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A REPORT TO MEMBERS OF
THE SOUTH CAROLINA BAR
YOUNG LAWYERS DIVISION

What now?

Sheila M. Willis

It has been described as “falling off a cliff” or “getting lost” or “finding something else to do.” These phrases have been attributed to what happens when young lawyers age out of the Young Lawyers’ Division (“YLD”). This phenomenon has happened every year—YLD members jump off (or, let’s be honest, are forced off) the merry-go-round that is YLD service, and they disappear into the abyss once they turn 36. Curiously, once young lawyers age out, many do not get involved in what is affectionately called, the “Big Bar.” No one can quite place their finger on why this occurs. Is it because at the same time one ages out, lawyers are also entering more critical roles in their jobs? Have they started a family now? Are they burned out from years of bar service? Whatever the answer is, the question is still the same. So, as this author stands on the edge of this cliff, the question before me is the question that so many other not-so-young lawyers have asked themselves at the ripe, middle (?) age of 36 – What now?

How is the “Big Bar” different?

One of the first things that can be daunting in trying to navigate the “Big Bar”, especially if your frame of reference is the YLD, is that the of the “Big Bar’s” organizational structure is different. Yes, there are still committees, but they are generally substantive, practice-specific sections and profession-type committees. For example, the “Big Bar” has the following committees: Administrative and Regulatory, Animal Law, Children’s Law, Community Association Law, Continuing Legal Education, Conventions, Diversity, Education Law, Elder Law, Ethics Advisory, In-House Counsel, Intellectual Property and Innovation Law, International Law, Judicial Qualifications, Law Related Education, Lawyer Legislators, Lawyers Helping Lawyers, Lawyers’ Fund for Client Protection, Memory Hold



the Door, Next Gen, Nominating, Practice and Procedure, Pro Bono Board, Professional Liability, Professional Responsibility, Resolution of Fee Disputes Board, SOLACE, Technology, Unauthorized Practice of Law, and Wellness.

As you may or may not know, the YLD committees (and attendant volunteer opportunities) are structured into two main types—Service to the Bar and Service to Public. For the most part, the “Big Bar’s” committees do not necessarily follow this regime. For example, the service to the public arm does not look like a legal feeding frenzy, a rehab of a domestic violence shelter, or fundraising and spending time with Special Olympics athletes or Make-A-Wish kids. Instead, the service to the public component of the “Big Bar” is comprised of things related to pro bono efforts (like the Pro Bono committee), and client protection—such as the Lawyers’ Fund for Client Protection committee, the Ethics Advisory committee, lawyer protection, and specific outreach efforts by the sections.

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Still, looking to your YLD participation, you can translate that into a “Big Bar” committee service. For example, if you enjoyed the Families Forever committee, you may consider the Children’s Law committee. If you liked the wills clinics, you may consider the Pro Bono Board. If you liked our many opportunities to work with middle school and high school children, you may consider Law Related Education and coordinate middle and high school mock trial.

The “Big Bar” has also 18 substantive law sections—Construction Law; Consumer Law; Corporate, Banking, and Securities Law; Criminal Law; Dispute Resolution; Employment and Labor law; Environment and Natural Resources; Family Law; Government Law; Health Care Law; Military and Veterans’ Law; Probate, Estate Plan-

ning, and Trust; Real Estate; Solo and Small Firm; Tax Law; Torts and Insurance; Trial and Appellate Advocacy; and Workers’ Compensation. Each of these sections is comprised of practitioners in the area. The sections prepare newsletters, participate in CLE programming, have email lists/listservs and more to keep people engaged in their particular practice area. They provide a great opportunity to connect with other practitioners in the practice area, provide speaking opportunities and writing opportunities, and provide you with the ability to be on the cutting edge of your practice area.

How do you become a leader in the Bar?

Another way to get involved with the “Big Bar”—especially if you preferred the Service to the Bar aspect of the YLD—is to participate in the governance structures of the Bar—the House of Delegates or the Board of Governors. At first blush, these governing bodies can be foreign concepts for some—as much of the governing structures young lawyers have been exposed to in their lives do not include governing bodies such as these.

