More Claims, More Problems: Ethical Issues in Workplace Investigations

October 29, 2015

Matthew Deffebach - Partner, Haynes and Boone

Elizabeth Lieb - Associate General Counsel and Director of Human Resources, Buc-ee's, Ltd.

Marjana Lindsey Roach – Partner, RoachGannon, LLP

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WHEN TO INVESTIGATE

- Formal Complaint from Whistleblower or Victim
- Anonymous Complaint
- Reports to Supervisor or Management
- Government Agency Complaint or Inquiry
- Civil Lawsuit or Criminal Complaint
- Accident or Injury
- Media Reports or Inquiries

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WHO SHOULD INVESTIGATE?

- What is the purpose of the investigation? (Internal, Outside Investigator, Lawyer?)

- Is there any potential for the lawyer to be called as a fact witness in this investigation?

  - Tex. Disciplinary Rules of Professional Conduct 3.08
  - Model Rules of Professional Conduct 3.7

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UPJOHN WARNINGS

- Establish who is (and who is not) the client.
- Witness instructions.
- Consider a third party investigator.

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EMPLOYEE COOPERATION

- Do employees have a duty to cooperate?

- Can you discipline or terminate an employee for not cooperating?

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“I WANT A REPRESENTATIVE”

- Do you have to allow an employee to have a representative?
  - In Non-Union context, “too bad, so sad.”
  - In Union context, these are *Weingarten* rights.
    - A fellow union member can attend when requested.
    - Or, employer must discontinue interview.

WEINGARTEN RIGHTS

“If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working condition, I respectfully request that my union representative or steward be present at the meeting. Without representation, I choose not to answer any questions.”

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GATHERING INFORMATION

- Can you videotape employee activity anywhere on premises as long as the cameras are “open and obvious?”

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TAPING AN INTERVIEW

- Can you? But should you?
- Can the interviewee? Should the interviewee?

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CONFIDENTIALITY

- Can an employer obtain information in an investigation and require an employee to keep the investigation confidential?

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CONFIDENTIALITY

- When a union requests witness statements from an employer's internal investigation, and the information is relevant, the employer must provide the statement unless it can show:
  - a legitimate and substantial confidentiality interest; *and*
  - that this interest outweighs the union's need for the information.
- The employer must raise the issue of confidentiality in a timely manner and "seek an accommodation from the other party."

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MEMOS TO FILE

- Handwritten notes and memos to file (not related to pending or anticipated litigation) are:
  - Privileged if they reflect privileged communication
  - Not privileged if counsel's thoughts are not communicated to business client

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BUSINESS ADVICE OR LEGAL ADVICE?

- Outside counsel instructed Defendants' human resources personnel on what actions (including disciplinary actions) should be taken, when to take those actions and who should perform them
- Outside counsel told Defendants what should be documented and how it should be documented
- Outside counsel drafted written communications to employee responding to his complaints
- Outside counsel drafted scripts for conversations with employee about his complaints
- The human resources department reported to outside counsel the outcome of actions outside counsel directed, asked outside counsel what to do next, and updated outside counsel on new developments.

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COMMUNICATIONS = BUSINESS ADVICE = PROTECTED BY ATTORNEY-CLIENT PRIVILEGE

- "Despite its legal content, human resources work, like other business activities with a regulatory flavor, is part of the day-to day operation of a business; it is not a privileged legal activity."

- "…outside counsel…'was not a consultant primarily on legal issues, but instead … helped supervise and direct the internal investigations as a primary adjunct member of Defendant's human resources team.'"

- "…the overwhelming majority of these communications discuss how Defendants should conduct the internal investigation and how to respond to and ameliorate [the employee's] complaints. That a stray sentence of comment within an e-mail chain references litigation strategy or advice does not render the entire communication privileged, nor does it alter the business-related character of the rest of the communication."

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COMMUNICATIONS = BUSINESS ADVICE ≠ WORK PRODUCT

- "While it may be true that the possibility of litigation prompted Defendants to seek outside counsel's advice, the communications themselves demonstrate that rather than discussing litigation strategy or advice, [outside counsel] advised Defendants on how to conduct the internal investigation and how to address [the employee's] ongoing work performance issues and internal complaints, i.e., human resources advice that would have been given regardless of the potential for litigation."

