

February 22, 2016

A PRACTICAL GUIDE TO DISCOVERY IN MODERN PLACES: THE WEARABLES

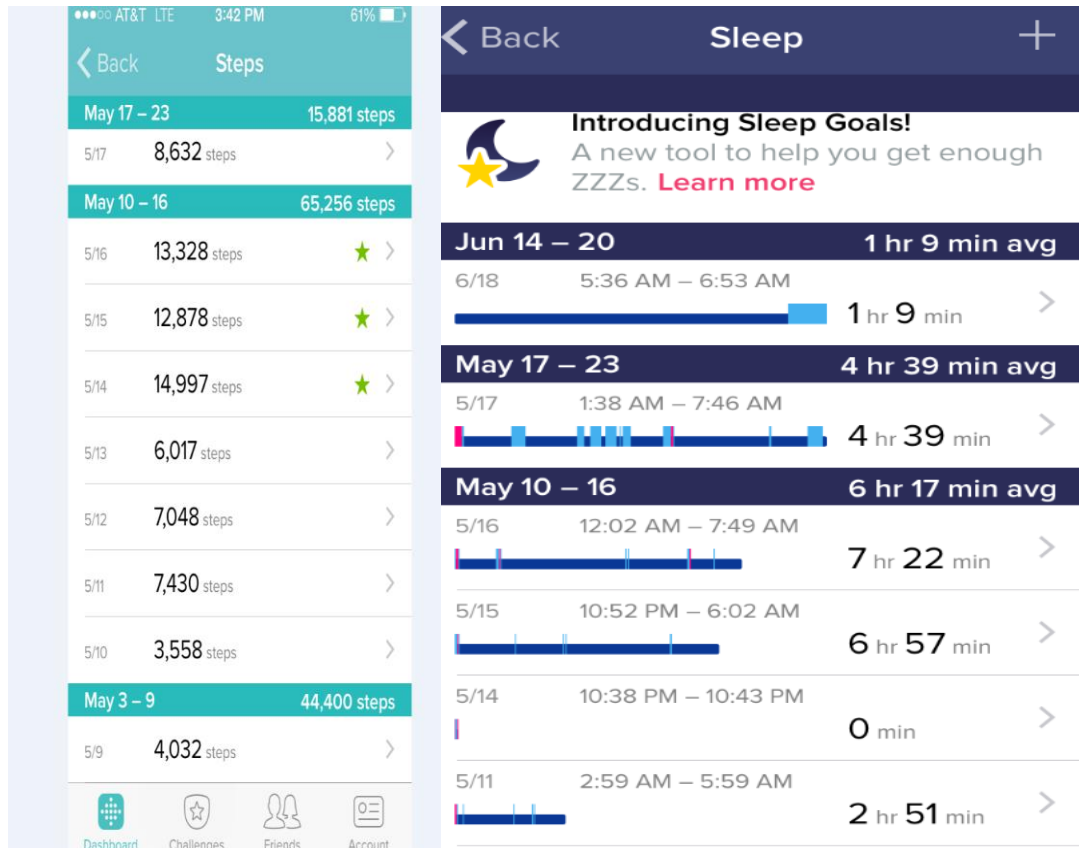
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Technology impacts the legal practice in unusual and ever-changing ways. It used to be that lawyers would look at gym memberships and surveillance as the means to discover a claimant’s physical habits. And while these remain viable sources of information, now claimants may be creating data on their own. A good example is the Fitbit, Jawbone, or Apple Watch. These are often referred to as wearable fitness devices, or “wearables.” Wearables are devices that track every step you make throughout the day, and may even show the wearer’s continuous heartbeat, temperature, and sleep patterns. Estimates are that as many as 70 million wearables were sold in 2014, 84 million were sold in 2015, and the forecast is for 126.1 to 245 million units by 2019.ⁱ These numbers indicate that many of the litigants we encounter in our practice will have a wearable.