Both of these bodies contain elected members that generally represent all the circuits in the state, out-of-state members, the deans of the law schools in the state, and more. The House of Delegates, the larger of the two bodies, controls and formulates the policy for the Bar. This means it functions as a legislative-type body and adopts policies for the Bar and determines the Bar’s official position on various matters. The Board of Governors, a smaller body, acts on Bar business when the House of Delegates is not in session. Elections to these positions are announced in the eBlast, so if you are interested in serving this way—be on the lookout!

How do you get involved?

One of the first things you should do when thinking about getting involved in the “Big Bar,” after you’ve identified where you want to be, is to determine how to sign up. For the most part, many Bar committees have an online sign up process (Visit www.scbars.org/getinvolved). Announcements about sign-ups are typically in

the eBlast. There are a few committees, however, that may require special appointment by the Bar President or the Supreme Court. When you review the committees’ descriptions on the Bar’s website, make sure you check to see the pathways to membership. Another great source of information regarding involvement is the Bar’s website in toto, as well as the Bylaws and Constitution of the South Carolina Bar. Upon closer inspection, perhaps this cliff is really just a small dip in the landscape, leading forward to something else that will be as rewarding as the bar service behind us. Looking forward to the next chapter of this journey with all!

President Award Recipients

- Taylor Davis Gilliam**, S.C. Commission on Indigent Defense, Columbia
- Sutania Alicia Fuller**, Eleventh Circuit Solicitor’s Office, Lexington
- Patrick James Cleary**, Bowman & Brooke, LLP, Columbia
- Mary Lee Briggs**, S.C. Department of Social Services Legal Department, North Charleston

Luggage Drive



Stars of the Quarter

- Jeff Gurney**
- Tyler Bailey**
- Derek Swindall**
- Joseph Bias**
- Lauren Acquaviva**
- Taylor Gillam**
- Jeff Gurney**
- Mary Lee Briggs**
- Patrick Cleary**
- M. Paige Ornduff**
- Erica Lybrand**
- Ashley Johnson**
- Grayson Lambert**
- Sutania Fuller**
- Shauna Gibson**
- Meredith Ross**
- Leslie McIntosh**

A “Black Box” for the Human Body: Civil Discovery of Wearable Technology Data in Personal Injury Cases

By Michael W. Rabb

On September 13, 2018, in Santa Clara County, California, a 67-year-old woman was discovered dead in her home, slouched in a dining room chair with lacerations on her head and neck, clutching a large knife. Two weeks later, her stepfather was arrested for her murder based in part on evidence obtained from a silent observer—her Fitbit. The fitness tracker she was wearing at the time recorded a spike in her heart rate followed by a slow decline in her heart rate until it completely stopped, all during a time when her stepfather—the last person to see her alive—admitted he was at her home.¹

The advent of wearable technology, expected to become a \$27 billion dollar market by 2022,² has brought forth the expansion of “smart watches” from simple step counters to complex computers strapped to our limbs. These devices allow us to measure fitness data from calories burned to V02 Max, communicate with our peers through telephone calls and text messages, check the local news and weather, scan through social media, and even play music—all from our wrists.³ Inevitably, these devices and their recorded data have also found their way into the courtroom. Lawyers have sought to use wearable technology data not only to help solve crimes, but to also bolster their clients’ cases in civil lawsuits as well. This article will discuss the details of engaging in discovery of this wearable technology data in civil personal injury lawsuits.

Initially, a lawyer should make a determination as to whether wearable technology is or was in use by the opposing party. This can be as simple as conducting a preliminary background check of the opposing party through social media. However, the safest approach is likely to send correspondence to opposing counsel at the beginning of the suit seeking preservation of any wearable technology data, regardless of whether counsel has confirmed the opposing party was using or still uses a wearable device.⁴



The next step should be sending written discovery requests seeking detailed information on any wearable devices used or in use as well as the production of data from those devices.⁵ The interrogatory and/or request for production requesting this information needs to be carefully constructed. A circuit court in Oregon recently granted a defendant’s motion to compel discovery of the plaintiff’s wearable technology information. The request in that case was drafted to require the production of “[a]ll documents, records, data, or information reflecting plaintiff’s personal fitness, diet, or other lifestyle management. This includes, but is not limited to, data and information from hardware (including wearable technology), software, or personal computing/telecommunication e-applications, e-logs, and e-diaries.”⁶

