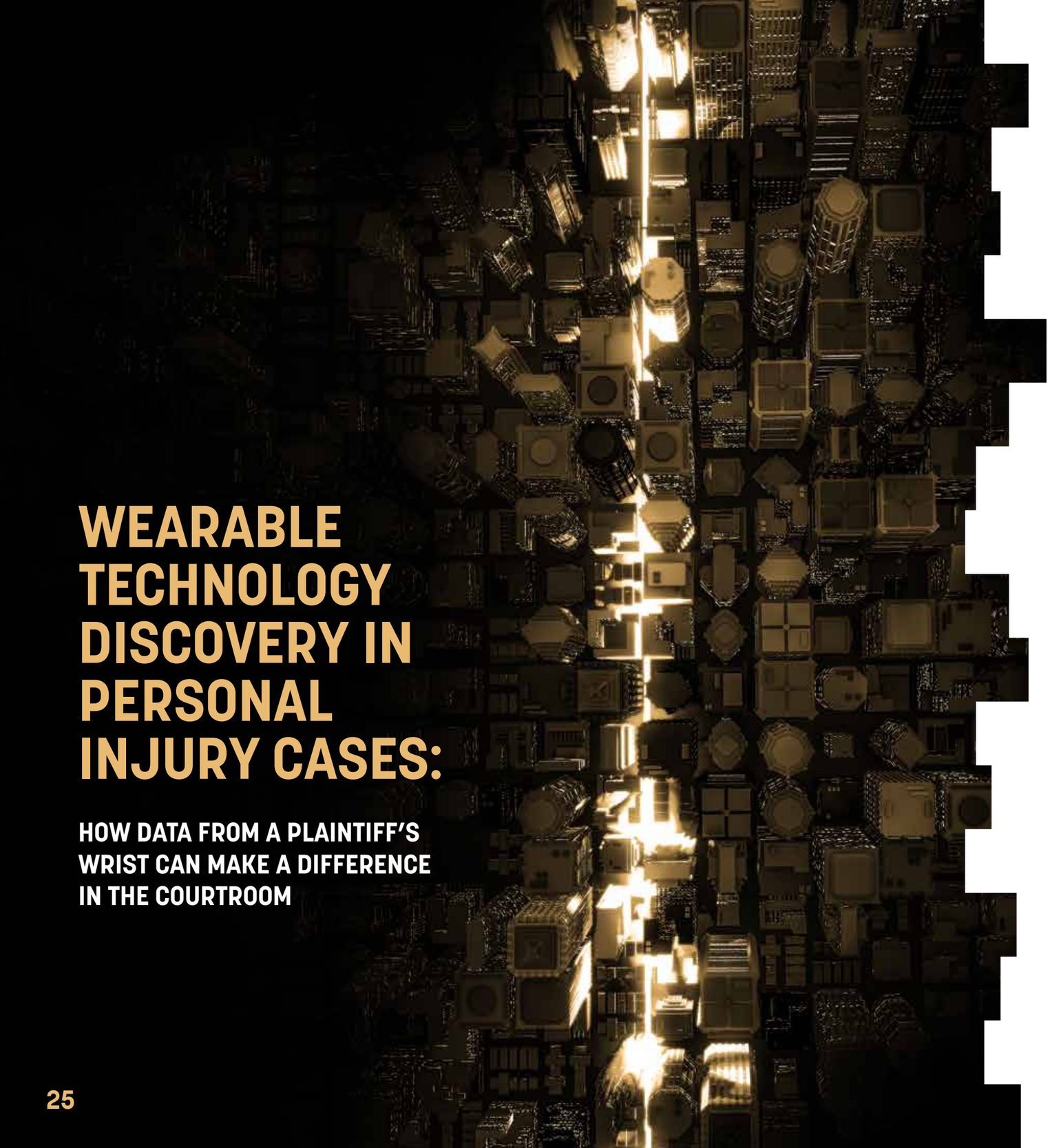


WEARABLE TECHNOLOGY DISCOVERY IN PERSONAL INJURY CASES:

