



ALFA International St. Louis Regional Transportation Mini-Seminar

What's New in Trucking Technology

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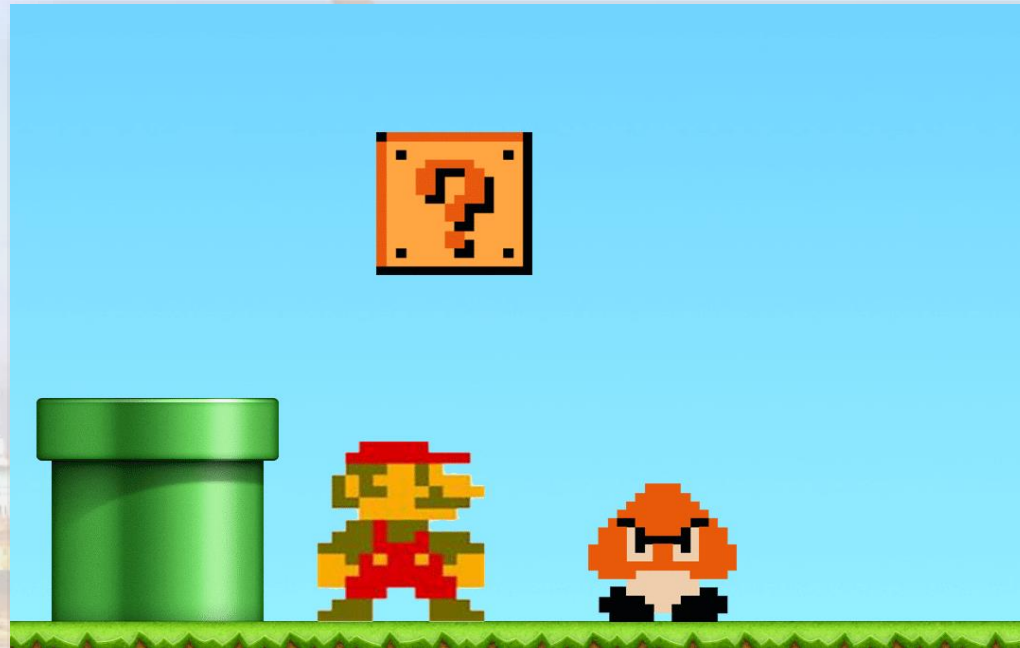
Philip Davidson
Wichita, Kansas



Things That Have Come And Gone



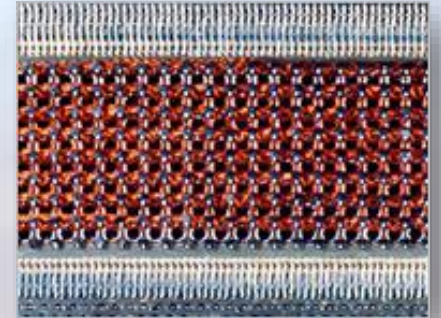
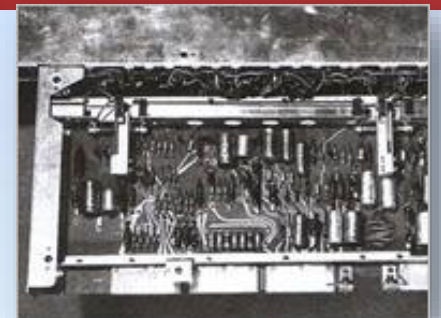
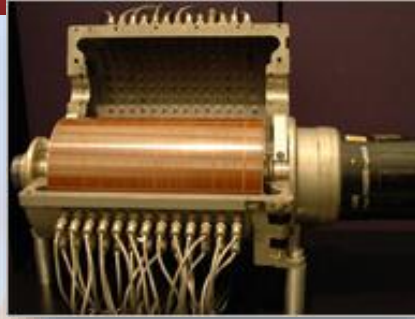
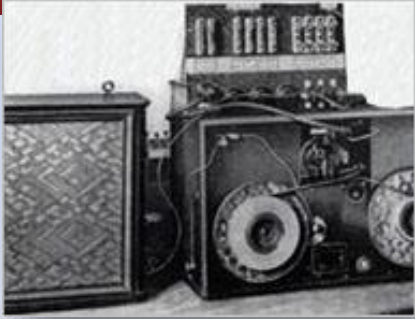
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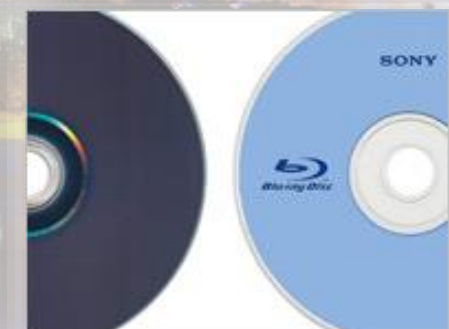
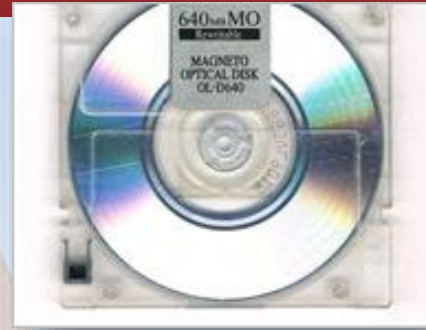
Things That Have Come And Gone



