

Michael Cowen:

This is Michael Cowen and welcome to Trial Lawyer Nation.

Speaker 2:

You are the leader in the courtroom and you want the jury to be looking to you for the answers.

Speaker 3:

When you figure out your theory, never deviate.

Speaker 4:

You want the facts to be consistent, complete, incredible.

Speaker 5:

The defense has no problem running out the clock. Delay is the friend of the defense.

Speaker 6:

It's tough to grow a firm by trying to hold on and micromanage.

Speaker 7:

You've got to front load a simple structure for jurors to be able to hold onto.

Speaker 8:

What types of creative things can we do as lawyers, even though we don't have a trial setting?

Speaker 9:

Whatever you've got to do to make it real, you've got to do to make it real. But the person who needs convincing is you.

Voiceover:

Welcome to the award-winning podcast Trial Lawyer Nation, your source to win bigger verdicts, get more cases, and manage your law firm. And now here's your host, noteworthy author, sought after speaker and renowned trial lawyer, Michael Cowen.

Michael Cowen:

Welcome to today's Trial Lawyer Nation. I'm joined by my partner Malorie Peacock, and we're going to talk today about some fun stuff we've been doing on cases that involves the intersection of technology and driving. That's going to be everything from drive cams, electronic logs, what they call telematics systems where companies back home at the office can track what vehicles are doing out in the field, and even how some of these applications actually cause crashes by distracting their drivers.

Before I jump in though, I want to thank our sponsor Law Pods. Law Pods produces this podcast. They make it really, really easy for me. All I have to do is come here and talk to people. They do the recording, the editing. They make all the little ads for us that you might see on social media. And if you want to do

your own podcast, which is a lot of fun, I highly recommend Law Pods. Malorie, how are you doing today?

Malorie Peacock:

I'm doing good. I'm feeling really inspired by this topic today and mostly because you are in my office earlier and we were talking about how technology is changing the legal field. You were talking about ChatGPT and some of the things that it can do and I've seen lawyers playing with it online and it's kind of fun. But technology has really changed the way our cases work too. And so I think it's a really interesting topic and we have tons and tons to learn about how it all works, but we've learned quite a bit even in the last two years that I don't think we've talked about it on the podcast before.

Michael Cowen:

No, we haven't. And this is something that more and more we're going less from looking at someone's paper documents and trying to put the case together to having to get into the electronic data. So what are some of the sources of data we're looking at Malorie?

Malorie Peacock:

Oh my gosh, there is so much in these 18 wheelers that drive down the road, or even in just regular passenger cars that are part of a commercial fleet. There's so many options out there that companies can put on vehicles in order to monitor drivers, try to affect safety. So if you want to start with 18 wheelers, there's electronic logging devices that are now required. There's GPS tracking systems, there's specialized brake systems that can break for you and that can do that automatic cruise control where it goes with the flow of traffic.

So there's all kinds of electronic systems on these vehicles and a lot of them are combined systems. So you might have an electronic log system that's also combined with a GPS that's also combined with monitoring harsh braking or harsh cornering or something like that and it's all one system. And then you might have three or four different systems in a vehicle that each do one isolated function. So it's pretty interesting the wide range of electronic systems that you can have, outside of just the cell phone. I mean every truck driver out there has a cell phone and sometimes the cell phone is what's recording all of this information too. So there's applications for the cell phone that can give you all of that stuff. And then there's systems that can be put on the vehicle itself to record this information. So all kinds of stuff.

Michael Cowen:

Yeah. And it's not just in our 18 wheeler cases. I mean a lot of the companies that have fleets of vehicles have other similar tracking systems. Even Domino's Pizza, I can order Domino's Pizza for my kids and then I can go online and track where that food is. Or Uber Eats, I can watch where that Uber Eats driver is. So can Uber Eats and Uber Eats gets all kinds of data. And even for a normal passenger and passenger cars, of course there's a trove of data, both good and bad on, cell phones.

Well let's start with, since we do a lot of trucking, let's start with the trucking stuff. So we talk about electronic logging device. What is an electronic logging device?

Malorie Peacock:

So back in the day, drivers used to have to keep what's called a paper log book. They had to track their hours in order to comply with the federal motor carrier safety regulations. And it had to be in a specific format for logs. I mean, you had to keep track of certain information. So how long you were driving, how

long you were off duty, how long you were on duty not driving. So there's different requirements for what you have to keep track of.