HOW DATA FROM A PLAINTIFF'S WRIST CAN MAKE A DIFFERENCE IN THE COURTROOM

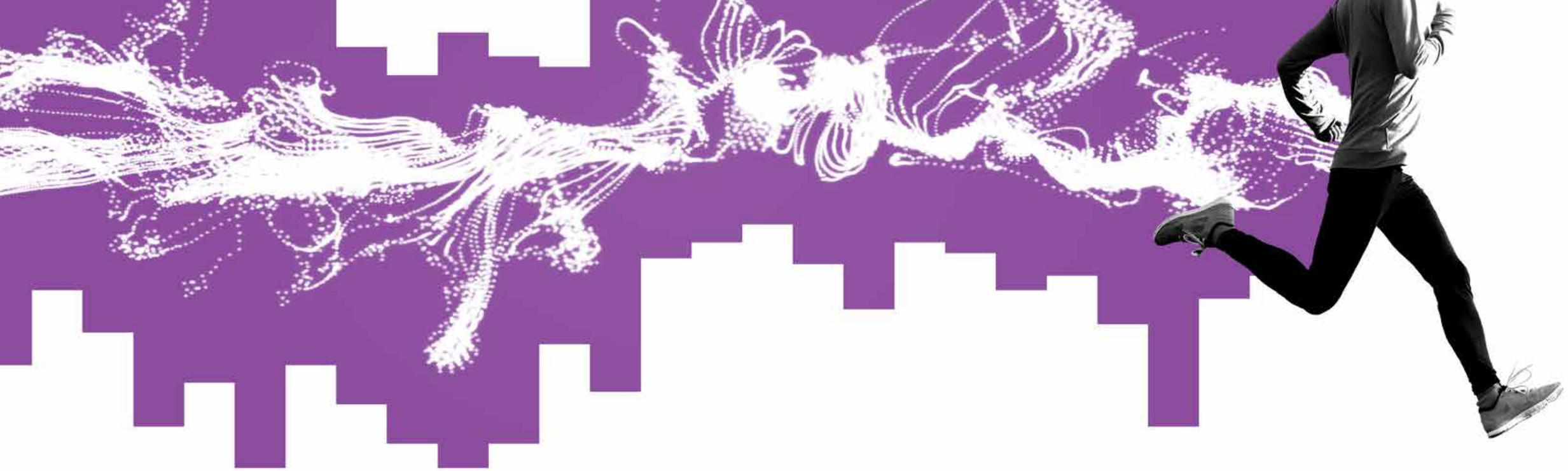
Defense counsel should consider calling a new, wearable witness to the stand in personal injury cases.

One in six American consumers currently owns and uses wearable technology[1]—smart devices such as watches and fitness monitors that allow compilation and exchange of data without the user's involvement. Activity monitors such as Fitbit® are capable of tracking nearly every facet of the human body. The devices compile extensive information on bodily systems—including activity levels, exercise attainment, food consumption, weight, sleep, heart rate, skin temperature, and respiratory rate. They can compile data on location using GPS functionality. And they can even measure vital signs, stress levels, and hydration levels, as well as be used to monitor diseases and chronic conditions. As the proliferation of these devices—and their capabilities—increases, so also does the potential for their use in litigation.

Production of this information will constitute the next wave of discovery challenges in personal injury lawsuits. The use of fitness tracker data in personal injury litigation is obvious: A plaintiff claiming injury could have his claim undermined by Fitbit® data showing that he ran his customary four-mile jog, even *after* his alleged back injury. The wearable device compiles an extensive track record of objective data entries that can be used to undermine a claimant's case.

On the plaintiff's side, one Canadian law firm has already called on Fitbit® data to buttress a plaintiff's claim that her activity levels drastically declined due to a car accident. The plaintiff used this evidence to show that her activity levels had decreased lower than is typical of someone of her age and profession, and thus entitling her to compensation.[2] And in the criminal investigation context, at least one Pennsylvania court has upheld use of Fitbit® data to contradict a 911 caller's assault claim.[3] In that case, Fitbit® data showed that the alleged victim was actually walking around the house at the time of the alleged attack, and not sleeping, as she had claimed.