Information Explosion



Information Explosion



Information Explosion



Information Explosion

Cost For Storage of a Gigabyte of Data

1956 = \$2,000,000

2009 = \$1

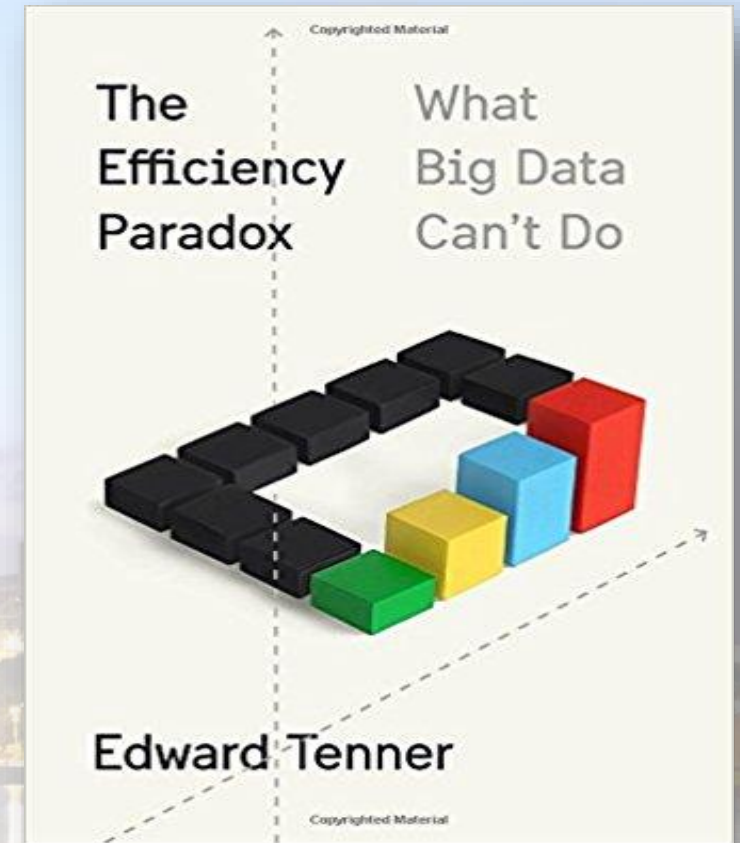
So, For Better or Worse

There is no divorce from the electronic world
Much like taxes, it is here to stay.

More Data – Less Productivity? More Complications?

Although technology is making our lives ever more convenient, it also may be having the unintended effect of lowering our skill set.

The Efficiency Paradox questions our ingrained assumptions about efficiency, showing how relying on digital platforms can in fact lead to wasted efforts, missed opportunities, and an inability to break out of established patterns.



The Solution



Ethical Duties of Attorneys

Rule 1.1 of the ABA Model Rules of Professional Conduct states: “competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation, and maintaining the knowledge.”

Comment 8 to Rule 1.1 requires lawyers to “keep abreast of changes in the law and its practice, including the benefits and risks associated with ***relevant technology***.”

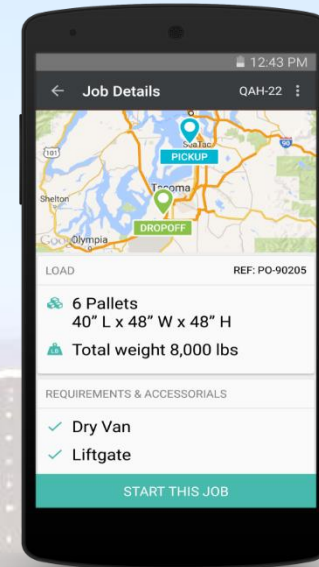
Ethical Duties of Attorneys

Attorneys must “have a general duty to be aware of social media as a potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.”

