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PERSPECTIVE

Wearables: your next trial witness?

By Neda Shakoori

Wearables are everywhere. From our homes to our workplaces, social events we attend and everywhere in between. These little gizmos are working away tracking data about our bodies and surroundings. Wearables like Google Glass and Fitbit, and myriad others, are not only revolutionary, but also key instruments in the phenomenon of the quantified self.

So what are the implications of this digital mountain of personal data in the context of litigation? How may this data be obtained and used? What evidentiary concerns exist in relation to the data logged and generated by wearables?

While we may not currently have much in the way of real-life examples providing answers to these questions, there are certainly legal and practical considerations that may provide guidance in determining whether using wearable-generated data is the right fit for your case.

Wearables can log information such as heart rate, number of steps taken in a day, geolocation data, searches conducted online, telephone calls placed, and the list goes on. They can log countless daily activities, creating a detailed narrative of a user's entire day. It is not hard to see why access to and use of this data could be useful in bringing, or defending, a legal claim. Lawyers interested in using wearable-generated data in litigation should first weigh the benefits of using the data against its burdens. This balancing act should, at a minimum, include the following considerations: relevance of the data to the claims, accessibility, collection and processing of the data and costs associated therewith, and reliability of the data.

Relevance

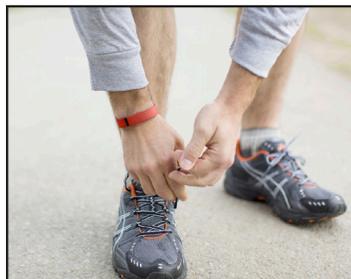
Wearable-generated data is potentially relevant in any number of cases, whether civil or criminal. Take a personal injury case where a plaintiff is claiming the injuries he sustained in an automobile accident prevent him from participating in physical activities, such as running. Suppose further that the plaintiff has worn a fitness tracking device recording every one of his five mile runs during the past three months. The data generated by the plaintiff's wearable device has the potential of completely discrediting his case for damages arising from the accident. Suppose, on the contrary, that data before the accident was compared to data after the accident, which shows the plaintiff stopped running after the accident. This could support the plaintiff's claim for damages.

While potentially relevant, using wearable-generated data may be unreliable and cost-prohibitive. Consider the significance of the data early on and weigh against it the potential downsides.

Accessibility

Given the uncharted waters of wearable-generated data, a proper discovery plan should be put in place — one that takes into account the potential for setbacks in obtaining, collecting and processing the data. Setbacks may be technological, or legal. If the opposing party is putting up a discovery fight, weigh the utility of the information against the burden of a long and costly discovery battle.

One initial consideration when seeking the data of an opposing party is whether the data even belongs to the party. The provider of the wearable may have a policy that all data generated by a wearable is the provider's property. This could mean discovery battles with the provider, as well as the user.



The New York Times

An undated handout photo of the Fitbit Flex bracelet on the wrist.

Another setback could be that the data belongs to the opposing party's employer. Employers are increasingly seeing benefits to having their employees use wearables and some companies have issued wearables to their employees. This may complicate matters. Maybe the opposing party's employer may have a BYOD policy in place and employees utilize their own wearables (whether the company has access to the wearable or the data is something that should be outlined in the company's employee handbook).

Collection, Processing and Costs

Although wearable-generated data may be useful in litigation, there is the question of how to collect and process the data. Whether the wearable-generated data is that of your client or the opposing party, the actual collection and processing of the data is a task best left to experts. The data generated from wearables may be stored locally or in the cloud and, as with any other form of electronically stored information, vendors often have the know-how and tools available to them to conduct a proper, defensible collection no matter the location or method in and by which the data is housed.

Using a vendor for the collection of wearable-generated data may be cost-prohibitive depending on your case, thus proper and early planning

is imperative. One should weigh the benefits of having the data against the cost of obtaining the data. This proportionality exercise is commonplace in litigation involving electronically stored information of any kind.

Reliability

While computer-generated data is often regarded as reliable, there is a potential for error in these devices. Failures in many wearables may make the data unreliable. A wearable device could log a user as having walked three miles, when the user was actually just shuffling his feet back and forth at his workstation. The data would therefore be unreliable in the context of a particular case.

And what about when the user is not even wearing the device? Many activities, or inactivity, could have occurred during that time. Wearable-generated data, at least at this point, may be incapable of telling a complete and accurate story of all of a user's daily activities.

With the potentially inaccurate or incomplete narrative of a user's activities, it seems the use of wearable-generated data may be best served when supplemented with a more traditional form of evidence, testimony from the user or witnesses, such as the user's medical doctor.

There is no one-size-fits-all approach to the use of wearable-generated data. The decision to use this data in litigation is one that should be made on a case-by-case basis.



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