Well a couple of years ago, the Federal Motor Carrier Safety Administration decided we're going to go all electronic and we're not going to do it on paper anymore. Frankly, because there was a lot of cheating that was happening on paper. I mean you just were relying on the record keeping of the 18 wheeler driver who has incentives to not comply with the hours of service regulations, to be truthful on those logbooks. So they went all electronic. And so it's basically the paper log but in an electronic format. Except the cool part about it is that it gets GPS data to tell you when the vehicle is actually moving and when it stopped. So there's that extra added component to it that you wouldn't have with a paper log.

Michael Cowen:

Yeah. And I think it's important to keep in mind, it's not that these truck drivers are bad people, but there's some really perverse economic incentives in trucking. And so most truck drivers are only paid by the mile. And so the average, what they call detention time, when they go there to pick something up or drop something off at a warehouse, they can be there from anywhere from three to eight hours. Unless they're at one of the few, and it's very, very few companies, that actually pay for what they call detention time. They don't get paid for any of that time. But that time counts against their number of hours they're allowed to work in an eight-day period before they have to stop driving. Also, if they break down, if they get stuck in slow traffic, they're getting paid by the mile. So if you're in a traffic jam for an hour and you're going five miles an hour, you get paid for five miles, not for 60 miles.

And you get to a point where you can't make a living unless you can somehow drive more hours than the regulations allow you to drive. But the regulations are there because you need sleep. They're already letting you work 14-hour days, driving up to 11 hours during that 14 hour day, working 80-hour weeks. I'm sorry, 70 hour weeks. That's already a lot of hours.

But unfortunately, they sometimes felt like they had to do more because if not, they can't afford to feed their families or if their owner operators, even make their truck payments. So they tried to, there's such widespread cheating. They tried to eliminate that by making the logs electronic. So the good thing about electronic logs is it's supposed to know whenever the truck is moving through the GPS device, so it's moving more than let's say five miles an hour, it picks up that it's moving and automatically moves it to driving in the logs. Some downsides is it doesn't necessarily know who's driving and it doesn't know when you're not driving, are you sleeping, are you working? It's still relying on honesty for that.

Malorie Peacock:

Right. And then there's, think Michael you've done some research into it, it seems like a foolproof system. The vehicle's moving, so it's logging you on duty and it's up to the truck driver to figure out who's driving and all of that stuff. But mean it seems like, how could you cheat on that? How could you falsify your logbooks in that case? If the truck is moving-

Michael Cowen:

Yeah.

Malorie Peacock:

...you're logged on duty. How does that happen?

Michael Cowen:

Well, there's a lot of ways, unfortunately, that truck drivers are able to cheat. Now the most outrageous one is with the cooperation of both the trucking company and the company that provides electronic logging device software. So the thing is on the electronic logging devices, they're not supposed to be able to edit their driving time. So by law, the software is not supposed to allow anyone to change the amount of time the driver is driving. That being said, these companies self-certify. So the government doesn't check the software. The companies just have to say, "You can't audit your driving time." And then if they went and put out a software that actually allowed it to happen, then unless someone complained and the government investigated and found out that it was happening, then they could get away with it. And so there were some companies in Eastern Europe that were selling a software where the trucking company could call back saying, "My driver needs more hours." And they would do edits then.

And to try to catch something like that, you just have to really look carefully at the GPS and there's going to be a hole somewhere. I mean, either it's going to show them teleporting from one location to another, driving at a speed that no one could drive at. Something. So you have to look really carefully at the data.

Other thing we call is phantom drivers. And so they will pretend there's another driver in the vehicle. So they'll create two logins. And again, the trucking company has to go along with it because they're going to pay this driver for what both drivers are doing. Or maybe it's an owner operator and he's just doing it himself. But basically they're trying to drive once under one name and once under another name. And that way they can keep driving. There's something else called unassigned drive time, where it's if you just don't log in the system and drive and just hope you don't get pulled over and have anyone check your logs, which you got a 99.5% chance of not getting pulled over on any given day, then it doesn't show up on your log because you're still showing as off duty during that time.

So for that, again, what you want to look at is if someone logs off duty one location to rest and then when they stop their rest and come back on duty they're at a different location, you have to think, well how did their truck move from one location to another? One way is unassigned drive time. Something else, and again the company is supposed to get a report on any unassigned drive time and they're supposed to try to figure it out but they don't always do it. And especially if the company's telling them, "Hey, you need to keep going 'cause we got to get this load on time. Just take a chance and go unassigned drive time."