- "Legal advice given for the purpose of preventing litigation is different than advice given in anticipation of litigation."

-- *Koumoulis v. Indep. Fin. Mktg. Group*, 29 F. Supp. 3d 142 (E.D.N.Y. 2014)

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KOUMOULIS AS AN OUTLIER ???

In re Kellogg Brown & Root, 756 F.3d 754 (D.C. Cir. 2014):

- Attorney Client privilege protects communications related to investigation if obtaining or providing legal advice was "one significant purpose" of the investigation.

- Do not draw "a rigid distinction" between business advice and legal advice. Instead ask: "Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?"

    - If yes, attorney client privilege applies.

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PRACTICAL PRIVILEGE TIPS

- Substance of the communication should contain more than “a stray sentence or comment within an email chain referen[cing] litigation strategy or advice.”

- Employers should think critically about whether counsel’s involvement in an investigation presents the appearance that counsel is actually participating in the investigation in the background by directing the investigation.

- At the outset of investigation, employers should define clearly the scope and responsibilities of participants in the investigation.

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BAD ACTORS WHO ARE KEY STAKEHOLDERS

- How should you deal with those key stakeholders who want to, or do engage in wrongful conduct?

- Do you have an obligation do dissuade a key stakeholder from engaging in wrongful conduct? An obligation to report the key stakeholder internally?

  - Texas Disciplinary Rules of Professional Conduct 1.12

  - Model Rules of Professional Conduct Rule 1.13

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TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 1.12(B)

A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

(1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;

(2) the violation is likely to result in substantial injury to the organization; and

(3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

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Q&A

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Apple Watch, Cloud Computing, and Other New Technology: Keeping Up with Your Ethical Obligations

Ethics in Employment Law

October 29, 2015

Jason Huebinger – Associate, Haynes and Boone

Meghaan Madriz – Associate, Haynes and Boone

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TOPICS TO BE COVERED

- ABA Model Rules of Professional Conduct
- Texas Disciplinary Rules of Professional Conduct
- Application of Rules to Wearable Technology
- Application of Rules to Cloud Computing

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ABA MODEL RULE 1.6 CONFIDENTIALITY OF INFORMATION

Comment 18 to Rule 1.6

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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TEXAS RULE 1.05 CONFIDENTIALITY OF INFORMATION

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the clients representatives, or the members, associates, or employees of the lawyers law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

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ABA MODEL RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment 8 to Rule 1.1

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

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TEXAS RULE 1.01 COMPETENT AND DILIGENT REPRESENTATION

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule neglect signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

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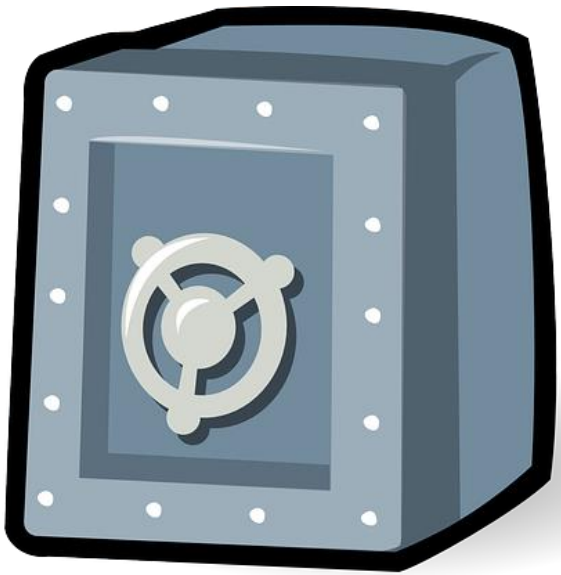
ABA MODEL RULE 1.15 SAFEKEEPING PROPERTY



(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. . . . Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

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TEXAS RULE 1.14 SAFEKEEPING PROPERTY

(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. . . . Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

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ABA MODEL RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANT

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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ABA MODEL RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANT … CONT.

Comment 3 to Rule 5.3

A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

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TEXAS RULE 5.03 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANT

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct.

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WHAT IS A “WEARABLE DEVICE?”

