When It Counts

Truck EDR Data—Strategies to Limit Plaintiffs' Event-Counter Evidence

By Elaine M. Stoll
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In newer trucks, several separate electronic systems may tally critical events. Here's how to limit plaintiffs' use of high counts to support dangerous-defendant narratives.

In today's reptile-theory climate, plaintiffs' attorneys seize upon evidence that fits into a narrative of dangerous truck drivers and the trucking companies that inadequately monitor and train them. Technological advances have resulted in a surprising soundbite source: the counts of critical events, or exceptions, kept by truck event data recorders (EDRs). In newer vehicles, several separate electronic systems may keep a running tally of events such as hard braking or sudden deceleration, collision warnings, and speeds surpassing certain thresholds. The counts may span months, years, or even the lifetime of a truck.

By now the concept of event data recorders is probably familiar. Electronic devices connected to a heavy truck's onboard network, including the engine electronic control module (ECM), fleet-management systems, and forward-radar-based collision warning and mitigation systems, have event-recording capabilities in addition to their primary functions. When one of these systems detects an event meeting parameters that it has been programmed to recognize, it stores incident data to memory. An EDR may hold two or three detailed incident event reports at a time, each containing data about how the vehicle was being operated at the time of the triggering event, and some containing additional data about the vehicle's operation for a period before and after the event. When an event occurs, the newest incident event report overwrites the oldest. The data is available to download until it is overwritten, and after an accident, it may be downloaded and analyzed by reconstruction experts. Traditionally in litigation over a motor vehicle accident, use of EDR data has focused on the detailed incident data captured from a critical event such as hard braking or a collision warning occurring just before or contemporaneous with an accident.

Increasingly, plaintiffs and their experts are also emphasizing event counts—data

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from the same EDRs tallying the *total* number of hard-braking events, collision warnings, or times when a driver reached a certain speed, to name a few examples. When the counts span years and hundreds of thousands of miles of driving, the high number of events provides an opportunity for a plaintiff to paint a damning picture of a dangerous driver and of a company that had access to but ignored readily available data that should have flagged the driver as needing further safety training.

How does event-counter evidence provide plaintiffs with an opportunity to turn a simple accident into a referendum on a trucking company's driver-monitoring and safety-training practices? What tools are available to defense counsel to place the data in context for a court and limit the damaging use of the data at trial? This article provides an introduction to truck EDR event counts and suggests strategies to mitigate the plaintiffs' effective use of such evidence at trial.

Who's Counting? An Introduction to EDRs with Event Counts

As truck technology continues to advance, electronic systems on a heavy truck increasingly gain EDR capabilities. Depending upon how it is equipped, a newer heavy truck involved in an accident may have three or more EDRs from which incident data can be downloaded. At least some of the resulting reports are likely to include event counts.

For example, when deceleration from braking triggers an ECM to store detailed incident data for a hard-braking event, or a sudden deceleration event, the event will likely be added to a running count of all such events. Detroit Diesel's ECM, Detroit Diesel Electronic Controls, produces a "Trip Activity" report that includes a hard-braking count for the duration of a "trip"—the period since the last time that data was downloaded. A "Vehicle Speed/RPM" report indicates the vehicle's average speed for that period and charts the percentage of the trip spent in specified speed ranges. "Monthly Activity" reports for each of the three most recent months also report a hard-braking count, the number of occasions when the truck's speed reached or exceeded 66 miles per hour and 71 miles per hour, and the maximum speed reached. Other manufacturers' ECMs also report event counts, such as the sudden deceleration count contained in Cummins' "Trip Summary Report."

Collision warning and mitigation systems are among the newer sources of event counts. OnGuard, manufactured by Meritor WABCO, and Wingman, manufactured by Bendix, both use forward radar to track vehicles ahead of a truck in its direct path. When a target vehicle poses a rear-end collision hazard, audible, visual, and haptic cues alert the driver. If the driver fails to respond, the system may advance to collision-mitigation measures that include reducing the throttle, engaging the engine retarder, and applying foundation brakes. In addition to saving data for the most recent collision-warning and collision-mitigation events, the systems may track the total number of collision warnings or collision-mitigation braking. An OnGuard snapshot report includes, in addition to an event record for the most recent haptic warning and the most recent collision mitigation event, an "Event Counters" section, reporting the total numbers of forward collision warnings, haptic collision warnings, and collision-mitigation braking. If the truck is equipped with a fleet-management, or telematics, system, the motor carrier may also receive real-time reports of a collision warning or collision-mitigation braking as it occurs.