What does this really mean for the discovery practice? “The data you unconsciously produce by going about your day is being stored up over time by one or several entities. And now it could be used against you in court.”ⁱⁱ The types of data stored vary from device to device and from user to user. Take FitBit for example:

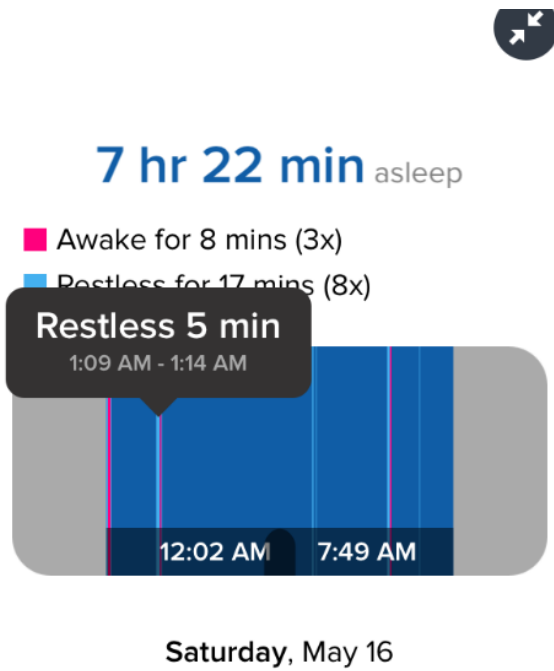
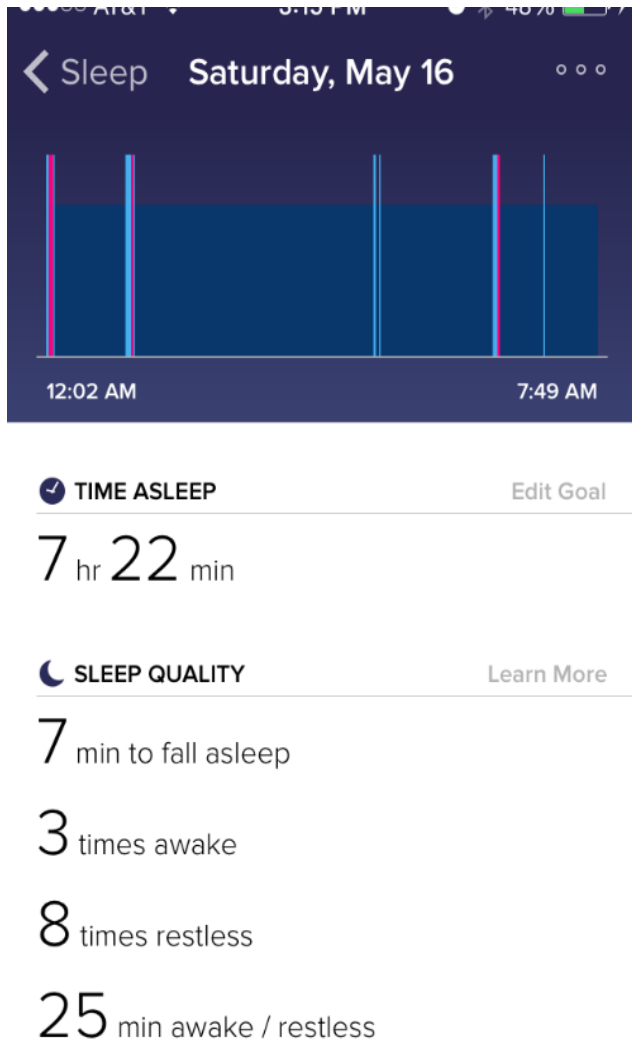
To activate a device and make personalized data accessible, users must create a Fitbit account on its websites, its mobile applications, or both. In doing so, users provide Fitbit with some initial personal information such as height, weight, gender, date of birth and e-mail addresses. The devices may then transmit collected data and other statistics to Fitbit, including the number of steps taken, weight, sleep quality, calories burned or distance travelled. Importantly, once a user syncs his or her device, data recorded about a user's activity is automatically transferred from the device to the Fitbit servers. This data is then stored by Fitbit and is associated with a user's account in order to provide the Fitbit service.ⁱⁱⁱ