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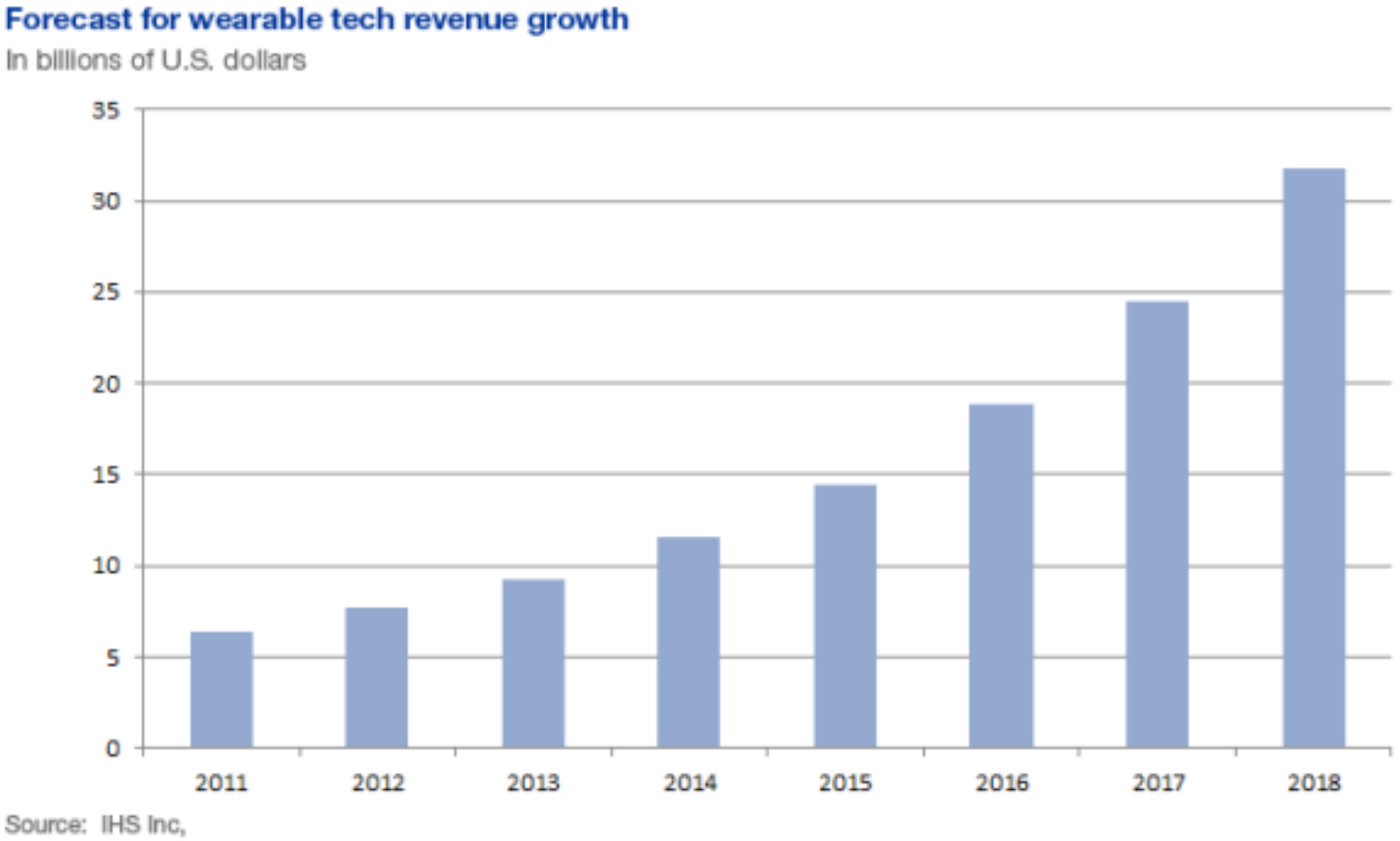
THE FUTURE OF WEARABLE DEVICES

- Morgan Stanley Estimate – $1.6 Trillion Potential
- Possibly 10% of the Global Electronics Market by 2016