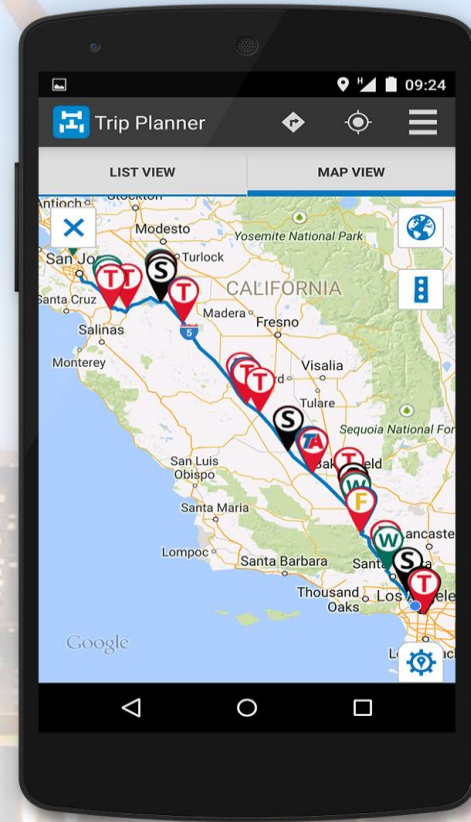
The Future



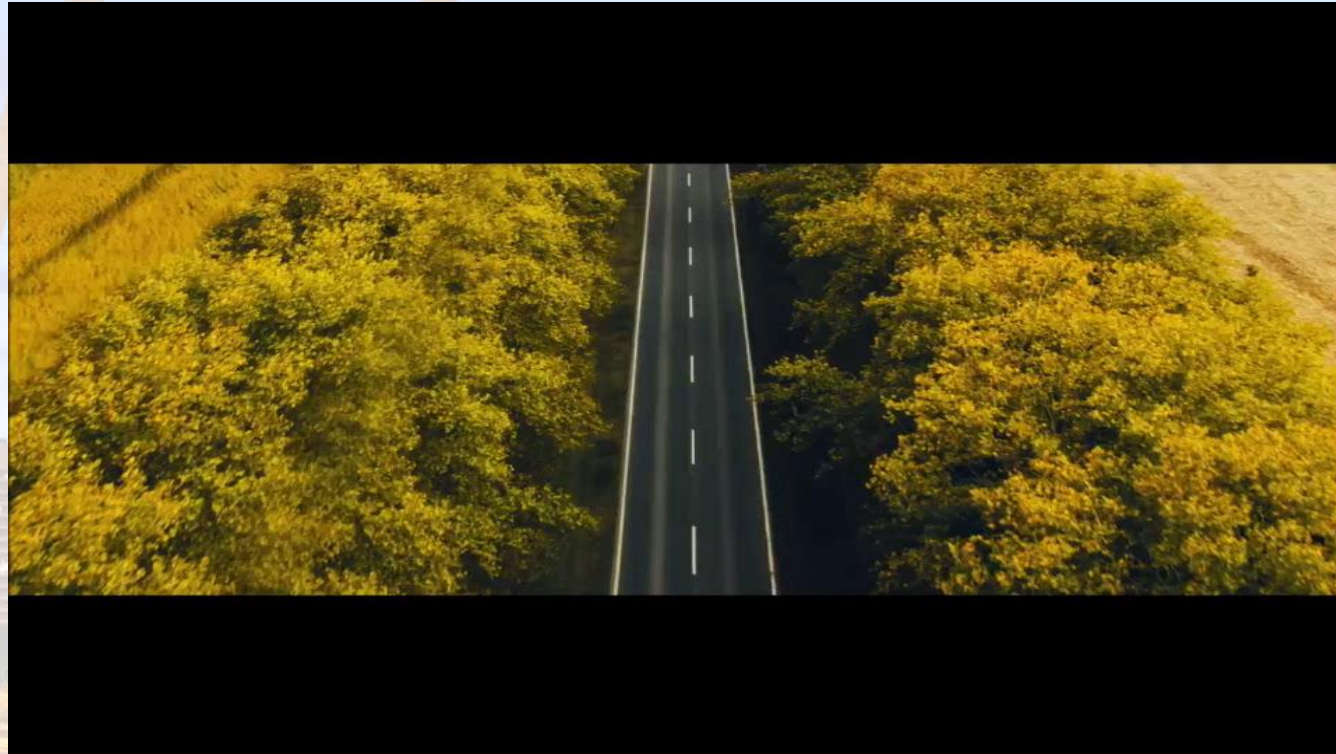
Uber for...