To avoid objection, a successful request for wearable technology information should be narrowly tailored both in time and scope, should specify the intended use of the information, and should specify the medium in which the information or data is to be produced.⁷ An especially detail-oriented lawyer might also request data from a wearable device that had been submitted to a plaintiff or defendant’s employer for a health insurance wellness program, as a possible “back door” to obtain information previously deleted

by the individual who wore the device.⁸ Although the admission of this data into evidence exceeds the megabytes of this article, the medium in which the data is produced is crucial for ensuring the data appears in a readable format to pass initial admissibility hurdles.⁹

As soon as the attorney identifies the wearable device company, a “litigation hold” letter should be sent to the company to maintain the information in their database.¹⁰ Additionally, the attorney should carefully review the company’s privacy policies—in the event a subpoena is required for the information—to determine where device data is stored and what types of data the company will allow to be shared or released.¹¹ If the information cannot be obtained by the party possessing the wearable device, a subpoena will be necessary to obtain the information from the wearable device company. Of note, Apple Inc.’s privacy guidelines apply to all of its devices, making it crucial for the practitioner exercising subpoena power to carefully tailor his or her request to obtain only the most relevant information.¹²

Additional considerations for attorneys engaging in discovery of wearable technology data include the Health Insurance Portability and Accountability Act (HIPAA), the Electronic Communications Privacy Act of 1986 (ECPA), and Rules 26(a)(1) and 34 of

the Federal Rules of Civil Procedure. HIPAA imposes certain requirements on “covered entities” that possess, use, and transfer private health information.¹³ Wearable technology companies are not considered “covered entities” under HIPAA because they do not provide health care, pay for health care, and cannot be considered health plans or health care providers.¹⁴ Therefore, a HIPAA authorization is not necessary to include in a subpoena for wearable technology data.¹⁵ Furthermore, companies are allowed to produce customer records under the ECPA as long as the records are not deemed communications.¹⁶ Wearable technology data likely does not constitute a communication under this Act as there is no intent to convey information.¹⁷ Therefore, this data is properly classified as a customer record available for production under the ECPA. Data from wearable devices may be an “initial required disclosure” under Federal Rule of Civil Procedure 26(a)(1). Moreover, the data certainly can be considered electronically stored information under Federal Rule of Civil Procedure 34, subjecting it to the requirements of this rule. Lawyers should be in sync with the requirements of these rules and prepared to adhere to their requirements when seeking discovery of wearable technology in federal court.

As the use of smart watches and fitness trackers continues to become more popular, clever litigators will continue to find creative ways to use the data from these devices to make or break a plaintiff’s personal injury claims. Practitioners must grasp the strategic value of this data and adapt their discovery techniques accordingly if they want to take full advantage of this “black box” of the human body.

Michael Rabb is an associate in the Greenville office of Gallivan White & Boyd, P.A. His practice focuses on all aspects of civil litigation, including medical malpractice defense, products liability, premises liability, insurance law, commercial litigation, and general negligence.

Endnotes

¹ Christine Hauser, *Police Use Fitbit Data to Charge 90-Year-Old Man in Stepdaughter’s Killing*, THE NEW YORK TIMES, Oct. 3, 2018, <https://www.nytimes.com/2018/10/03/us/fitbit-murder-arrest.html>.
² Paul Lamkin, *Smart Wearables Market to Double*

What’s Been Happening

Although we are currently in the midst of the COVID-19 pandemic, South Carolina young lawyers still found ways to give back to the community and socialize with one another. South Carolina young lawyers participated in the Families Forever Committee’s Luggage Drive for Foster Children; YLD Trivia Night; #YLDStayAway5k10k; #WellnessAtHome challenge; and several informative webinars.



Know Your Rights Panel Discussion, organized by the Color of Justice Committee

by 2022: \$27 Billion Industry Forecast, FORBES, Oct. 23, 2018, <https://www.forbes.com/sites/paullamkin/2018/10/23/smart-wearables-market-to-double-by-2022-27-billion-industry-forecast/#c0b9eb726569>.

³ Nick Statt, *The Rise and Fall of Fitness Trackers*, CNET, Jan. 1, 2015, <https://www.cnet.com/news/fitness-trackers-rise-and-fall/>.