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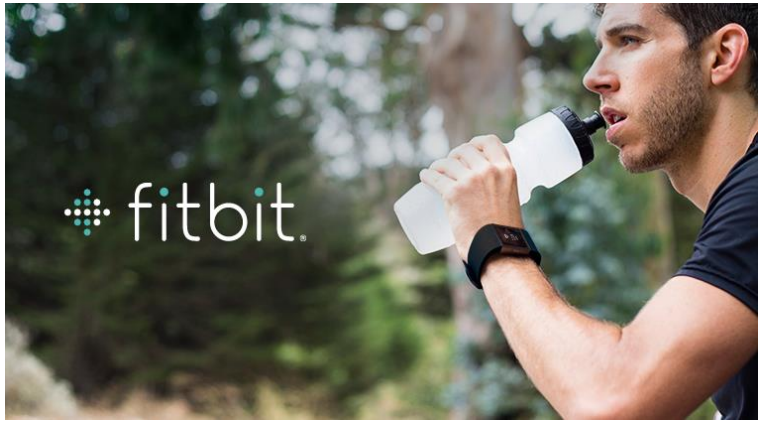
HOW CAN WEARABLE TECHNOLOGY BE USED IN THE WORKPLACE?

- Performance Optimization and Safety
  - Relevant Production Data
  - Time Efficiency
  - New Methods of Training
  - Privacy Concerns?



- Wellness Programs
  - Fitbit, Jawbone, Nike+, etc.
  - Tracking employees' health and wellness
  - Possible reduction in healthcare costs?
  - HIPAA and ADA compliance

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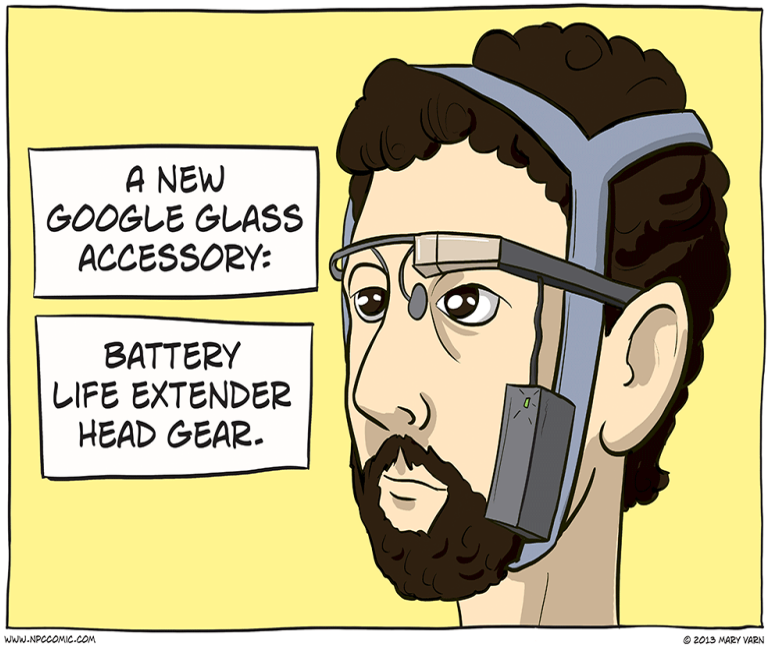
DISCOVERABILITY OF DATA FROM WEARABLES

- Unclear, and not a great deal of litigation yet.
- FitBit's TOS: will surrender a user's data if "disclosure is reasonably necessary to comply with law, regulation, valid legal process (e.g. subpoenas or warrants served on us), or governmental or regulatory request."
- Electronic Communications Privacy Act provides little clarity with regard to wearables, leaving employers with a great deal of discretion.
- No passage in proposed Email Privacy Act (H.R. 699) referring to data from wearable computing



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PARALLELS TO SOCIAL MEDIA DISCOVERABILITY

- Rule 26(b)(1): "Relevancy is broadly construed during the discovery phase, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party.“
- Generally, social media content is neither privileged nor protected.
- *But*, discovery requests my be tailored to be reasonably calculated.
- Greater expectation of privacy with wearables?

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FIRST FITBIT CASE – IN SUPPORT OF A PERSONAL INJURY SUIT

- Plaintiff brought a lawsuit in Calgary
- Plaintiff was a personal trainer who led an “active lifestyle”
- Law Firm for Plaintiff is using her FitBit data to illustrate her reduced activity levels
- Utilized analytics platform Vivametrica, which uses public research to compare a person’s activity data with that of the general population.

