

Today's Forecast: Clouds Appearing Everywhere

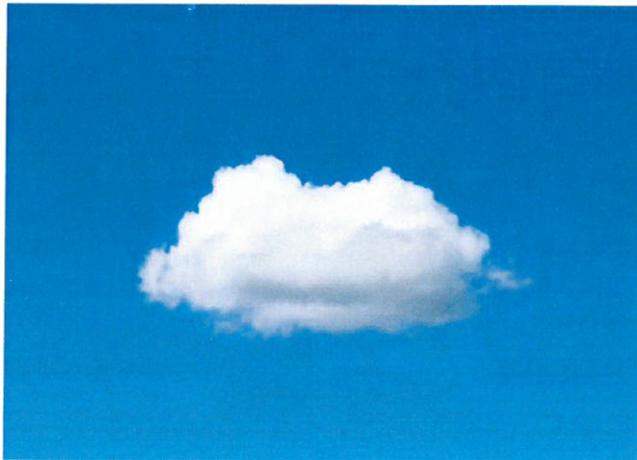
By Brian S. Legum, Esquire

While many think of “the cloud” as a place one actively chooses to store information, such as photos or legal documents, the cloud is also used passively by many electronic devices to store and transfer information.

One example of this can be found in the technology that is brought into motor vehicles. The list of electronics that we bring into the car now includes everything from iPhones, Androids, and other smartphones, to FitBits, new electronic watches, and countless products specifically designed for car use, including mapping apps and tools that monitor our driving performance. Cloud technology is utilized to communicate and store the data obtained by the use of these devices in the car.

Unfortunately, this technology can be distracting on the road, such as texting and driving, which has become a major public danger. According to the Department of Transportation, cell phones are involved in 1.6 million auto crashes each year, causing a half million injuries and taking 6000 lives.

This potential for destruction, coupled with the popularity of wearable tech, leads to an extensive list of legal issues surrounding the use of electronics in the car and the information stored via the cloud. Many concerns go far beyond the typical texting and driving discussion.



Smart Watches – Okay in the Driver's Seat?

One topic that is currently interesting lawyers and lawmakers is the legality of driving while using a smart watch, such as the new Apple watch. Apple's latest addition to the market allows owners to make calls, text, go online, and perform other tasks that require the use of cellular data, all on their watch.

With these smartphone-like capabilities, the Apple watch could potentially be subject to the same distracted driving laws as cellphones, tablets, and other devices. According to the Delaware Code, “no driver shall operate a motor vehicle on any highway while using an electronic communication device while such vehicle is in motion,” whether to text, make a call, or post a photo to social media.

Based on the language of the law, the watch would almost certainly fall into the category of an “electronic communication device.” The question then seems

to be whether the watch qualifies as a hands-free device, which a driver is permitted to use in Delaware and which is defined as a device that has a feature, like a bluetooth headset or speakerphone, “by which a user engages in a call without the use of either or both hands.”

The answer is not quite clear — while you do not necessarily need your hands to make a call on an Apple watch, users report that it is

necessary to hold the watch up to your mouth while speaking, which would remove a driver's hand from the wheel in the same way that a cellphone would. Plus, because hands-free devices are only covered while a driver is “engaged in a call,” sending texts and performing other tasks on a watch would arguably be against the law.

Wearable Tech Data as Evidence

While these kinds of complex issues could certainly come up in future cases, lawyers, especially personal injury attorneys are more likely to deal with wearable tech in fairly straightforward, but still important ways, primarily by using device data stored via the cloud, as a form of evidence.

For example, cellphone records are subpoenaed during the discovery process to help argue a driver's role in causing an accident. Since records provided by phone companies include the exact times

that a smartphone user sends texts or makes a call, these documents can be used to show that another driver was using their phone, and was therefore distracted.

Similarly, tools that monitor a driver's choices on the road may also help us to show fault in an accident. Take Nationwide's SmartRide program, which is intended to reward drivers for safe driving. Upon registration for SmartRide, you receive a small device that plugs into your car, tracking the miles you drive, the rate at which you accelerate, and the days and times you are driving — all via cloud-based technology.

This information is typically used to determine insurance rates, but we may be able to request it from another driver to prove that they were driving recklessly when an accident occurred with our client. And, with these programs growing more popular every day, it is likely that this type of discovery will become more common, though it is somewhat unclear whether privacy concerns will make it difficult to obtain a device's data.

Keeping Up with the Techies

Along with using records to show that another driver is at fault, attorneys are also starting to discover new ways we can use our client's electronic footprint to improve their case.

According to a *Forbes* article, one lawyer is interested in using data from the fitness tracker Fitbit to establish that a client's physical activity has suffered as the result of an injury. The client, the columnist writes, had a history as a personal trainer and had excellent levels of fitness before she was injured. With this background, data from her Fitbit, including heart rate, activity levels, sleeping habits, and distance traveled, could be used to show that her current activity levels are below normal for her.

In a field where doctors' reports and subjective testimony from our clients are often the only tools we have to show a jury how our clients' injuries have impacted their lifestyle, it is easy to see how this more concrete data, uploaded to the cloud, could become invaluable in a car accident case.

As we consider the ways Fitbits and other new devices could be applied in the courtroom, it is clear that fresh legal issues are arising as quickly as new devices hit the market. Lawyers have ever-expanding professional responsibilities to investigate and inform their client as to the potential data that can be passively communicated through devices that utilize the cloud to exchange information. It is essential to know the current technological landscape so that we can protect our clients.

So, while the weather outside might be clear and sunny, "clouds" are forming everywhere with the technological advancements of how information is stored and transferred. In turn, our professional responsibilities as attorneys obligate us to do our best to predict "the weather" for our clients. ☺

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