They can also do something called a personal conveyance. So let's say the truck driver is off on their off-duty hours. Well they want to go eat, they can drive the truck to a restaurant and they can drive the truck to like a store to go shopping. That doesn't count as driving time because they're not working. But what they'll do is they'll say they're doing a personal conveyance, but they're really moving their load. And we have a case like that where the driver every day he would drop off the load and then drive the next few hours to the home base and call it personal conveyance and it isn't.

Lots of other things they can do if it's an older truck, before a 2000 model year, which is getting few and fewer of those out there in 2023. Or they can get a new truck but they can put an old engine in it. And that's the requirement. Again, sooner or later all those old engines are going to wear out. But you can do that.

And the other thing they can frankly do is just unplug it and just say, "Well it broke and I had to switch to paper logs." Because the backup system, if your electronic log system goes out, you have to use the paper log. So anytime you see a paper log, just assume it's fraud and look really carefully.

Malorie Peacock:

Yeah, I mean the reality is the incentive is still there. So the incentive to falsify the logbooks so that you can drive more time, it didn't go away just because they changed to electronic logbooks. And so people are getting more creative with how to falsify them. And frankly, I don't know about you Michael but I see it almost just as often as I saw it with paper logs. It's a little harder to catch, but once you learn some of the tricks that are being used, you can catch it almost every single time.

Michael Cowen:

Yeah, I think I've gone from about a 90% falsification rate to maybe a 50 something percent. So I think it's gone down a little. I don't know if that's because there's less cheating or just it's harder to catch now. But I will say the thing to remember is people want to talk about what the truck drivers do wrong, but all the perverse economic incentives on the driver, those are also economic incentives on the trucking company. Because again, the trucking company typically gets paid by the mile. The trucking company has pressure to get that load there on time to keep their customer happy.

And so the fact is, if we're catching them when they're cheating their log, the trucking company can definitely catch them when they're cheating on their logs, if they cared to. And they're not catching them or they're catching them and looking the other way, because they want to make more money. And they're the ones that are choosing to pay their drivers this way and choosing to create these perverse incentives. So just don't fall in the trap of trying to blame everything on the poor drivers. It's really the industry that's set up all these perverse incentives and come up with all these ways to cheat.

I would recommend if you do a lot of trucking stuff, just go online and find some of the trucking forums. A lot of them are open, like Trucking Truth and other ones. And it's truck drivers talking about this stuff. I mean, you do searches, they talk pretty openly about how they cheat on the logs and how to do it. You could only imagine what they're telling each other when they're doing the driver orientation and drivers talking to each other at the truck stops. But there's a pretty big subculture of cheating and it's not going away with the paper logs. I thought it was going to become a lot less fun when we went to electronic logs, but I think it's getting even more fun.

Malorie Peacock:

Yeah, I mean the mystery is still there. I think the most common way that I see it is that they go to sleep in one place, wake up in another place 30 miles away, and it'll be small distances. But those little small distances add up. I mean that's over the course of a week, saving those 30 miles or those 45 minutes could make or break your 70 hours.

Michael Cowen:

Absolutely. And I even saw one, and we weren't able to take the case because there was no one that could bring the case under the law in Texas. Only the parents, the spouse or the children could bring the case and the person that was killed didn't have living parents, wasn't married, didn't have any kids. But an 18 wheeler was driving at under five miles an hour in the interstate because it wanted to get to a location but didn't want to have drive time showing on the logs. It's insane.

But that was this driver's idea to, I guess they only needed a few more miles to go and was just going to try to go at four miles an hour on the highway so that they could get to the location, make their money and not trigger a violation showing on the hours of service rules. So it's important if you're going to do trucking work to be looking for these things. But electronic logs are just kind of the beginning. This what they call telematics. These systems that have GPS tracking and monitoring are just amazing. There's so

many different ones out there. And Valerie, what are some of the things that you've seen that are kind of cool with what they call the telematics or the GPS tracking systems?