⁴ 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)

⁵ Paton, Wetmore, & Magill, *supra*, note 4.

⁶ *Concienne v. Asante*, No. 123280L3, 2016 WL 5673003 (Or. Cir. Ct. May 25, 2016)

⁷ *Spoljaric, Jr. v. Savarese*, No. 608838-2017, 2020 WL 611911 (Sup. Ct., Suffolk Cty., N.Y., Jan. 28, 2020)

⁸ Clint Cowan, Jr., *Wearable Technology Discovery in Personal Injury Cases: How Data From a Plaintiff’s Wrist Can Make a Difference In The Courtroom*, Feb. 19, 2017, <https://3epjwm3sm3iv250i67219jho-wpengine.netdna-ssl.com/wp-content/uploads/2017/07/Wearable-Technology-Discovery-In-Personal-Injury-Cases.pdf>.

⁹ *Mikolinski v. Phuoc Nyugen*, No. CV176010111S, 2019 WL 5431400 (Sup. Ct. of Conn., Judicial Dist. of New Haven at Meriden, Oct. 9, 2019)

¹⁰ Paton, Wetmore, & Magill, *supra*, note 4; Cowan Jr., *supra*, note 8.

¹¹ Paton, Wetmore, & Magill, *supra*, note 4; Cowan Jr., *supra*, note 8.

¹² Meghan A. Rigney, “Steps” For Discovery: Subpoenaing Wearable Technology Data, AM. BAR ASS’N, May 14, 2019, <https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2019/steps-for-discovery-subpoenaing-wearable-technology-data/>.

¹³ Paton, Wetmore, & Magill, *supra*, note 4.

¹⁴ Paton, Wetmore, & Magill, *supra*, note 4.

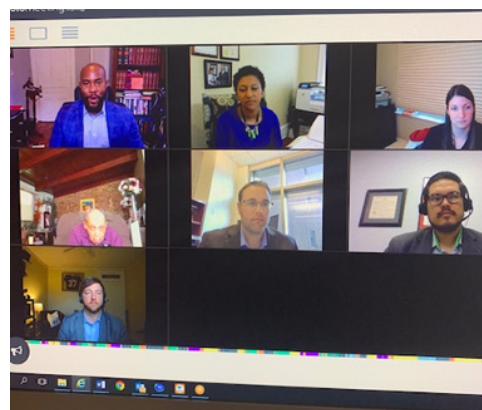
¹⁵ Rigney, *supra*, note 12.

¹⁶ Cowan Jr., *supra*, note 8.

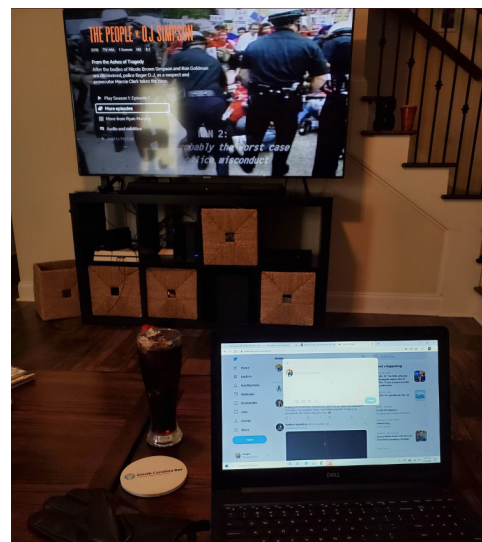
¹⁷ Cowan Jr., *supra*, note 8.