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JEANNINE RISLEY CASE

- Risley was in Lancaster for work and stayed in her boss's guesthouse
- Risley told police an unknown man raped her at knifepoint
- Investigators obtained Risley's FitBit, and Risley provided the username/password
- Data showed she was awake the entire night, contradicting her story
- Risley was charged with filing a false report

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LAWYERS' USE OF WEARABLES AND ETHICAL OBLIGATIONS

- ABA Commission on Ethics 20/20 responded to two important trends.

1. **"First**, technology has irrevocably changed and continues to alter the practice of law in fundamental ways. Legal work can be, and is, more easily disaggregated; business development can be done with new tools; and new processes facilitate legal work and communication with clients.10 Lawyers must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve."

2. **"Second**, coupled with technology, globalization continues to transform the legal marketplace, with more clients confronting legal problems that cross jurisdictional lines and more lawyers needing to respond to those client needs by crossing borders (including virtually) and relocating to new jurisdictions."

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WEARABLES AND RULE 1.1

- ABA Rule 1.1: "A lawyer shall provide competent representation to a client.
- Comment 8 to Rule 1.1: "…a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology . . .*"
- What are the "risks" with wearables?

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RULES ON USING WEARABLES TO RECORD CONVERSATIONS

- In Texas, where there is actual or anticipated litigation, an attorney who is a party to a telephone conversation is permitted to gather evidence of opposing party admissions by recording the conversation.

- Where such recorded party admissions are relevant, they generally are discoverable, admissible and constitute business records.

- Opinion No. 575 (Nov. 2006), issued by the Professional Ethics Committee for the State Bar of Texas: Absent an affirmative act of deception and absent an unlawful purpose, a lawyer in Texas is permitted to make (and use) an undisclosed recording of telephonic conversations between the lawyer and another person in Texas (who could be the lawyer's own client).
  - Reversed over 25 years of precedent emanating from Ethics Committee Opinions No. 392 (Feb. 1978) and No. 514 (Feb. 1996).

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RULES ON USING WEARABLES TO RECORD CONVERSATIONS

- For a lawyer to be permitted to make undisclosed recordings of telephonic conversations with opposing parties, *all* of the following criteria must be met:
    1. All parties to the phone conversation must be within and subject to the jurisdiction of Texas;
    2. The recording attorney must be a party to the conversation and must consent to the recording;
    3. The recording attorney must not engage in dishonesty with regard to the recording of the conversation; the recording attorney must not create the false impression that the conversation is *not* being recorded;
    4. The recording attorney must not have an "unlawful purpose"; and
    5. The recording attorney must not otherwise be prohibited by state or federal law from recording the conversation (e.g., certain telephonic court proceedings cannot be recorded without permission of the Court and/or other parties).

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WEARABLES AND RULE 1.4(A)

- Per Rule 1.4, a lawyers shall (1) reasonably consult with the client, (2) keep the client reasonably informed, and (3) promptly comply with reasonable requests for information.
- Wearables may become the fastest and easiest mode of communication.
- With smartglasses, lawyers may be able to record depositions, remotely conduct hearings and interviews, create photo vignettes for trial, perform hands-free research, quickly access information during client meetings, etc.

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WEARABLES AND CONFIDENTIALITY

- ABA Rule 1.6: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of . . . Information relating to the representation of a client."
- Cmt 18 to Rule 1.6: A lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties."
- Many wearables utilize cloud technology.
  - More on this from Meghaan…

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WHAT IS CLOUD COMPUTING?

- Cloud computing involves use of an outside service provider which provides computing software and data storage from a remote location that a lawyer accesses over the Internet via a web browser or mobile app (on a smart phone or table).
- Lawyer's files are stored at, or programs are run on, the service provider's remote server.
  - Remove server = not your desktop or office server
- Lawyer can access his/her files from any computer or device and can share files with others (as long as lawyer has an internet connection).
- Generally made available in the form of a "subscription" with a periodic fee per user.