Malorie Peacock:

So I think with a lot of these systems, if we can dream it up, they can do it. So if we can imagine what would a really, really safe company want to do in order to make sure that their drivers were safe? They can do it with these telematics and they can get all kinds of reports back to the home base. They can get all kinds of information about what their drivers are doing out there on the roadway in ways that are easy to process, easy to digest, easy to read, easy to quickly scan through and could really make a difference for some of the safety issues that we see on the roadways. At first, when I first started looking at some of these telematics, I thought, "Well that's great that they can track if someone's speeding, but if you don't have a real-time notification, how is someone back at home going to stop it?"

Well, guess what? They have real-time notifications. And then you think, "Well, maybe the reports are really, really difficult to read." And then you see these really beautiful dashboards that some of these telematics companies have that are just, you can click on a driver and you can see how fast they're going at any given time. I mean they're really, really, I guess, knowledgeable systems. I mean, they're just really easy to use when they're intuitive. And I think any safety company and any safety director at any trucking company or even just a regular commercial fleet, can easily implement any of these telematic systems within their safety program.

Michael Cowen:

And they're not that expensive. 'Cause the systems already know. They already know what the speed limits are on all the different roads. And you can program it in, if the driver speeds or sometimes they'll give a little cushion, driver goes five miles an hour over the speed limit, "Send us an email right away." They can even have, "If the driver slams on the brakes and it decelerates by more than this amount," or "the driver takes a turn and the lateral acceleration is more than this amount, then alert us." And they don't only do an alert, but then they send a video clip, on some of the systems, of what is in front of the vehicle and what the driver's doing at the time, and for so many seconds before the event. So when a driver slammed on the brake, you can see was the driver falling too close? Was the driver distracted? Or was it truly an emergency where someone pulled in front of the driver, the driver had to slam the brakes? You should not penalize the driver for reacting appropriately, because sometimes you do have to slam on the brakes.

But it is just amazing the real time... And it can all happen within seconds of it happening the safety director has the video, and then they can also be programmed to give a score or give statistics of how many, what they call hard breaks per thousand miles have you done, how many times have you been speeding for every thousand miles? Should be zero. But even then they could set a standard that's different than zero and they can know that. And it's really, really sophisticated. They even have systems now that can, with a camera looking at the driver... I mean they already had it where people could just go in and audit randomly, "Let's go look at our drivers, see if they're playing with their phones. Or playing with iPads."

Well now they actually have them where the system uses artificial intelligence to detect when a driver is picking up the phone and looking down and it will say, "Distraction to the driver," but it will also then send the video to the safety director immediately. Because one of our issues we've had in our distracted driving cases, we've known for a long time, it's a bad idea to drive distracted. But how does a trucking company dispatcher in Springfield, Missouri know that a driver is looking at his phone while driving on Interstate 10 in the Arizona desert?

Well now if they spend the money and get the system, they do know in real time the driver's doing that. It's just incredible. Now the drivers hate it. The drivers hate having the camera looking at them all day. I get it. I mean, I probably wouldn't want a camera watching me 24 hours a day. That being said, I mean they're driving 80,000 pound vehicles at highway speeds. There's the number of people killed and catastrophically injured by trucking companies, I think justifies the invasion of privacy. And again, they're not taping them when they're sleeping and off duty. They're just doing it while they're driving.

Malorie Peacock:

Now what would be, I mean they're not free, these systems. So what would be the incentive for a company-

Michael Cowen:

Yeah.

Malorie Peacock:

...to do this other than just because they're trying to make the roads safer. I mean, I don't know that that's always a good incentive for companies, but why would they want to do this?

Michael Cowen:

Well there's a couple. One, your drivers just knowing they're going to be watched, they're going to drive more safely. So you're going to have fewer claims. The second, they claim in all their studies that the vast majority of crashes are the four wheelers fault. Now I think a lot of that is because the law enforcement doesn't really know the rules. And we had to do a lot of cases where the police report said it was our client's fault, and when we got into it wasn't.

But that being said, if the crash really isn't your fault, don't you want to have that video evidence to exonerate you? But the biggest thing is you're preventing the crash from happening in the first place. You also have better fuel economy when you don't speed. You don't have to change out your brakes as often when you're not slamming on them from falling too close or being distracted and having to slam on your brakes real hard. So there's other economic benefits aside from safety and lower insurance rates and not having your client, your customers pissed off because you were supposed to get them a load of something they really needed and you crashed and it didn't get there.