Some newer antilock brake systems with stability control and traction control record incident data when a stability-control event occurs. Certain fleet-management systems include a speed-alert function that reports when a driver exceeds either a posted speed limit or a speed parameter determined by the motor carrier. Electronic driver logbooks can flag hours of service violations. A number of companies are currently marketing "driver scorecard" technology that not only tracks the frequency of certain critical events or exceptions, but also purports to compare a driver with other drivers in the same fleet or in other fleets with respect to safe and risky driving behaviors. These systems, too, might be sources of event-counter data in the aftermath of an accident.

Plaintiffs' Use of Event-Counter Evidence

Plaintiffs are increasingly using attention-capturing event counts to manufacture direct negligence claims against motor carriers, sometimes with an accompanying claim for punitive damages.

First, the plaintiff's counsel and expert will portray event-counter evidence as an objective tally of past driving events evidencing a pattern of "dangerous" driving. Counts of hard-braking events or collision warnings become, in this narrative, evidence of driving inattentively or following vehicles ahead too closely (no matter that cars cutting in front of a truck could explain the same data). Counts of speeds of 66 miles per hour or greater become evidence of regular speeding (notwithstanding that the driver's route may include stretches of highway with speed limits for trucks of 70, 75, or even 80 miles per hour). Different event counts are combined to tell a consistent story. For example, hard-braking events counted by the ECM and data showing speeds of at least 66 miles per hour some 10 percent of the time show, the plaintiff's counsel will argue, that the driver was usually in a hurry and in the habit of following vehicles too closely.

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Next, the plaintiff's counsel and expert will suggest that the trucking company had a responsibility to discover and correct the unsafe driving behavior and could have done so by simply looking at the available data any time before the accident that harmed the plaintiff. During the deposition of the motor carrier's safety director, the plaintiff's counsel will seek testimony that monitoring volumes of data and individually coaching drivers after every event would be too expensive and time-consuming. The plaintiff's counsel will also use excerpts from the company's driver handbook for language on safe following time and appropriate speed. Event counts that violate the trucking company's policies will be presented as proof that the company knew that such driving was unsafe but failed to discover and to address the driver's regular safety violations.

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The plaintiff's trucking safety expert will use event counts to highlight the trucking company's ability to monitor driver performance using data already available. For the driver in question, the data evidenced unsafe driving practices, the expert will opine. The expert may conclude that because the event counts spanned months or years, or tens or hundreds of thousands of miles, and were not downloaded or reviewed by the trucking company until its driver was involved in the accident that harmed the plaintiff, the trucking company mismanaged driver safety and enabled dangerous driving to continue uncorrected.

Such evidence is sufficient, the plaintiff will argue, to raise a jury question on the trucking company's negligence in retaining, supervising, or training the driver in question. The plaintiff may also seek punitive damages against the trucking company based upon the same evidence of "reckless" safety management.

Put the Event Counts in Context for Courts

Educating a court about what event-counter data does and does not show is an essential prerequisite to effective legal arguments to exclude or to limit use of the data at trial.

Event Counts Do Not Indicate Who Was Driving

Plaintiffs' counsel and experts tend to assume and to represent that a defendant driver was responsible for all of the driving reported by event counters. But nothing about the data establishes who was driving. All that the data show is how many times a certain type of event occurred during the period for which the events were counted. This is apparent on the face of the reports containing the event counts and may be an effective area of inquiry when deposing a plaintiff's expert.

Event counts may have been recorded over tens of thousands or hundreds of thousands of miles—a distance most likely available in the report containing the event count. The truck involved in an accident with the plaintiff's vehicle may or may not have been under the defendant truck driver's exclusive control for that entire period. Defense counsel should find out whether other drivers used the truck and whether the truck was purchased or leased new versus used. It is also possible that a certain number of counted events were generated during vehicle testing or maintenance. Since only past driving by the defendant truck driver could be relevant, and not driving by another user of the same truck, event-counter evidence should be excluded to the extent that the counts may not even reflect the defendant driver's conduct.