A Fitbit wearer has the ability to look back at their usage and locate information that looks like the following:



As is illustrated then, a wearable may show how many steps a user has taken or how many hours a user slept in a particular time period. The wearable may even provide an account of whether the user's sleep was disturbed. The following user (according to Fitbit) slept seven hours and

twenty minutes on May 16, 2016 and was awake 25 minutes (five minutes of that from 1:09 to 1:14 am) during that time from restless sleep:



The relevancy of the information to particular cases is obvious. For example, the personal injury plaintiff who claims that she can no longer sleep at night due to the pain, or that an injury prevents her from walking long distances. The data from these devices may contradict the claims. One particularly creative plaintiff's lawyer in Canada even tried to use a client's Fitbit data to show the effects of an accident on the client.^{iv}

Obtaining the data, while maybe unique, should be subject to the same rules as any other requested data. Thus, an attorney may send a preservation or litigation hold letter to both the claimant and the wearable company out of an abundance of caution as

[n]ormally, Fitbit stores a user's personalized information for as long as the user maintains a Fitbit account. However, users are able to modify or delete certain data. The upside is that, even when a user removes data from his or her Fitbit account, 'backups of that data will remain associated with [the user's] Fitbit account and in [Fitbit's] archive servers. Copies of this back up are removed pursuant to an automated schedule, so data may potentially remain in Fitbit's archives only for a short period of time.^v

Use of the preservation letter may take it out of the automated removal schedule. Likely, however, the best way to obtain the data is through interrogatories that call for the identification of wearable devices such as Fitbit, Jawbone, Apple Smart Watch, followed by a request for production of the stored information for a particular time period and a request for production to sign an authorization for the data. While the Stored Communications Act may protect FitBit and other wearable companies from subpoenas for the data, it does not prevent production of data where there is a waiver from the user.^{vi}

ⁱ IDC Press Release, *Worldwide Wearables Market Forecast to Reach 45.7 Million Units Shipped in 2015 and 126.1 Million Units in 2019*,

<http://www.idc.com/getdoc.jsp?containerId=prUS25519615> (last visited January 7, 2016); 245 million wearable devices will be sold in 2019, <http://www.wearable.com/wearable-tech/245-million-wearable-devices-sold-2019-1606> (last visited January 7, 2016).

ⁱⁱ Kate Crawford, The Atlantic, *When Fitbit is the Expert Witness*, Nov. 19, 2014.

ⁱⁱⁱ Laura P. Paton, Sarah E. Wetmore, and Clinton T. Magill, *How Wearable Fitness Devices Could Impact Personal Injury Litigation in South Carolina*, The South Carolina Lawyer (January 2016).

^{iv} <http://www.forbes.com/sites/parmyolson/2014/11/16/fitbit-data-court-room-personal-injury-claim/#2715e4857a0b370b5426209f> (last visited January 13, 2016)

^v Paton, *supra* at p.47.

^{vi} 18 U.S.C. § 2702 (b)(3) (the service provider may release the user’s records with the “lawful consent” of the user.); *In re Air Crash New Clarence Center, NY on Feb. 12, 2009*, 2011 WL 6370189 (W.D.N.Y., Dec. 20, 2011) (nothing that the defendant may request a written authorization for the data). The Act prevents an entity providing electronic communications services (“ECS”) or remote computing services (“RCS”) from knowingly divulging to any person or entity the contents of a communication. While social networking sites have been found to be protected by the Act, *see e.g. Glazer v. Fireman’s Fund Ins. Co.*, 2012 WL 1197167, *3 (S.D.N.Y. 2012); *Viacom Int’l, Inc. v. YouTube, Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008), it is not known if wearables would be given similar protections.

The thanks of the AADC go out to:

***Jamie Huffman Jones of Friday, Eldredge & Clark
For writing this article.***



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