Malorie Peacock:

Yeah, I mean I think too, it's important if you're thinking about these systems for the purposes of a deposition or for the purposes of your case, if they don't have the systems, look at the marketing that these systems do to the trucking companies. I mean, they're not plaintiff's attorneys doing the marketing. So look at reasons that the company might have it other than just safety. I mean, I think it can give you a perspective on why so many trucking companies and so many fleet companies in the industry have these systems now. And I think at this point, so many of them have it, it's probably the industry standard of care to have them at this point. Now maybe back in the day, maybe not because they were newer systems, but now pretty much everybody has them.

Michael Cowen:

I think it's probably the industry standard of care. I think it's a better case if you've had a pattern of similar crashes that could be prevented or mitigated against by using these systems. So you can show

that they hadn't noticed that they needed them because they had had other crashes. But at the same time, I think the better case, honestly, is the not having them is having them and not paying attention to the data.

Malorie Peacock:

Yeah.

Michael Cowen:

And I think those are the best cases. There's an old Wham song, "If you're gonna do it, do it right." That's been on my mind a lot, 'cause we have a case where... in this case the shipper was using telematics to monitor the drivers but then didn't do it right. They still were having an excessive number of vehicles rolling over. And so that's my thought. If you're going to have the data, then you can't ignore it. Now how do you get it though? How do you get that data from them?

Malorie Peacock:

It's tough. I'm not going to sugarcoat it. Everybody claims that the data is in someone else's possession. I don't know. I mean it obviously lives somewhere and it is hard to get the data. I mean I'm not going to, I don't... It depends on the system, depends on the sophistication of the company, depends on how they have it set up. There's different ways to get it. So if the company has it set up where the only way that they get information about their vehicles is by logging onto a portal for the telematics system, then it's probably accurate that the data is not in the possession of the trucking company. That doesn't mean they can't go access it for you. So then you'd have to learn about how long is that stuff available on those systems. I mean, you'd have to know all of that information and then force them to go access it for you.

It's a little bit easier if they're getting reports emailed to them or notifications sent to them. They have to get to your safety department somehow. It's typically through email. So sometimes just requesting the email notifications for those reports is how you get a lot of that data. And they come in really pretty formats that are easily readable. You don't get some kind of data dump of some computer software that doesn't make sense to anybody or not... I mean it makes sense to computer engineers. And then you have to hire some kind of software engineer to tell you what it says. So there's different ways. It all depends on exactly how the information is being accessed. You could also download information directly from some of these devices, but not all of them. So I mean they're all different, frankly.

Michael Cowen:

Yeah. I think it's really important if you have one of these systems, is to find someone that has experience with the system, with the dashboard to find out how can it be set up? What information's available? How can you get it? 'Cause a lot of times they play games with us: "Well we don't have it. it's not in our position." And you can just log on, run a report. But if you can have your expert basically go do screenshots and you do a request production like, "Run this specific report from the program," and then you send them screenshots, "This is exactly what you have to do," then it's really hard for them to argue to the judge they couldn't do it.

Also, learning from experts, some of the things they can do. It's like, let's say you have a stretch of road that a commercial vehicle needs to drive slower than a regular vehicle. There's something called geo fencing. You could actually just go to the map and draw a box around that section of road and set the speed limit for getting the alerts at a lower speed limit. So let's say you have a curve and you have a tanker truck. Tanker trucks are supposed to go 10 miles an hour under the curve speed. So say it's a 55

mile an hour limit, 45 mile an hour curve limit, well then you should be going 35 if you're driving a tanker truck. And they can actually program that in there. Now I don't think that they could go through the entire United States and look at every single curve, but if they're in an area where they're going to be driving, making the same delivery over and over again, that might be something they need to do. But it's just really amazing how much they can do and how easy it is.

But they'll play games with you. And like I said, just finding an expert who has played with the system and then hopefully you can just sit down with them and look at it and play with it yourself is ideal. And in fact, I think one of the things we're going to be doing next year is getting one put on our farm suburban and just seeing how easy it is to track and seeing what kind of games you can... Not games, what kind of reports you can do, what kind of data we can get. Just so we have a little more knowledge of what they have. Because I do believe they play so many games with us in board games and, "Well, I don't know," but they could download it really quick.

Voiceover:

Each year, the law firm of Cowen Rodriguez Peacock pays millions of dollars in co-counsel fees to attorneys nationwide on trucking and commercial vehicle cases. If you have an injury case involving death or catastrophic injuries and would like to partner with our firm, please contact us by calling 210-941-1301 to discuss the case in detail and see where we can add value in a partnership. And now back to the show.

