



## SUMMER 2015 E-NEWSLETTER

At Digital Mountain we assist our clients with their e-discovery, computer forensics and cybersecurity needs. With the recent Jeep Cherokee hacking incident and the evolution of the traditional car as part of the Internet of Things (IoT), we chose to theme this E-Newsletter on the impact vehicle discovery has on attorneys, litigation support professionals and investigators.

### DIGITAL MOUNTAIN'S GUEST CONTRIBUTOR THE HONORABLE RONALD J. HEDGES

#### VEHICLES & ESI

##### Introduction

“The automotive industry is developing innovative technologies and services that promise to deliver substantial benefits and enhance the driving experience. These technologies and services may assist in enhancing safety, reducing the environmental impacts of vehicles, diagnosing vehicle malfunctions, calling for emergency assistance, detecting and preventing vehicle theft, reducing traffic congestion, improving vehicle efficiency and performance, delivering navigation services, providing valuable information services, and more.” *Consumer Privacy Protection Principles: Privacy Principles for Vehicle Technologies and Services* at 1 (AAM/AGA: Nov. 12, 2014).

In other words, motor vehicles now create and store electronic information. This article is an overview of preservation and discovery of this information (“VESI”) in civil litigation and of privacy rights that may attach to it. Research (admittedly cursory) has not found any reported judicial decision that addresses VESI in civil litigation. In any event, those will assuredly come to be.

##### Discovery of Vehicular ESI

Rule 34(a)(1) of the Federal Rules of Civil Procedure was amended in 2006 to reference “electronically stored information” and ensure that ESI was within the scope of discovery. The Advisory Committee Note to the amendment explained that this was “intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.” Can any reader seriously doubt that, if relevant, VESI would be discoverable under the federal rules? Let’s examine several possibilities in personal injury/property damage litigation:

1. Vehicle A is stopped at a traffic signal. It is rear-ended by vehicle B. The owner/operator of A sues B for personal injuries and property damage. The owner/operator of B denies liability and argues that he is not responsible for the accident because his vehicle experienced a sudden and unexpected brake failure. The plaintiff demands production of

any ESI stored in B that recorded brake usage at and before the time of the accident. Is that discoverable?

2. Vehicle A experiences rapid acceleration such that the operator loses control and the vehicle crashes. The operator commences a products liability action against A's manufacturer. The manufacturer demands production of all ESI stored in A that recorded acceleration at and before the time of the crash. Is that discoverable?
3. A passenger in vehicle A is injured in a motor vehicle collision. She brings a personal injury action. There is evidence that she was not wearing her seat belt at the time of the accident. The defendant demands production of ESI that recorded seat belt usage at the time of the accident. Is that discoverable?

The unequivocal answer to each question is "yes." There might be limitations based on scope and/or proportionality but there will be at least *some* production.

### Preservation

Of course, commencement of litigation precedes discovery requests and production. Under each of the examples above there came a time when the duty to preserve VESI arose. Broadly speaking, that duty arose when the existence of litigation became known or was reasonably anticipated. Once the duty to preserve was "triggered" by that knowledge or reasonable anticipation the next question that arose was the scope of the duty. Again, turning to our examples:

1. Here, *at the latest*, the defendant's duty to preserve brake-related ESI was triggered when he decided to assert his defense of sudden and unexpected brake failure.
2. Here, *and again at the latest*, the plaintiff's duty to preserve acceleration-related ESI arose when he decided to institute suit and asserted that the crash was caused by the sudden acceleration.
3. Here, the trigger of the duty to preserve may be tricky. The owner/operator of A did not institute suit. Rather, a passenger did. Assuming that the passenger had "control, custody, or possession" of ESI related to her seat-belt usage, *and again at the latest*, the passenger's duty to preserve arose when the defendant asserted a defense based on her alleged failure to use.

These examples are, of course, based on the common law duty to preserve. Other preservation obligations may come into play based on statutes or regulations that relate to VESI. One example is newly-enacted New Jersey Public Law 2015, Chapter 60, "An Act concerning motor vehicle data recording devices \*\*\*."

In essence, the Act does two things:

1. It compels preservation: "No person shall knowingly alter or delete data on a recording device, or knowingly destroy a recording device with the intent to prevent access to or destroy the recorded data, within two years after a crash event that resulted in bodily injury or death."
2. It protects the "privacy" of VESI. Subject to various exceptions, "no person, except the owner of the motor vehicle that contains the recording device, or the owner's

representative, may retrieve, obtain, or use data recorded, stored, or transmitted from the recording device \*\*\*.”

This statute illustrates the relationship between preservation of VESI and protection of that information from “broad” disclosure.

### Privacy

We know that VESI can be subject to a duty to preserve and to discovery. We also know, using only the New Jersey law as an example, that VESI can be protected from broad disclosure. Putting aside statutes and regulations, what else might restrict access to VESI in the litigation context? The answer lies in the rules.

Rule 26(b)(2) governs discovery of ESI from “sources” that are “not reasonably accessible because of undue burden or cost.” Although not privacy-related *per se*, this rule may limit discovery of VESI. Moreover, although not directly related to privacy, Rule 26(b)(2)(C) may limit production of VESI if doing so not be “proportional” to the needs of a civil action.

Rule 26(c)(1) provides that a court may, “for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” under various circumstances. This rule directly implicates any privacy interests in VEHI.

It is hard to imagine a situation in which otherwise-discoverable VEHI would be barred under this Rule 26(c)(1). Indeed, the New Jersey law allows for disclosure of VESI “pursuant to a legally proper discovery request or order in a civil action.” However, assuming that good cause could be shown in VESI, Rule 26(c)(1) would permit issuance of an order keeping VESI confidential during discovery. Perhaps a reader could suggest what fact or facts could demonstrate the need for confidentiality?

### Conclusion

This article has merely scratched the surface of preservation, production, and confidentiality of VESI. As it becomes ubiquitous, varied, and voluminous, these topics will require broader – and in-depth – consideration.

*Ronald J. Hedges served as a United States Magistrate Judge in the District of New Jersey from 1986 to 2007. He is the chair of the Advisory Board of Digital Discovery & e-Evidence, a Bloomberg BNA publication. Mr. Hedges has authored numerous articles on electronic information. Among other things, he is a coauthor of both editions of the Federal Judicial Center publication, Managing Discovery of Electronic Information: A Pocket Guide for Judges and is a senior editor of the editions of The Sedona Conference Cooperation Proclamation: Resources for the Judiciary. Mr. Hedges taught e-discovery at Georgetown University Law Center, Seton Hall School of Law and Rutgers School of Law-Newark. He has served as a special master, mediator, and arbitrator. Mr. Hedges also consults on complex case management and electronic information in litigation.*



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## UPCOMING INDUSTRY EVENTS

### August 2015

HTCIA 2015: August 30 - September 2

### September 2015

ACEDS 2015 E-Discovery Conference: September 28-30

### October 2015

EDI Leadership Summit: October 14-16

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*Digital Mountain, Inc. Founder and CEO, Julie Lewis, will be presenting at some upcoming industry events. Please send requests for speaker or panel participation for her to [marketing@digitalmountain.com](mailto:marketing@digitalmountain.com).*

## DIGITAL MOUNTAIN, INC.

4633 Old Ironsides Drive, Suite 401  
Santa Clara, CA 95054  
866.DIG.DOCS

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**[www.digitalmountain.com](http://www.digitalmountain.com)**

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