Event Counts Do Not Establish Culpable Driving

A counted event such as hard braking or a collision warning can be generated without any culpable driving on the part of a truck driver. Either or both of those events could result from another vehicle changing lanes directly in front of an attentive truck driver. The fact that there are two equally plausible explanations for the same counted event, one of which does not implicate any negligence by a truck driver, highlights the speculative nature of an opinion interpreting certain event counts as a pattern of dangerous driving and the potential for unfair prejudice to the defendants if a plaintiff is permitted to portray the data as objective evidence of culpable driving. Along the same lines, speed-count data showing occasions of speeds above 65 miles per hour but below higher speed limits found along a driver's routes may reflect that the driver was following, not exceeding, speed limits.

A related problem is that plaintiffs and their experts use event counts to suggest a pattern of dangerous or negligent driving almost always without proof that the frequency of a given event was greater on the defendant driver's truck than would be expected based upon normal or safe driving. A judge (and jurors) may be unfamiliar with the distance traveled and the amount of time typically spent on the road by a commercial truck driver, which make some counted events inevitable, and a high event count may sound alarming out of context. Educate a court on the hours and miles traveled, and perhaps on how to think about the frequency rather than total count of a particular event. If a report containing a hard-braking count also includes a much higher count of total brake applications, for example, that context will help undermine a suggestion that the event count is important evidence of dangerous driving.

Event Counts Do Not Show Where or When Driving Occurred

In many cases, the defendant truck driver regularly passes through a number of states. Nothing about the event-counter data show where the counted events occurred. This may be important if the plaintiff seeks punitive damages, which may not be awarded for out-of-state conduct lacking a causal connection to

the plaintiff's harm, as discussed further below. Nor does an event count show when the events occurred. Courts have sometimes imposed a time limit on driving-history evidence even when otherwise permitting such evidence to show direct negligence by a trucking company, finding certain driving history too remote to be probative even for that purpose.

Event-Count Terminology Can Be Misleading

To some extent it may be necessary to educate a court on what particular event-count data means. Labels are sometimes misleading. For example, the Wingman and OnGuard radar-based collision-warning systems provide collision "alerts" and "warnings." However, an alert or a warning does not mean that a collision was imminent or even likely. A driver alert occurs when following time falls below a set threshold. OnGuard aims to achieve a 3.6-second following time using adaptive cruise control. If following time falls below that threshold when a truck is traveling above 15 miles per hour, OnGuard will generate an audible and visual warning to the driver. A "collision warning" simply indicates a reduction of following time to the target vehicle, not that a collision is likely. Take care to explain the actual meaning of event-count data when necessary for a court to understand a legal argument for exclusion or to recognize how the plaintiff or the plaintiff's expert may be misrepresenting the data.

Limit Plaintiffs' Use of Event Counts at Trial

Admissibility of event-counter evidence depends, of course, upon the purpose for which it is offered. Event counts may be offered against a defendant truck driver to suggest that because the driver has previously driven dangerously, he or she must have been driving that way at the time of the accident, or against the driver's employer to suggest negligence by the trucking company in retaining the driver or in failing to intervene with additional safety training.

Case law has not yet caught up with truck event data recorder technology. Most of the cases discussing EDR data address discovery disputes and spoliation claims without reaching the question of admissibility. But longstanding rules of evidence and decisions applying them to driving-history evidence provide a number of avenues to limit or to preclude a plaintiff's use of event counts at trial.

Prohibition on Character Evidence Offered to Show Conformity with Character

Event counts captured by truck event data recorders are just a new form of evidence of a driver's past driving conduct. The argument for complete exclusion of event-counter data, as with any driving-history evidence, is easiest when a plaintiff's claims are predicated on a truck driver's negligence and the plaintiff asserts no direct negligence claim against the trucking company that employed the driver. When this is the case, the most robust authorities for excluding such evidence altogether are based upon the rule prohibiting use of evidence of a person's character offered to prove action in conformity with character.