Currently, no federal statute regulates Fitbit® or other wearable devices. HIPAA does not safeguard the information stored on these devices because they do not qualify as "covered entities" under the statute.[4] Moreover, it is unlikely that the FDA will ever regulate wearables, as they are advertised as promoting health instead of serving purely medical purposes.[5] Additionally, while the Electronic Communications Privacy Act of 1986 (ECPA) might enable federal regulation in this space, the statute has a carve-out that allows companies to produce customer records, as long as they are not



deemed communications. Data from wearables would not constitute a communication because there is no intent to convey information. Therefore, the information would more properly be classified as customer records, leaving them unregulated.[6]

Although personal injury litigants have no federal statutory concerns, there are still issues presented by federal and state rules of civil procedure and evidence.

REQUEST A LITIGATION HOLD IMMEDIATELY

Fitbit® data may be a form of "initial required disclosure" under Federal Rule of Civil Procedure 26(a)(1).[7] The information stored there relates directly to the allegations in a personal injury complaint. Such information could easily support a plaintiff's or defendant's claims or defenses by either strengthening or undermining the asserted facts pertaining to injury. Because the Fitbit® user has control over the data, per company policy, discovery requests should be served directly on the user. And because a Fitbit® user can delete his data at any time, defense counsel should request a litigation hold as soon as possible.[8] The deletion of wearable technology data by a personal injury plaintiff could constitute spoliation of evidence. In addition, defense counsel should include in discovery requests information from such wearable devices that may have been submitted to a plaintiff's employer in conjunction with a health insurance wellness program. Any such evidence of physical wellness and activity can undercut claims of permanent or pervasive injury, and GPS data can establish a plaintiff who claims to have been debilitated was traveling or on vacation during the pertinent time period.

WEARABLES DATA IS ESI

Fitbit® data also qualifies as appropriate ESI under Federal Rule of Civil Procedure 34, which allows for production of data stored in any medium that can be obtained directly from the opposing party.[9] Because a Fitbit® user can access the information on her personal computer, direct access would be present here and entitle the opposing party to production. Defense counsel should, however, narrowly tailor the time frame of requested information in order to satisfy Rule 26(b)(1) proportionality requirements. Additionally, a defendant might avoid a Rule 26(b)(1) challenge by paying for collection of the data by a third-party service, thus minimizing the burden on the plaintiff.

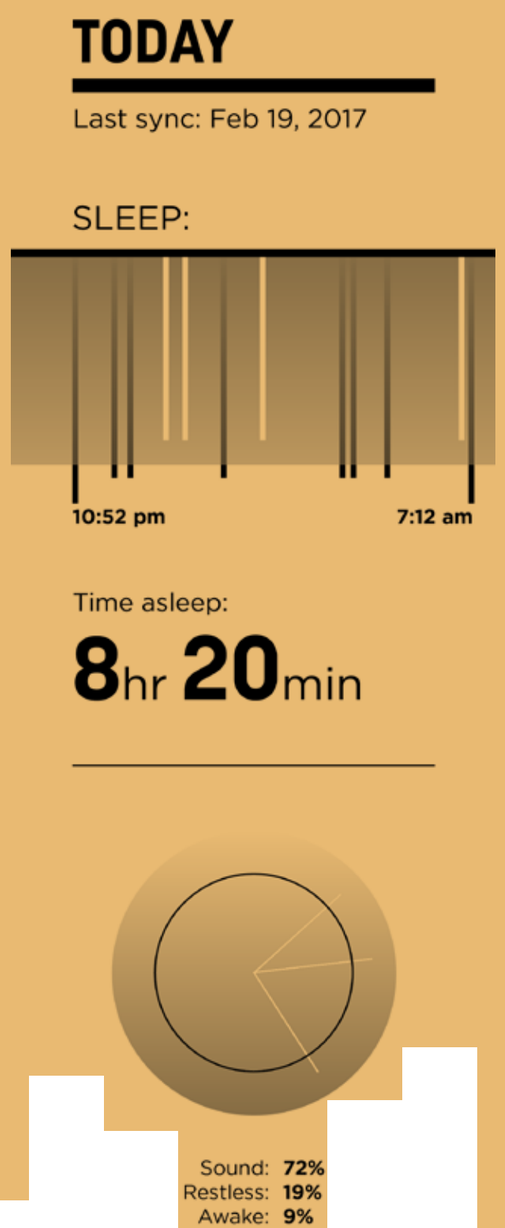
Rule 34 also allows for objection if the party requesting the ESI fails to specify the form or fails to state the intended use of the information.[10] Accordingly, a defendant must give particular reasons for requesting the plaintiff's Fitbit® data and concretely describe the intended use of this information. A blanket request for this data—merely hoping to find something to undermine plaintiff's claim—is insufficient.[11]