Malorie Peacock:

And I also know that when, for some reason, whenever I get a report from one of these systems in discovery, it's like this weird Excel spreadsheet with all these weird formulas and it doesn't make a lot of sense. And I've seen online what the reports look like and they don't look like that. So what kind of weird whatever have they done to the report before they gave it to me? I don't know.

Michael Cowen:

Yeah. So we have to learn what data's available, what reporting formats are available, and get really specific-

Malorie Peacock:

Right.

Michael Cowen:

Because if not, they'll tell the judge or judge will give them the data. But if you can tell the judge, "This is what they gave me, this is what they can give me. And here's an affidavit from my expert talking about how easy it would be," then it's a lot easier to get it. But you have to make the time to do the work when you have a good case here because they aren't just going to give it up for you. Like anything else, you always have to fight to find the truth. Something else I'd like to talk about is apps that create distractions. What are some things you've seen on the telematics or the other kind of apps that actually could potentially cause a crash?

Malorie Peacock:

Well, every single application on your phone can cause a crash. I mean, they're all distracting. Doesn't matter what you're doing. Doesn't matter if you're playing Pandora, it doesn't matter if you're scrolling

through your photos. All of those are distractions because they require you to look down and look at your phone. I think a lot of the newer 18 wheelers and a lot of new just regular vehicles, they have Apple CarPlay or something like that. That helps because you can do a one-touch activation of a call or of moving to the next podcast you want to listen to or whatever it is without having to look down at your phone. But if you have to look at your phone to do anything, it's definitely a distraction.

But what are the applications that I think a lot of people are using while on the road? I think it's very common that, especially truck drivers, are using Facebook or FaceTime or making calls, talking to people for long distances. They're making videos, they're making TikToks. They're bored. They're bored, they need something to entertain themselves. They watch movies. They're not just listening to a podcast like you would be listening to the radio, there's a lot more going on. They're watching YouTube. And you can see some of these truck drivers have their own YouTube channels and you can see them videotaping themselves down the road and you just think, "Ooh my god, that's just a accident waiting to happen." I mean just, ugh, looks awful. So all kinds of things on your phone that people are doing because they're bored on the road, they're spending 11 hours on the road, behind the wheel. Most of which is nothing interesting to look at.

Michael Cowen:

Yeah, I think it's so important, especially before you file a lawsuit, before maybe a lawyer tells them clear everything up. I mean, go see what all they have online and try to find their TikTok, their Facebook, their Instagram, whatever else they have. Because you will find it's crazy, you people, they're sitting there, they're filming themselves driving. I mean then sometimes they put crashes online too in some of these groups to talk about them and they're trying to blame the four-wheeler for the crash that happened. And you look at it and they're doing something really stupid. And it is crazy what they put on there.

But also to really get the stuff, you got to get the phone downloaded and you got to get it downloaded as quickly as you can. What we found is for about a week on most of these phones, you actually get second by second if you get the download and you get all the data. The location of the phone, the longitude and latitude coordinates, the speed at which it's moving. And then everything that's happening on the phone, whether they're opening an app, closing an app, pausing a song, interacting with something. And it's even more powerful, I think, when they're opening like emails from work. Someone sends them an invoice, someone sends them the directions, some kind of load confirmation sheet. So work is actually distracting them when they're driving. Distracted driving is always bad, but if you could have the company distracting their drivers, I think it's even worse.

Malorie Peacock:

Yeah, and a lot of, well pretty much all of the communications that most truck drivers have with their dispatch is through their cell phone. Meaning they don't really use their radios anymore. I don't think they use as much the messaging systems through the devices that are in the trucks. I think mostly it's through cell phone.

Michael Cowen:

And a lot of it doesn't show up on the cell phone bill. You cannot just get someone's cell phone bill to tell if they're on the phone, because it will tell you whether you're making a phone call using the telephone app, the telephone function, and whether you are sending a text, an SMS text. Even an iMessage doesn't show up on your phone bill. And definitely if you're using WhatsApp or one of the other programs, neither the voice call on WhatsApp nor any messages you send on WhatsApp will show up on your phone bill because that's all data. That's not considered a message or a phone call. It's considered an app

using data. And so the only way to find that out is to get the phone and you want to get it as quickly as possible while... Because what happens is the phone holds an enormous amount of data, but it's always downloading new data all the time that's overriding the old data. So even though they have gigabytes and gigabytes of data nowadays, it's still only enough to hold about a week's worth of the super detailed stuff.