Under Federal Rule of Evidence 404(b) and equivalent rules in many states, evidence of a person's past crime, wrong, or act is inadmissible to prove a person's character to show that the person acted in conformity with that character on a particular occasion. Applying this rule in civil cases arising from automobile collisions, courts have routinely excluded evidence of a driver's past driving, offered to prove a propensity for negligent driving, as impermissible character evidence. *E.g., Berry v. Transp. Distribution Co.*, No. 4:12-cv-00488-JED-FHM, 2013 U.S. Dist. Lexis 170634, at *12–13 (N.D. Okla. Dec. 4, 2013); *Villalba v. Consol. Freightways Corp. of Del.*, No. 1:98-cv-05347, 2000 U.S. Dist. Lexis 11773, at *20–24 (N.D. Ill. Aug. 14, 2000); *Cameron ex rel. Cameron v. Werner Enters., Inc.*, No. 2:13-cv-00243-KS-JCG, 2016 U.S. Dist. Lexis 68711, at *12 (S.D. Miss. May 25, 2016). Evidence of a driving "pattern" offered to show that it is more likely that a truck driver acted in the same manner at the time of the accident is precisely the purpose prohibited by Rule 404(b). *Villalba*, 2000 U.S. Dist. Lexis 11773, at *24. Character evidence is considered to be of slight probative value and has the potential to be very prejudicial because it distracts from the evidence of what actually happened on the occasion at issue and invites decision on an improper basis of character, reputation, or past conduct. *See* Fed. R. Evid. 404 advisory committee's notes on rules. When a plaintiff cannot cite a plausible, proper purpose for driving-history evidence besides proof of character for a use barred by Rule 404(b), Rule 403 also supports its exclusion because the danger of undue prejudice substantially outweighs any probative value. *See* Fed. R. Evid. 403.

A decision especially on point is *McQuiston v. Helms*, in which a federal court excluded a plaintiff's expert's reference to more than a year of speed data from a tractor's engine electronic control module on the grounds that the evidence amounted to proof of character offered to show conformity with character at the time of the accident. *McQuiston v. Helms*, No. 1:06-cv-01668-LJM-DML, 2009 U.S. Dist. Lexis 19141, at *15–19 (S.D. Ind. Mar. 4, 2009). The plaintiff exited his vehicle on an interstate highway and was struck by a portion of the defendants' tractor-trailer. The parties disputed whether the plaintiff and part of his vehicle were in the travel lane at the time and whether the truck driver was negligent. The plaintiff's expert emphasized speed-count data from the tractor's ECM. During the month of the accident, the ECM showed 895 counts of speed of at least 66 miles per hour and 40 counts of speed of at least 71 miles per hour, with higher counts the month before. During a period of more than 16 months and almost 150,000 miles, the driver's maximum speed was 89 miles per hour. Based upon the speed-count data, the expert opined in his report that the trucking company had "the ability to monitor driver performance (safe driving strategy) by downloading the truck's engine control module (ECM) data… during normal maintenance schedules" but was not "using the ECM data as an effective tool to monitor driver performance."

The district court in *McQuiston* barred the speed-count data under Rule 404(b) after concluding that "the only use for this evidence is to argue that because [the driver] had driven in excess of the speed limit in the past, he must have driven in excess of the speed limit on the day in question." *McQuiston*, 2009 U.S. Dist. Lexis 19141, at *18. According to the defendants' *Daubert* motion and the expert's own deposition testimony, there was no evidence suggesting that the truck driver was speeding at the time of the accident. The court recognized inherent limitations of the speed-count data: the data could not be tied to "the day of the accident,"

did not necessarily represent driving by the defendant truck driver, and may not have reflected speeding if "recorded in states that have speed limits up to and exceeding 70 MPH." *See id.* As for the plaintiff's expert's opinions based upon the speed-count data, the court concluded that without a negligence claim against the trucking company based upon failure to monitor driver performance or inadequate driver training, testimony about the company's failure to use the data to monitor or to train the defendant driver was irrelevant. *Id.* at *17.

Invoking rules governing relevance and character evidence, courts have limited admitting evidence to establish a driver's manner of driving during an accident to the driving that immediately preceded it.