Apps, Apps, and More Apps



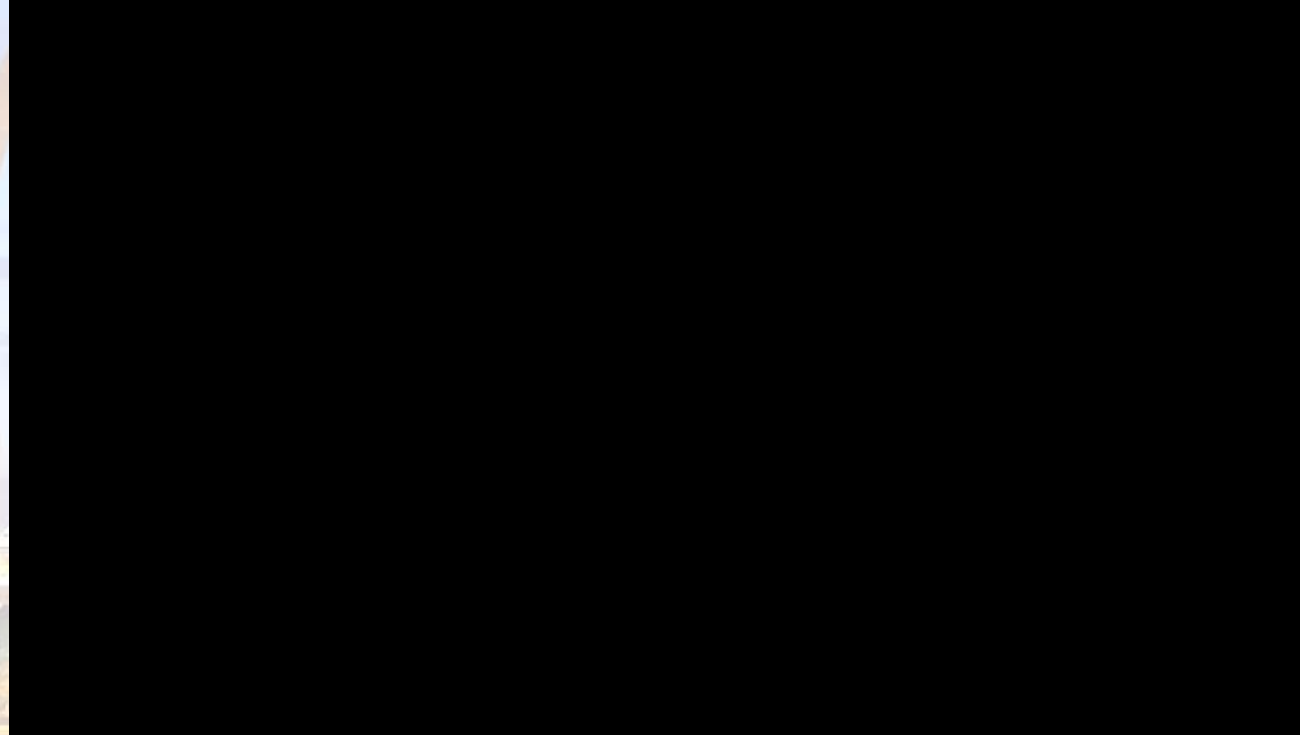
Vehicle Modifications



Autonomous Vehicles



Platooning Technology



“Technology is a useful servant but a dangerous master.”



Technology Affects Everything

- Use by Drivers and Company
- Post-Accident Investigation
- Litigation Hold
- Preservation Letter
- Filing of Suit and Written Discovery
- Trial

Use by Drivers and Company



Use by Drivers and Company

- Electronic Logging Devices
- Camera Systems
- Driver Scorecards
- Collision Mitigation Technology
- Dynamic Routing
- Trailer Tracking
- Temperature Tracking/Record Keeping
- Health and Fitness Trackers

Use by Drivers and Company



Use by Drivers and Company



Use by Drivers and Company



Post-Accident Investigation



Post-Accident Investigation



Post-Accident Investigation



Another One Bites the Dust



Commercial Uses

- Give an added perspective
- Minimize the human risk to hazards
- Provide first overview of situation
- Reduce need for other inspection methods

FAA Compliance: Part 107: August 29, 2016

- Allows small drone use for commercial purposes.
- Under 55 lbs.
- Testing or training provided by the FAA.
- Vetted by the TSA.
- At least 18 years of age.
- Pre-flight inspection required.
- Report serious injuries or property damage.