YLD Trivia Night



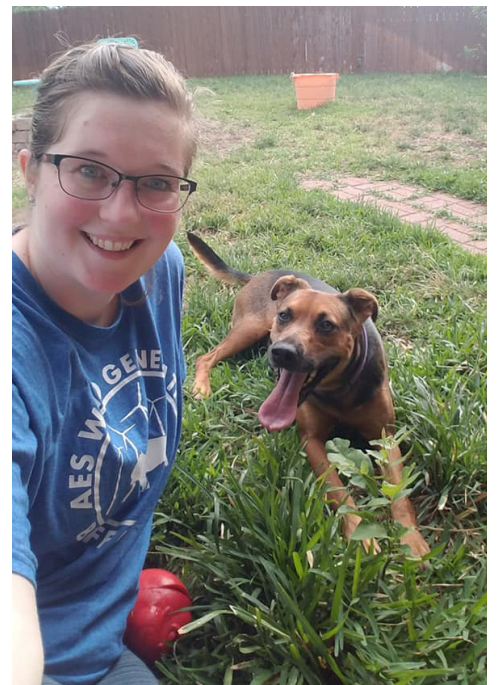
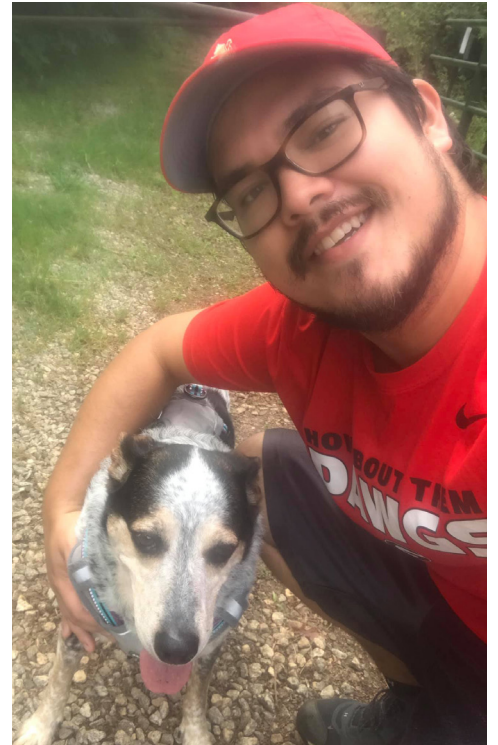
COVID-19 and The Pandemic Recessions: Perspectives and Tips



from Solo Practitioners Webinar #SCYLDWatches

In May and June, we held the first SCYLD Live Tweet and Watch Along as we watched “The People vs. O.J. Simpson: American Crime Story” on Netflix. Led by Joseph Bias, the event featured different tweeters for each episode using the #SCYLDWatches.

Virtual 5K/10K, May 23-25





South Carolina Bar

Young Lawyers Division

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Letter from the President

Dear Young Lawyers:

As this Bar year draws to a close, I am struck by what this Bar year had to offer us. I don't think I could've predicted that we would be facing a global pandemic, protests, or NASCAR banning the confederate flag. I didn't know words like "social distancing," "N-95," or "George Floyd" would become part of our lexicon.

But, I did know that this Division was going to excel at everything that was thrown at it. I shared one of my favorite quotes, "Good is not good enough if better is possible" in my first President's letter, knowing that as a Division we were built on some excellent foundation, which meant we were going to do even better things.

And, boy, was I right. From award-winning diversity programming in the fall to virtual COVID-19 task force programming in the spring, our members found ways to serve their communities and each other in new and exciting ways. I am so proud.

I'm a type-A planner. So, during my leadership retreat last year, YLD

committee chairs completed an exercise where we planned out the entire Bar year with events roughly scheduled to occur each month. But as they say, if you want to see God laugh, make plans. And while it seems that God enjoyed the best that Kat Williams and Dave Chappell had to offer with our plans, our members and leaders were resilient and nimble. For that, I am thankful.

I am also thankful that I have had this incredible opportunity to lead you. I have participated in YLD events since law school (volunteering for the Cinderella Project), and it has been an integral part of my growth and development as a practicing lawyer. The YLD means so much to me. I've made friends, learned so much about myself personally and professionally, helped countless members of my community and countless members of the Bar. I've been able to travel across the country representing our great organization. But, most importantly, I've had the distinct pleasure of (I hope) providing you with the opportunity to allow the YLD

to fulfill and enrich you in the ways that it did me.

As I prepare to pass the torch into the capable hands of Perry MacLennan, I can't help but think about the wealth of talent that exists in this Division. We are comprised of individuals with strong legal skills as well as deep abiding devotion to their communities. I hope that each of you keeps up your passion and dedication as the years roll on.

The opportunity to serve as your President was truly an incredible and fulfilling dream. It has been full of highs and lows, but I wouldn't trade any of it. So, thank you all so very much. I hope you have a safe and wonderful year.

Best regards,

Sheila M. Willis
YLD President