These authorities provide strong support for an argument to exclude event-counter evidence and expert opinions on the grounds that such evidence amounts to improper character evidence. As *McQuiston* illustrates, the chances of success are the highest when there is no direct negligence claim against a truck driver's employer and also when defense counsel has clearly articulated in a pretrial motion—and highlighted in the deposition of the plaintiff's expert—the inherent limitations of the data and any disconnect between the data and accident events.

Cases Limiting Relevant Driving-Conduct Evidence to Conduct Immediately Preceding an Accident

Invoking rules governing relevance and character evidence, courts have limited evidence admissible to establish a driver's manner of driving during an accident to the driving during and immediately preceding it. For example, witnesses' observations of a party's aggressive driving immediately before an accident at the preceding intersection may be admissible as tending to make more probable the fact that he was driving dangerously at the time of the accident, whereas evidence of his dangerous driving "weeks, days, or even hours before the time of the accident" would be excluded. *Roberts v. Sunbelt Rentals, Inc.*, No. 5:14-cv-00040-EKD-JCH, 2016 U.S. Dist. Lexis 41897, at *35 (W.D. Va. Mar. 30, 2016). "[P]roximity in time and place makes all the difference here." *Id.* at *35–36. *Accord Larson v. Solbakken*, 34 Cal. Rptr. 450, 456 (Cal. Ct. App. 1963) (holding driving not too remote if it "occurred within a short time prior to the accident and in close proximity thereto."). The rationale for the time-and-place limitation on driving behavior offered to show how a person was driving at the time of an accident is that trial centers on a specific incident, not on a defendant's behavior in general. This echoes the explanation for the rule limiting use of character evidence. Whereas evidence of a person's general driving behavior has little to do with his or her driving on a specific occasion and raises concerns about a decision on the basis of improper character considerations, a person's driving immediately before an accident is probative of his or her driving conduct at the time and place of the accident.

To bolster an argument for excluding event-counter evidence offered against a defendant driver to suggest a history of dangerous driving, build upon a character-evidence argument by adding a case from your jurisdiction articulating or applying a time or place limitation on accounts of a person's driving behavior before an accident. A decision excluding witness observations of a driver's behavior mere miles or minutes before an accident brings into sharp focus why event-counter evidence tallied over many months cannot be probative of the truck driver's conduct at the time of the incident involving the plaintiff.

Options When Event-Counter Evidence Has a Probative Purpose

When a plaintiff has pleaded a negligent retention, supervision, or training theory, driving-history evidence that may have no proper purpose to show a truck driver's negligence can be probative of what the trucking company knew, or should have known, about the driver's fitness as a truck driver before the accident involving the plaintiff. *E.g., Tom v. S.B. Inc.*, No. 1:10-cv-01257-GBW-WPL, 2013 U.S. Dist. Lexis 192732, at *6–7, 9–11 (D.N.M. Mar. 29, 2013). This includes driving-history evidence in the form of event counts and related expert testimony. *See McQuiston*, 2009 U.S. Dist. Lexis 19141, at *17–18 (holding testimony regarding trucking company's failure to use ECM speed-count data to train or to monitor the driver irrelevant because the plaintiffs pleaded no inadequate monitoring or inadequate training theory). Likewise, when a plaintiff seeks punitive damages, the court may find driving-history evidence probative of whether the trucking company "acted recklessly in failing to enforce its own safety policies and procedures" or "in failing to discipline and/or terminate an unsafe or unqualified driver." *Tom*, 2013 U.S. Dist. Lexis 192732, at *11.

Just because driving-history evidence such as event-counter evidence could be probative, however, does not mean that it will be admitted into evidence at trial, or that if it is, the plaintiff may use it however the plaintiff desires. A number of options remain to seek exclusion or limits on the use of such evidence.