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USES OF CLOUD COMPUTING

- Software from the Cloud (e.g., GoogleDocs and Microsoft 360)
- Storage and file sharing (e.g., DropBox or Box)
- Billing services (e.g., Rocket)
- On-line client relationship management applications

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BENEFITS OF CLOUD COMPUTING FOR LAWYERS AND LAW FIRMS

- Provides lawyers with a means to store and share documents and connect with their clients
- 24-hour access to documents and information from any Internet-connected computer (or mobile device)
- Eliminates the need to maintain large amounts of physica storage space or carry physical storage devices
- Easy way to transfer large amounts of information or data and from clients
- Enhanced security (in some respects) and back-up
- Reduced personnel and costs (not investing in hardware, software, installation, and support services)
- More flexible/scalable/elastic (quickly expand and contract storage and computing needs based on demand)

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RISKS OF USING CLOUD SERVICES

- Unauthorized disclosure of data resulting from security breaches
- Other types of unauthorized disclosures
- Ownership and licensing issues
- Temporary loss of access to data
- Permanent loss of data
- Geographical risks based on server locations
- Problems at termination of service contract

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THE ISSUE . . .

- May lawyers ethically use cloud computing technology in their practice?

  - Yes. Every state bar association to consider the question has given its qualified approval.

Alabama	Arizona	California	Connecticut
Florida	Iowa	Maine	Massachusetts
New Hampshire	New Jersey	New York	Nevada
North Carolina	Ohio	Oregon	Pennsylvania
Vermont	Virginia	Washington	Wisconsin

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“REASONABLE CARE” STANDARD

- Standard for using cloud computing is “reasonable care” not strict liability
- Lawyers using cloud computing technology must use reasonable care with respect to:
  - Protecting client confidences;
  - Safekeeping client property/records; and
  - Working with the cloud computing provider.

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DUTY OF COMPETENCE

- Requires lawyers to take reasonable steps to ensure that information stored in the cloud is properly maintained, organized, kept confidential when required, and accessible when needed.
- What to do to fulfill this duty?
  - Understand technology being used
  - Evaluate cloud provider's services, policies and practices and monitor on on-going basis
  - Ensure any agreements with provider are consistent with ethical obligations
  - Supervise provider to ensure it is properly handling client data
  - Ensure information is safeguarded from unauthorized disclosure, properly backed up, and accessible to attorney and client when needed
  - Learn where servers are located and whether laws of jurisdiction sufficiently protect the data
  - Stay abreast of technological and legal developments that implicate cloud computing (or consult with experts)

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DUTY TO PROTECT CLIENT CONFIDENCES

- Lawyers must take reasonable steps to safeguard against disclosure of confidential client information stored in the cloud and to ensure vendors implement safeguards to protect confidential information.
  - Research providers before using to ensure they are well established, reputable, financially secure, and have appropriate policies, practices, and procedures to ensure information is secure, encrypted, properly handled, and backed up.
  - Ensure personnel of vendor are competent to perform required tasks.
  - Ensure law firm staff understand importance of maintaining security (e.g., protection of passwords, accessing cloud from secure networks).
  - Ensure service contracts: (a) require provider to safeguard client information (i.e., enforceable obligation to preserve confidentiality and security); (b) have appropriate provisions about ownership of data, handling of subpoenas and other legal process, and notification of data breaches; and (c) have appropriate termination provisions (ability to delete data and move data to a different provider).
  - Ensure data is accessible when needed, even if services contract is terminated or vendor goes out of business.
- Before using cloud services, lawyer must consider the sensitivity of the client's information, whether cloud storage is appropriate, and/or whether additional security measures are necessary.
  - Is client consent needed?

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OTHER ETHICAL DUTIES

Supervision of Nonlawyers

- Overlaps with other ethical duties
- Ensure work is delegated to competent providers
- Ensure provider is able to limit authorized access to the data to necessary personnel
- Ensure information is backed up, reasonably available to the attorney, and reasonably safe from unauthorized intrusion

Safekeeping of Client Property

- Overlaps with other ethical duties
- Ensure data is secure and available during representation
- Ensure data is returned to client and deleted from cloud after representation ends or lawyer purges file
- Ensure client retains ownership of data (and not vendor)

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QUESTIONS TO ASK CLOUD VENDOR

- Do you offer a trial period or demo of your product?
- What training options are available for customers?
- How often are new features added to the product?
- Do you require a contractual agreement for a certain length of service?
- What is the pricing history of your product? How often have rates been increased?
- How many attorneys are using your product?
- What hours is your tech support available?
- What is your company's history – e.g., how long have you been in business, and from where do you derive your funding
- Do you offer a Service Level Agreement (SLA) and/or would you be willing to negotiate one with me?
- What types of guarantees and disclaimers of liability do you include in your Terms of Service?
- How do you safeguard the privacy/confidentiality of stored data?
- Have your security practices been independently audited?
- Who has access to the data?
- Who owns the data?
- Have you ever had a data breach?
- What are your notice procedures (for security breaches and legal processes)?
- Do you have any policy that insures against data loss?
- How often, and in what manner, is users' data backed up?
- Where does the data reside – inside or outside of the United States?
- What happens to the firm's data if the company fails?
- What happens to the data after the service contract expires or terminates?