Now you'll get messages, you'll get other stuff that go further back than a week. But if there's any way you can get that phone frozen and downloaded, even if you can't look at the download yet, even if you're going to have a fight about that. Just get it, get the mirror image made of the phone, get all the data preserved and we can fight about who gets to look at what later.

Now there is a conversation now with your own client before you do this sometimes because sometimes our clients have things on their phone that they don't want anyone else to know about. If it's related to what they're doing at the time of the crash, you may not want to look at the other person's phone if they get to look at yours. If it's related to something that's personal and embarrassing, you may be able to exchange relevant crash related information while protecting maybe your client's conversation with their wife that they wouldn't necessarily want the world to know or the conversation with someone else they wouldn't want their wife to know about or whatever else it is.

Malorie Peacock:

Right, yeah. I mean I do want to warn people though that it is harder than it sounds to protect things that are not related to the crash because of the way that you get data from these phones. It's a tough road to climb. So I mean it's a real serious conversation you need to have with your client and you need to know the extent of what needs to be protected. Because sometimes it is harder-

Michael Cowen:

Yeah.

Malorie Peacock:

...than you think to just give this one piece of data because all of the data interacts with each other.

Michael Cowen:

What you basically have to do is let their expert download the whole phone with the agreement that their expert will let you review all the data and be able to redact things before they give it to defense counsel. And then you just have to hope that the defense expert is going to follow the rules, which they may or may not.

Malorie Peacock:

Right. I mean, I think there's not a way that you can give the phone, as far as I know, there's not a way you can give the phone to an expert and say download only for the day of the crash. That that's not how it works. And so...

Michael Cowen:

They have to download everything and then filter out with that. But they still have to have the complete data. The complete one to filter out.

Malorie Peacock:

Right. So I think there's also applications. I mean there's your typical distracting applications, right? TikTok, Facebook, that kind of stuff. But there's applications that truck drivers have specifically on their phone that can be distracting. So there's some of the logging, the electronic logs are actually on the phone. So there's actually truck driver applications that can themselves be distracting.

Michael Cowen:

Yeah. And even the ones that aren't on the phone, like the Qualcomm system for example, they can send messages and depending what the settings are, those messages may come out while they're driving. Depending on what the settings are, they may respond while they're driving. But even not, just the message popping up is distracting, even if it's a safety message that, "Make sure you don't drive distracted," but that's popping up while you're driving. That's not very helpful.

Much worse when you get to the Uber and Lyft and the Uber Eats and those kind of, DoorDash, those kind of apps that not just while they're driving while they're on duty, but when they're off duty they want to keep the driver paying attention to the app in case a ride or delivery comes up. And so they're constantly, it's called gamification. Jeanmarie Whalen, a great lawyer in Florida, has a actually case where they're suing Uber for the design of their software system causing distractions to drivers. 'Cause they had a driver that did not have a passenger in tow, so they only had 50,000 coverage, run over a pedestrian and cause catastrophic injury. And they survived summary judgment on it. So it's an ongoing case, but they've really looked into how these apps are actually designed to keep the drivers engaged because they want to make sure that when there is a ride, that someone's right there ready to go pick it up. But to do that they have to keep them looking at the screen while they're driving. Yes.

Malorie Peacock:

Yeah. Well, and I've definitely been in an Uber where they're using the app for more than just map directions for my own Uber ride. You see them interacting with it because they're getting notification of the next ride-

Michael Cowen:

Yeah.

Malorie Peacock:

And they have to look at it to see if it's something that they want. And so they're sitting there looking at it while they're supposed to be driving you. I mean, I've seen it happen while I'm in an Uber. So...

Michael Cowen:

And that's all Uber's choice. Uber could choose that that only comes up, 'cause it knows how fast you're going, that it only comes up when you're not moving and you don't have a passenger in there. But because they want to make the money on the next passenger, they want to keep things going. They choose to create the app to create alerts and allow interaction while drivers' driving. And I think they should be held liable for that if they cause harm.