Defense counsel must specify the medium by which they want the ESI data produced—whether via email, screenshots, printouts, etc.[12] Rule 34(b)(2)(E)(ii) requires production in the form in which the data is usually maintained, if no other form is specified. As such, the data by default would come from printouts or screenshots from the plaintiff's computer, where the data is typically displayed for the Fitbit® user.[13]

ADMISSION OF WEARABLES DATA AT TRIAL

A defendant asking for admission of Fitbit® information must also demonstrate the touchstone requirements of relevance, authenticity, and reliability.

Relevance should be fairly straightforward. Data on activity levels tends to strengthen or weaken the facts establishing injury. And because some wearables can even measure emotional states or stress levels, there is potential to have this data admitted for claims of emotional and psychological injury, as well.



Authenticity may be established through several channels.[14] Federal Rule of Evidence 901(b)(1) allows the Fitbit® owner to authenticate the data through questioning on the stand. Such a person appropriately qualifies as a witness with knowledge under the rule.[15] Rule 901(b)(4) can provide for authenticity through distinctive features of the data—the Fitbit® information may, for example, refer to a particular exercise location uniquely associated with the plaintiff, thus proving its genuine tie to that individual. Rule 901(b)(9) could potentially allow evidence about the Fitbit® device's data collection method and accuracy rate to be presented in order to establish authenticity. Under this rule, the proponent may need to present evidence that users do not commonly falsify Fitbit® data, for example, by having another individual wear the device in their stead. Finally, Rule 901(b)(3) allows for authentication through a computer forensics expert, who could verify the data's origin.[16]

Within the authenticity concern lies the issue of reliability. Fitbit® and other similar devices sometimes erroneously track steps while a user travels by car. Other devices do not easily track cycling as an activity or will sometimes falsely count arm-waving as walking.[17] The proponent of this evidence must show that its data collection methods are sound by presenting evidence from the manufacturer on error rates or possibly collecting information on subsequent remedial measures taken to correct earlier malfunctions in the devices.

Even if the raw data itself cannot be admitted, the proponent may still get its broad strokes admitted through the testimony of an expert witness, who herself need not rely on admissible evidence in preparing a report or testifying at trial.[18] The surest way of getting wearable device data before the jury may indeed be to have the expert review it and rely upon it as the basis for an expert opinion.[19]

Depending on the case, an expert witness could also rely upon such data to establish that a plaintiff did not suffer from an alleged condition and discredit causation, based on the physical metrics shown from the data (i.e., a plaintiff claiming a particular injury would not exhibit the physical data demonstrated from such metrics). It is also worth mention that wearable technology data should be sought in discovery from spouses with consortium claims. Plaintiff spouses claiming they were forced to work more or "fill in" for their injured spouses for income or at home, or that they suffered debilitating depression rendering them unable to work or go about their usual activities, can be impeached with data from such devices showing facts to the contrary.

Defense counsel may also consider employing a third-party data analytics service to handle the Fitbit® ESI. In the Canadian case mentioned above, the plaintiff proponent of the Fitbit® information employed an analytics company to compare her activity levels to those of her demographic using industry and public research.[20] This comparison aided her claim that her activity levels had dropped to abnormal levels as a result of the defendant's negligence. On the defense side, an analytics company could compare a personal injury plaintiff's activity levels to the general population to establish the opposite point—that no meaningful decrease in energy or capacity had occurred as a result of the accident, thus undermining any claim for damages.

As wearables continue to grow in popularity, defense counsel must realize their evidentiary value and strategically request production of this type of ESI. Fitbit® may be the surprise witness to seal a defense victory.

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19. Laura P. Paton, Sarah E. Wetmore & Clinton T. Magill, *How Wearable Fitness Devices Could Impact Personal Injury Litigation in South Carolina*, 27 S.C. LAW. 44, 48 (2016); Michel & Sager, *supra note 8*.
20. *Id.*

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