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QUESTIONS??

Jason Huebinger
jason.huebinger@haynesboone.com
713.547.2531

Meghaan Madriz
meghaan.madriz@haynesboone.com
713.547.2082

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What You Use Can and Will Be Used Against You: Information Employers Can Ethically Use in Making Employment Decisions

Ethics in Employment Law

October 29, 2015

Felicity Fowler – Partner, Haynes and Boone

Alex Stevens – Associate, Haynes and Boone

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THE INTERVIEW… AND BEYOND

- Employers often want to look beyond the interview when selecting candidates
  - Verify information
  - Learn more about personalities
  - See how they interact with others
- Social media profiles may be tempting to get an “unfiltered” look

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THE INTERVIEW… AND BEYOND

- Can a manager go cyber sleuthing for this and then use it to deny employment?

- Can you pay a third party to do the cyber sleuthing for you?

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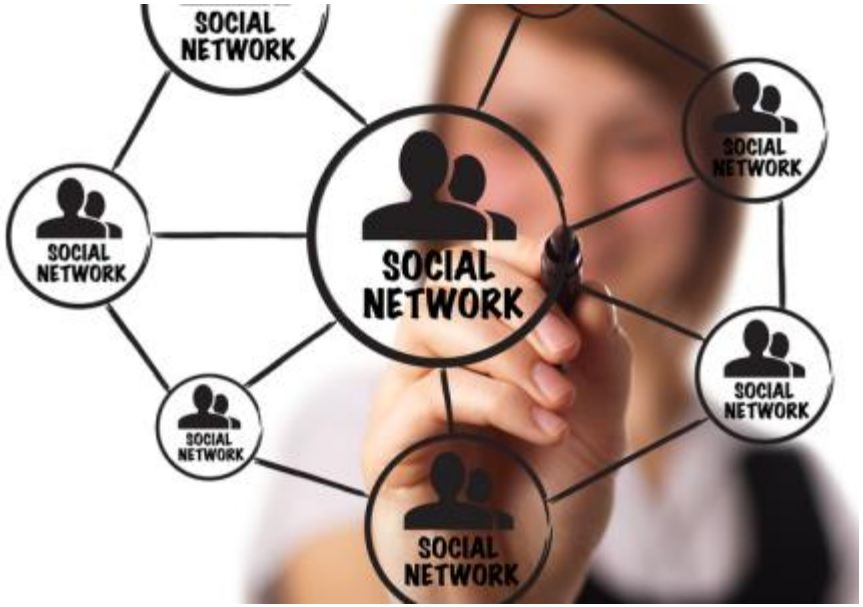
SOCIAL MEDIA SCREENING

- Risks revealing protected information
- Decision maker cannot “unsee” information about race, age, religious beliefs, disabilities, etc.
- If social media information is used, consider a screening system



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FAIR CREDIT REPORTING ACT

- Must provide initial notice to its current and prospective employees of background checks.
  - Must obtain authorization prior to requesting credit report from consumer reporting agency.
- Must provide subsequent notice before taking adverse employment action based on consumer report.
  - Summary of Rights Under FCRA must be included
- If decision to take adverse employment action finalized, must provide third notice
  - Not required to be in writing, but good practice.

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THE INTERVIEW… AND BEYOND

- Should in-house counsel review applicant profiles?

- Should outside counsel?

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EXPLAINING NO-HIRE DECISIONS

Can you tell someone that he/she is not hired based on the “at-will rule” when the real reason is a troublesome arrest?

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MEDICAL QUESTIONS

If a job is hazardous, can you ask about an employee's medical history to ensure the employee can safely perform the job?

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FMLA AND LEAVE ISSUES

If an employee presents the required documents for taking FMLA leave, but you think the employee is lying, can you call a PI to spy on the employee?