FAA Compliance: Part 107: August 29, 2016

- Cannot fly over people not involved.
- Cannot fly within 5 miles of an airport.
- Cannot fly at night.
- Cannot fly in bad weather.
- Cannot fly beyond line of sight.
- Cannot fly over 100 mph.
- Cannot fly above 400 feet.
- Cannot fly outside class G airspace.

Post-Accident Investigation: Advice to Driver

- After an accident, the driver should be advised about careful use of the internet, including social media, emails, blogs, etc.
- The driver should not create any electronic information related to accident.
- Ask the driver to send you his personal cell phone record for the day of the accident.

Post-Accident Investigation: Information is Everywhere

- Social networks (Facebook, LinkedIn, Match.com)
- Media sharing (YouTube, Instagram, Pinterest, Flickr)
- Activity tracking (Nike + Running, FourSquare, Fitbit)
- Blogs and microblogs (WordPress and Twitter)
- Social news (Digg and Reddit)
- Discussion forums, comments and reviews

Post-Accident Investigation: Information is Everywhere



• [BCFlake](#) wrote on 3/29/2010 2:05:55 AM:

As part of his punishment, the semi driver should have to watch videos of the baby's first (and only) year of life, including his first birthday, every year on what would be that child's birthday. A fine or token few months of jail are not enough. He should have to remember this child and the potential that his impatient and thoughtless action snuffed out.



• [bluegrassstripper](#) wrote on 3/29/2010 12:37:37 AM:

Another Semi-truck killer driver. Nothing can be done but these animals must start following the LAW.



• [letch77](#) wrote on 3/28/2010 10:41:51 PM:

"The semi was passing on the right shoulder, around another westbound semi that had stopped to turn left."

W.T.F??? The passing semi driver is an idiot and should not be on the road.

Post-Accident Investigation: Using Social Media

- Investigate claimants and their allegations.
- What is claimant's online identity?
- Photos, aliases, date of birth, relationship status, educational background, employment status, list of family members and friends, information related to the accident.

Post-Accident Investigation: Using Social Media

If you suspect that information has been deleted, visit www.archive.org or www.waybackmachine to search for old versions of the website.

Post-Accident Investigation: External Sources of Video



Post-Accident Investigation: External Sources of Video



Litigation Hold



Litigation Hold: What is Your Policy?

- Logs
- Electronic on board recording devices
- Data storage on tractors (ECMs, computers, etc.)
- Data storage on passenger vehicles (ECMs, air bag modules, computers, etc.)
- Cell phones
- GPS devices

Litigation Hold: What is Your Policy?

- Emails
- Calendars
- CD-ROMs, DVDs, flash drives
- Local hard drives, company server
- Word files, spreadsheets, photographs
- Instant messages
- Back-up tapes
- Website log files

Litigation Hold: What is Your Policy?

- It is estimated that 80% of ESI is never printed to paper.
- ESI classes are now being taught in law school.
- Be wary of devices that can be erased remotely.


Litigation Hold: What is Your Policy?



Litigation Hold: What is Your Policy?



Litigation Hold: What Information Should Be Retained



Hours of Service records	6 months
Maintenance records	1 year
Clean drug or alcohol test	1 year
Dirty drug or alcohol test	5 years
Driver Qualification file	3 years
Accident Register	1 year

Litigation Hold: What Information Should Be Retained?

- Preserve evidence that proves your case.
- Preserve evidence that disproves plaintiff's case.
- Avoid a spoliation charge.

Litigation Hold: What Information Should Be Retained?

- If your company has a policy for what is held in litigation hold....follow it!
- 30 days of logs on driver involved in accident.
- EDR and ECM – case by case basis.
- All maintenance records on tractor and trailer.
- Then FREEZE ongoing destruction of such records that could be relevant.

Litigation Hold: Drive Cam / Bendix / Smartdrive

- Challenges due to massive amounts of video data.
- Attorney subpoenaing vendor directly could obtain data not included in your subscription.

