braking and lane departure prevention technology.⁶ The monitoring and storage of this data will be embedded into.

The IVIS will increase the amount of retained data that may be relevant and available in a legal action. Access to this data is presently unregulated – i.e., there is not yet federal legislation analogous to 49 CFR § 563, which governs both the minimum standards of data acquisition and accessibility of event data recorder – colloquially known as a "black box" – technology.

Is IVIS the Next Black Box?

The likely answer is yes. Less than twenty years ago, after a motor vehicle crash,

downloading a vehicle's black box was far from routine. In fact, it was not until 2006 that 49 CFR § 563 established "uniform, national requirements for vehicles equipped with event data recorders (EDRs) concerning the collection, storage, and retrievability of onboard motor vehicle crash event data," for vehicles manufactured on or after September 1, 2012.⁷ The stated purpose was "to help ensure that EDRs record, in a readily usable manner, data valuable for effective crash investigations and for analysis of safety equipment performance (e.g., advanced restraint systems).

This data will help provide a better understanding of the circumstances in which crashes and injuries occur and will lead to safer vehicle designs.⁸ As a practical matter, this federal regulation required that if a vehicle had a black box, it had to capture and store certain critical data pertaining to a crash or event, and the software to access it was required to be commercially available.

Downloading a vehicle's black box, typically associated with the airbag deployment system, has become an integral and routine part of motor vehicle collision investigations. These systems, however, typically only capture the seconds and milliseconds prior to a crash or event. An IVIS may have a far greater memory, is not dependent on the occurrence of a crash or event, and may include histories associated with multiple users of the same vehicle. The breadth of captured data may trigger disputes regarding the constitutionality of the search and privacy rights of the user.

Interestingly, it presents a crossroads between the trend of increasing Fourth Amendment privacy rights in telephones and smart devices and the historically diminished privacy interests relating to motor vehicles on public roadways.

Case Study: Leaving the Scene of a Fatal Crash (VTL § 600.2), Solved Using Vehicle Infotainment and Telematics System Data Several years ago, in the middle of the night I was summoned to respond to a roadway in Suffolk County, New York to a fatal motor vehicle crash scene. The offending driver had fled the scene after striking and killing a pedestrian. The involved vehicle left minimal car parts at the scene, a lone eyewitness saw a dark four-door sedan strike the victim and flee, and a surveillance video showed an involved red four-door sedan. These facts initially created provability challenges in terms of identifying the offending vehicle and, more importantly, the operator. Our investigators ultimately were able to discover additional evidence and locate the involved vehicle that had damage patterns and forensic evidence consistent with striking a pedestrian. However, we needed to confirm the identity not just of the vehicle, but of the operator at the time of the crash. One of the investigators recommended that we see if the vehicle's infotainment system could be of assistance.

The IVIS became a key witness. An investigator who had specialized training downloaded and analyzed the involved vehicle's IVIS. In conjunction with other evidence in-

cluding residential surveillance videos and exhaustive phone record analysis, our investigators used the IVIS to uncover critical data that identified the operator and established his culpability. The IVIS shared real-time GPS and event data, information about when and where the operator's driver's side door opened and closed, when the vehicle engaged in "hard braking", and data that established the operator as the sole occupant of the vehicle at the time of the collision. The IVIS data even revealed that the operator circled back to the crime scene, while the active investigation was still ongoing. In that case, the vehicle's IVIS was integral to solving the crime and delivering justice for the victim and his family. It may be the key to your future investigations and litigation, as well.

Practice Comment

In today's rapidly-changing technological and legislative landscape, any practitioner with a vehicle-involved matter, ranging from personal injury to homicide, will be at a disadvantage if he or she is not considering the potential availability and impact of IVIS data in investigations and litigation. While there are vendors exclusive to law enforcement, there are also private vendors that have

emerged advertising the ability to perform IVIS downloads and analysis; the current prohibition is cost. Much like with black box technology, practitioners should anticipate that over time, more and more private vendors of this service will emerge, thus reducing costs.

Beyond consulting those with expertise in IVIS and litigators with familiarity using the data, litigation practices should account for this new technology. For civil practitioners, modifying preservation and spoliation notices and augmenting investigation and discovery requests are important steps.

Acquiring IVIS data may inform the assessment of the viability and/or strength of a cause of action, suggest possible defenses, and identify potential tortfeasors and witnesses. Criminal practitioners, both prosecutors and defense attorneys, should anticipate an increased use of IVIS in criminal investigations.

The bottom line: these cooperating digital witnesses will increasingly be the source of compelling and convincing evidence in many aspects of litigation. Practitioners should be prepared to take advantage of and/or defend against the wealth of data that IVIS data will provide, and litigants will need to know how to allow the IVIS data to tell its story. ↻

- 1 www.Berla.co
- 2 Id.
- 3 Infotainment Downloads - U.S. Forensic (usforensic.com)
- 4 PL § 117.58; PUBL058.PS (govinfo.gov)
- 5 Id. at §§ 24208-9 and § 24220
- 6 Volvo Will Be The First Manufacturer To Install Driver Monitoring And Intervention To Stop Drunk And Impaired Drivers - BestRide
- 7 49 CFR §§ 563.1 and 561.3
- 8 49 CFR § 563.2.



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