Admitting Vicarious *Liability*

In many jurisdictions, a plaintiff's direct negligence theories against a driver's employer, such as negligent retention, supervision, or training, will be eliminated or subsumed by the trucking company's admission of vicarious, or respondeat superior, liability for the driver's actions, at least when punitive damages are unavailable. *E.g., Ballard v. Keen Transport, Inc.*, No. 4:10-cv-00054-BAE-GRS, 2011 U.S. Dist. Lexis 5487, at *14–15 (S.D. Ga. Jan. 19, 2011) (applying Georgia law); *Southern Pac. Transp. Co. v. Builders Transp., Inc.*, No. 2:90-cv-03177-EBC, 1993 U.S. Dist. Lexis 7380, at *28–30 (E.D. La. May 25, 1993) (predicting Louisiana law). This is a matter of state law worth exploring. In such jurisdictions, admitting vicarious liability before trial and moving for dismissal of direct negligence claims against the trucking company removes from the case any driving-history evidence that would have been

admissible to prove the employer's direct negligence, but is irrelevant or improper character evidence absent such a theory.

Seeking Partial Summary Judgment

Evidence that is admissible only when offered to prove direct negligence claims against a trucking company or entitlement to punitive damages becomes inadmissible if those claims are eliminated through summary judgment. Whether that is feasible in a particular case depends upon the specific facts and upon the standards in that jurisdiction for a prima facie direct negligence or punitive damages claim. In a jurisdiction with a high threshold for maintaining a direct negligence claim against an employer or for raising a jury question on punitive damages, driving-history and related evidence offered by a plaintiff against a defendant truck driver or employer may fall short as a matter of law. *See, e.g.*, *M.T. v. Saum*, 3 F. Supp. 3d 617, 624–31 (W.D. Ky. 2014) (applying Kentucky law).

Using Basic Causation Principles to Limit Liability and Narrow Evidence

Focusing on basic causation principles that limit liability may be beneficial in pursuit of a partial summary judgment or in arguing for the irrelevance of certain event-counter evidence for the purpose of excluding it. Suppose that event-counter evidence shows a history of speeding, but the accident at issue involved a negligent turn from a stop or a similar scenario in which speed played no role. Perhaps data from the radar-based forward collision warning system on the defendants 'truck show a high "collision warnings" count—triggered by the risk that the truck would run into a vehicle ahead—but in the accident that gave rise to the litigation, the plaintiff ran into the rear of the truck and alleges that the driver was negligent in parking on the shoulder or in failing to use emergency flashers. Maybe electronic logs demonstrate a number of driver logbook inconsistencies, but the parties do not dispute that the driver was in compliance with hours of service limits at the time of the collision and was not fatigued. A disconnect between the driving conduct alleged to have harmed the plaintiff and the type of culpable driving that the plaintiff suggests that the event-counter evidence shows presents an opportunity to narrow the issues and evidence for trial by invoking basic but fundamental causation law.

Negligence does not give rise to liability without causation, so a truck driver's liability for negligence extends only to the driving that actually harmed the plaintiff. Standards for negligent retention, training, or supervision claims differ by jurisdiction, but there should be some requirement that an employer's alleged negligence created an unreasonable risk of harm to the plaintiff of the type that actually occurred or that the employer's alleged negligence made the accident with the plaintiff foreseeable. In some jurisdictions this causation requirement is strict. For example, in one case, a truck driver's series of tickets over 10 years for driving above the speed limit did not make foreseeable an accident in which the driver was driving under the speed limit but too fast for conditions, the court held. *Estate of Presley v. CCS of Conway*, No. 3:03-cv-00117-JGH, 2004 U.S. Dist. Lexis 9583, at *15–16 (W.D. Ky. May 18, 2004) (applying Kentucky law).

In addition to any proximate cause threshold requirement for punitive damages imposed by state law, the U.S. Constitution limits liability for punitive damages to "the conduct that harmed the plaintiff" and prohibits awards of punitive damages for "being an unsavory individual or business" and for out-of-state conduct without "a nexus to the specific harm suffered by the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–23 (2003). These constitutional limits are particularly useful when a defendant trucking company is based in a state other than where the case is pending, when the driving that the plaintiff suggests that the company should have discovered mostly occurred in states other than where the case is pending, and when any alleged negligence in failing to discover an alleged pattern of dangerous driving and to intervene also occurred out of state.

