

# Tracking the Truth: Utilizing App Data in Personal Injury Defense

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**W**ith the summer months upon us, the warm weather and increase in physical activity bring with them an often overlooked and untapped area of evidence for defense attorneys to explore. This evidence comes in the form of various fitness tracker apps and programs, which have exploded in popularity over the past decade.

Fitness tracker apps and workout programs have revolutionized how individuals monitor their physical activities. With features like heart rate tracking, step counting, distance covered, and calorie expenditure calculations, these tools have become instrumental in helping people stay fit and achieve their health goals. However, the data they generate can have implications beyond personal fitness. In personal injury cases, this data can provide objective insights into an individual's activities, health metrics, and overall physical well-being, potentially challenging or refuting claims made by the opposing party.

## Usage/Data

Statistics related to fitness applications highlight their extensive usage. According to a study conducted in 2022, approximate-

ly 40% of Americans regularly incorporate smartwatches, such as Fitbits or Apple Watches, into their daily routines. While smartwatches offer more comprehensive data, it is worth noting that even fundamental information, like steps taken, calories burned, and distance traveled, are routinely, and often unknowingly, tracked through applications such as the iPhone's Health app and Google's Google Fit app. This data remains stored on an individual's phone indefinitely, enabling them to retrieve information from a specific day, even from several years ago, with just a few taps on the screen. Additionally, depending on a user's application and privacy settings, smartwatches and smartphones can track and provide details regarding a person's location on a particular date.

Alongside wearable devices and smartphones, the utilization of home fitness equipment has experienced a notable surge in the post-pandemic era. Prominent manufacturers like Peloton, Nordic Track and Mirror offer virtual fitness classes to millions of Americans on a daily basis. These applications feature user profiles that

capture a wealth of physical data encompassing workout dates, duration, physical exertion levels, calories expended and other metrics.

The applications of this data in litigation are boundless. Within the realm of personal injury cases, defense attorneys can leverage stored information to challenge the veracity of a plaintiff's alleged physical impairment. This data can serve as valuable evidence to counter claims made by the plaintiff regarding their level of physical activity prior to an accident. Furthermore, location information derived from fitness tracker apps and cell-phones can play a pivotal role in establishing the presence of a plaintiff in a specific area or their engagement in driving along a particular route leading up to an accident. The data can also be presented alongside expert testimony to strengthen the defense's position. Experts in biomechanics, sports medicine, or exercise physiology can interpret the data, provide context, and testify on the claimant's physical capabilities and overall health condition.

### **Discoverability**

Currently, no federal statute regulates fitness tracking applications and wearable devices. Additionally, because they are not considered "covered entities," HIPAA does not safeguard the information stored on these devices. As such, the data sought can be requested directly from a plaintiff, which is the most efficient method of discovery. While a subpoena may be directed to the company responsible for the fitness application or wearable device, these efforts are likely to be time-consuming, costly and potentially unsuccessful. There is no guarantee that the company will provide user data as many prioritize user privacy. Therefore, if

feasible, it is advisable to obtain the information directly from the plaintiff.

During the plaintiff's deposition, relevant details regarding ownership of at-home fitness equipment and wearable devices and participation in at-home fitness classes can be obtained through targeted questioning regarding claimed activity levels before and after the accident. Subsequently, tailored discovery requests can then be served to secure the production of the data within the pertinent timeframe, minimizing potential objections by the plaintiff. These requests should include a request for a data download, which can be easily accomplished by the user.

### **Admissibility**

The two hurdles to admissibility of the obtained data at trial are relevancy and authenticity. The data acquired from virtual fitness tracking applications and wearable devices is highly pertinent in personal injury cases where a plaintiff alleges diminished physical capabilities. The relevance of the data, however, must be demonstrated through specific deposition questions and written discovery requests.

With respect to authenticity, the data can be established through various means, including witness testimony and computer forensic expertise. In most cases, a plaintiff's testimony should be sufficient. For instance, questioning the plaintiff about their specific profile and usage of the fitness application or wearable device can help confirm the authenticity of the data. In cases where the plaintiff is unable to provide such testimony, defense counsel has the option to engage a computer forensic expert who can effectively authenticate

data from virtual fitness trackers or wearable devices.

The integration of fitness tracker apps and workout program data in personal injury defense represents a fascinating development in the legal landscape. By leveraging these technologies, attorneys can present objective evidence and insights to challenge claims and establish alternative narratives. As technology continues to evolve, it is likely that the role of fitness tracker apps and workout programs in legal proceedings will continue to expand, providing new avenues

for evidence and enhancing the defense strategies in personal injury cases.



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