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FMLA AND LEAVE ISSUES

Can an employer monitor whether someone who seeks to take leave for an adoption is really using the leave for that purpose?

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EMPLOYEE SOCIAL MEDIA USE

Can an employer monitor an employee's social media activity?

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EMPLOYEE SOCIAL MEDIA USE

- Social media snooping
  - Is it OK to snoop into someone else's *private* social media posts? (No!)
- Three influential cases
  - *Konop* (9th), *Pietrylo* (DNJ), *Ehling* (DNJ)
- OK to use publicly available information
- "Authorized User Exception"
  - Consent is KEY.

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EMPLOYEE SOCIAL MEDIA USE

What if an employee posts on his Facebook page that he committed a crime over the weekend. Co-workers who are Facebook friends are now scared to come to work. What do you do?

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EMPLOYEE SOCIAL MEDIA USE

Can you rely on Facebook postings from an employee's spouse that the employee has joined a cult to terminate the employee?

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EMPLOYEE IN COLORADO JUST POSTED THIS ON FACEBOOK

Can you rely on it in taking adverse employment actions?

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OFF-DUTY CONDUCT LAWS

- There are risks associated with taking disciplinary action for conduct that is obnoxious or undesirable, but not illegal…
- Off-duty conduct laws provide protection for
  - Off-duty conduct
  - Off-site legal activities

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OFF-DUTY CONDUCT LAWS

- California and Colorado
  - An employer's disciplinary action based on an employee's social media postings of such conduct, such as participating in a controversial political rally, could subject the employer to liability
- Illinois, Minnesota, Montana, Nevada, North Carolina, North Dakota, New York, and Wisconsin
  - Ban an employer from treating an employee adversely for using a lawful product during nonworking hours off of the employer's premises
- Some commentators have suggested that proposed OH statute could protect marijuana use if related initiative passes

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EMPLOYEE SOCIAL MEDIA USE

What would you do if somebody sent you an anonymous letter with postings by an executive on a website discussing his affair with a coworker. Can you (should you) rely on this letter?

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EMPLOYEE SOCIAL MEDIA USE

Can you ask for consent or a password to monitor social media accounts?

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EMPLOYEE SOCIAL MEDIA USE

Can you take action against an employee who posts that he and his coworkers are "fed up" with their supervisor and the Company's policies?

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THE NLRB AND SOCIAL MEDIA

- NLRB's Continued Focus on
  - Social Media Policies
  - Discipline

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NLRA SECTION 7

- "Employees shall have the right:
  - to self organization,
  - to form, join, or assist labor organizations,
  - to bargain collectively through representatives of their own choosing, and
  - to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and
  - shall also have the right to refrain from any or all such activity…."

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Pier Sixty LLC

- Employees sought to unionize company, and made complaints about supervisor to management
- Supervisor later used a “loud voice” and “raised, harsh tone” during catering event
- Employee posted on Facebook:
  - “Bob is such a NASTY M---------- don’t know how to talk to people!!!!! F--- his mother and his entire f------ family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!”
- Did NLRB determine employee’s comments were protected?

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Pier Sixty LLC

- Yes
- Employee's post was protected discussion of employee mistreatment
- Employee did not lose protection because "vulgar language is rife in [Pier Sixty's] workplace, among managers and employees alike."
- Facebook posts "were not a slur against [Bob's] family but, rather, an epithet directed to [Bob] himself."

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Three D. LLC d/b/a Triple Play Sports Bar and Grille

- Former employee posted:
  - employer “can’t even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!”
- Several other former employees also responded that they owe money, purportedly because of employer’s mistakes
- Current employee “liked” original comment and was fired for disloyal conduct
- NLRB found that pressing “like” on Facebook was protected activity under the NLRA

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TRIPLE PLAY TAKEAWAYS

- An employee's negative comment online may not constitute disloyalty, especially if there is no mention of the employer's products or services.
- While an obscene comment made in the physical presence of customers may cause an employee to lose her NLRA protections, a similar comment made on social media may remain protected, even if customers view the social media comment.
- Employers should continue exercising caution to avoid drafting overly broad social media policies.

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LICENSE TO LISTEN?

Can you listen in on phone conversations of an employee who you believe may be planning to take off with your trade secrets and join a competitor?

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QUESTIONS??

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