Moving for Bifurcation

In a jurisdiction that permits a plaintiff to maintain a direct negligence claim against an employer notwithstanding an admission of vicarious liability for the actions of its employee, bifurcation may be available. Bifurcating trial of the claims against a driver and trial of any direct negligence theories or punitive damages claim against the trucking company ensures that the driver is not prejudiced by driving-history evidence that is inadmissible to show that he or she acted in conformity with a dangerous pattern of past driving but admissible to show the employer's negligence or to seek punitive damages. *See, e.g.*, *Keifer v. Reinhart Foodservice LLC*, No. 2:09-cv-01558-JFC, 2013 U.S. Dist. Lexis 82025, at *6 (W.D. Pa. June 11, 2013), *aff'd on other grounds*, 563 Fed. App'x 112 (3d Cir. 2014).

A decision excluding witness observations of a driver's behavior mere miles or minutes before an accident brings into sharp focus why event-counter evidence tallied over many months cannot be probative of the driver's conduct at the time of the incident involving the plaintiff.

Requesting Limiting Instructions

When evidence of a truck driver's driving history will be admitted for one purpose but may not properly be considered for another, request a limiting instruction in which the jury is asked to consider the evidence only for specific purpose or purposes, and not for the purpose of determining whether the driver drove in a negligent manner at the time of the collision. *Tom*, 2013 U.S. Dist. Lexis 192732, at *9. Other limits on driving-history evidence may be available and appropriate, such as exclusion of driving history that is too remote to be probative even for the purpose for which the court has allowed the evidence. *See id.* at *4–6, 11–12.

Challenging Expert Testimony Based Upon Event-Counter Data

No matter the purpose for which a plaintiff proposes to introduce driving-history evidence from EDR event counters, expert testimony premised upon the data is subject to the usual rules and restrictions governing expert testimony. For one thing, no expert testimony is needed or permitted for matters within jurors' understanding. For example, if event counts are self-explanatory and the plaintiff offers them to show a history of conduct violating a straightforward policy about which evidence has been presented, challenge the admissibility of proposed testimony from the plaintiff's expert opining that the data show a policy violation. Experts also may not instruct a jury on the law or how to apply it, and testimony crossing that line should be challenged as inadmissible. *E.g., Thomas ex rel. Thomas v. Nat'l Carriers, Inc.*, No. 2:05-cv-02669-HGB-ALC, 2007 U.S. Dist. Lexis 95103, at *10–11 (E.D. La. Mar. 22, 2007). Rules and case law requiring that expert testimony be founded on sufficient facts or data, requiring that the testimony reflect an application of the expert's specialized knowledge or expertise, and barring speculation can support a challenge to sweeping conclusions by a plaintiff's expert about the trucking company's driver monitoring, driver training, or safety practices based upon event-counter data when the expert lacks knowledge of the company's actual practices and speculated to bridge gaps about what the data cannot show. *See, e.g.*, Fed. R. Evid. 702. Admissions from a plaintiff's expert at deposition that highlight the expert's lack of knowledge of company practices, assumptions that the expert had to make to reach his or her data-based conclusions, or the disconnect between the type of driving that the event counts demonstrate compared with the driving involved in the particular accident, can be persuasive in a subsequent motion to exclude the expert's testimony. *See* Mem. Law Supp. Mot. Exclude Test. Pls.' Expert Dwayne G. Owen 7–9, *McQuiston v. Helms*, No. 1:06-cv-01668-LJM-DML, ECF No. 76 (S.D. Ind. Jan. 20, 2009).

No matter the purpose for which a plaintiff proposes to introduce driving-history evidence in the form of event counts, expert testimony premised upon the data is subject to the usual rules and restrictions governing expert testimony.

Conclusion

Evidence that cannot even show who was driving, pinpoint when or where, or distinguish between the presence or the absence of culpable driving behavior by a truck driver hardly constitutes objective evidence of dangerous driving. Explained in its full context, much event-counter evidence compares unfavorably with other driving-history evidence that is routinely excluded from vehicle accident cases or relegated to a later phase of trial. Undermine a plaintiff's intended use of event-counter evidence most effectively with a two-pronged strategy that combines factual background and legal argument. Be prepared to educate the court and to challenge the plaintiff's expert about what event-counter data actually show, and highlight the explanations for counted events that need not involve culpable driving by the defendant truck driver. Until case law catches up with the new truck technology, look to analogous driving-history evidence and basic evidentiary principles to exclude or narrow a plaintiff's use of critical event counts to fit the typical dangerous-defendant narrative. FD