So how does someone learn about, if you want to learn more okay, you think one of these apps or one of these electronic devices is present in your case, you want to figure out more about how they work, what data is available. You don't necessarily want to start off by paying thousands of dollars to an expert. What do you do?

Malorie Peacock:

Become a software engineer. No. I mean I always start with Google, whenever I'm looking at anything. I mean you'd be shocked at how many weird rabbit hole YouTube videos you can watch about some of this stuff just to learn how it works and what the design theory behind it is and all of that kind of stuff. So even just watching just random people on YouTube explain how these apps work, and especially the truck driver ones, they're all into doing YouTube videos, showing you how to do their logs or, I mean, how the apps work and stuff like that and-

Michael Cowen:

Yeah.

Malorie Peacock:

...companies themselves even release YouTube videos about how to do certain things because their drivers are out on the road. They're not in the terminal to get this training, so they just release it through YouTube. But I think I would start there. I would start with Google and YouTube and then escalate from there, decide if it's really something that you think is worth investigating in your case, because it is an expensive investigation. So you have to determine can the case weather this kind of information gathering that's going to be required? Not just from an expert point of view, but I mean it's just going to be a big time commitment and are you going to get something that's useful to you?

So if you don't have to prove for your case that someone's on the phone... I mean do you need to go down that road, right? I mean if they rear-ended someone and it's your injuries aren't worth more than a million dollars, then you know don't have to prove they're on the phone to win. So it can be, so you have to just kind of decide what is the value of that for the purposes of your individual case before you go all in. But I think doing a little bit of research ahead of time to see what you think you might get and what you think you're able to get. I mean, if someone hired you almost two years after the crash happened, doing a bunch of data downloads of a cell phone is not going to get you a lot of information, so why go down that road?

Michael Cowen:

I will say also, just going back to the apps, especially the telematics programs, I mean just figuring out what telematics provider it is, which you can just send an interrogatory or ask a question to depo, but I like to get it way before I do the depositions. And just go to the website and it talks about all the different things you can do and how easy it is and have videos. And again, like you said, YouTube. Just so you can go figure out what information is available. But I think anytime you can prove a driver's distracted, it's a huge value multiplier in our cases. Because every juror thinks that they can safely talk on the phone and text while driving, and every juror thinks that nobody else can. That everyone else is a horrible danger. And I think it's really up there with alcohol and drug use, and getting jurors triggered to allow big verdicts when you get this stuff. And I think it's something we should definitely be looking at.

And of course the other thing where I think it's really good is cheating. I mean, anytime you get someone lying and cheating, you look at what are the characteristics of a villain? One of them is being deceptive, another one's being immoral. So lying is deceptive by definition and it's also lying to do something dangerous and endangering other people and trying to cover it up is immoral. So I think those kind of things are the kind of things that make a juror conclude that the defendant is the bad guy or the villain of the story and that they need to do something about it. So I think these are really good opportunities to

get the raw ingredients of our trial story that we can then mesh into something that's compelling, moving and will hopefully get justice for our clients.

Well, I hope y'all have enjoyed this. I know it can get really deep and dense. If you want to learn more about telematics and electronics, I recommend you join us at our big rig bootcamp on June 16th. You could sign up at [bigrigbootcamp.com](http://bigrigbootcamp.com). It's going to be here in San Antonio. It's going to be a lot of fun. You get six hours of CLE. We're accredited in Texas and... Or we're going to be accredited in Texas and New Mexico and other states, I guess you can go and see if your state will recognize it. But it's going to be six hours. We have some little bit of ethics in there too, which is going to be a game show format. It's going to be a lot of fun. We have door prizes, music, light show. It's just going to be a good time. And you get to meet Malorie and me and Sonya and everybody else and we hope you can join us.

Thank you for joining us on Trial Lawyer Nation. I hope you enjoyed our show. If you'd like to receive updates, insider information, and more from Trial Lawyer Nation, sign up for our mailing list at [triallawyernation.com](http://triallawyernation.com). You could also visit our episodes page on the website for show notes and direct links to any resources in this or any past episode. To help more attorneys find our podcast, please like, share and subscribe to our podcast on any of our social media outlets. If you'd like access to exclusive plaintiff lawyer only content in live monthly discussions with me, send a request to join the Trial Lawyer Nation Insider Circle Facebook group. Thanks again for tuning in. I look forward to having you with us next time on Trial Lawyer Nation.

Voiceover:

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