Litigation Hold

[REDACTED]

From: [REDACTED]
Sent: Tuesday, April 04, 2006 10:01 AM
To: Lisa
Subject: RE: 1st Qtr 2006 - royalty statement [REDACTED]

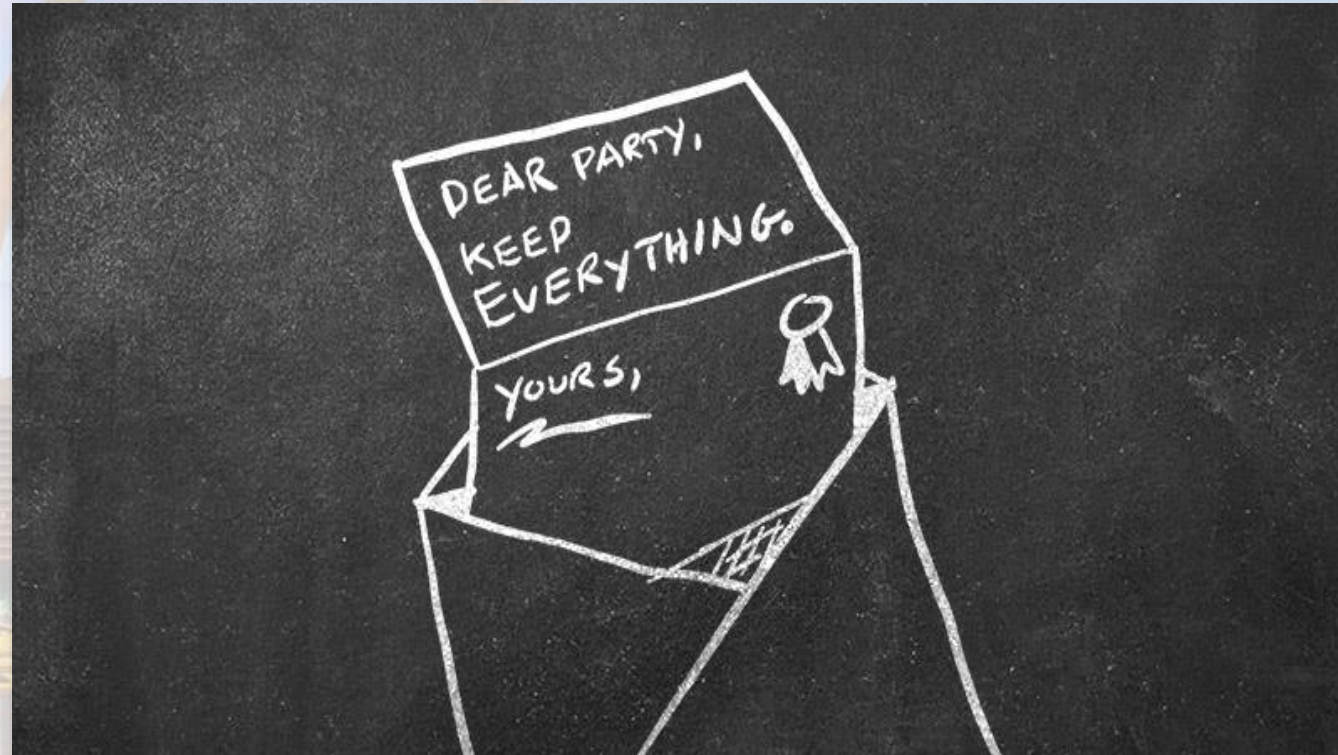
I told u guys to prepare a fire for all the documents.....seriously....

also, destroy bobo notes and contact information...

Litigation Hold: Going “Paperless”

- It starts with a single e-mail.
- The single e-mail is routed to several recipients.
- Replies are sent to the e-mail.
- Various individual and/or group dialogues ensue.
- The e-mail is forwarded to others, with comments.
- Some print the e-mails.
- Some write comments on the e-mail.

Preservation Letter



Preservation Letter: What Should Be Preserved?

- Information responsive to preservation letter.
- The company must affirmatively prevent destruction or alteration of potentially relevant information.
- The company should suspend normal practice of purging if litigation is anticipated.

Zubulake Decision

- Duty to preserve records attaches when litigation is instituted or when litigation can be reasonably anticipated.
- Service of complaint?
- Preservation letter?
- Notice of accident?

Zubulake Decision

- Monetary sanctions
- “Adverse inference” jury instruction
- Summary judgment/dismissal
- Preclusion of evidence/witnesses

Zubulake Revisited

“By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence.”

Zubulake Revisited

- Litigation hold must be written.
- All key players must be identified and included in hold to confirm their electronic and paper records are preserved.
- Must cease deletion of emails and preserve records of former employees.
- Must preserve back-up tapes when they are sole source of relevant information.
- Must create mechanism for collecting preserved records so they can be searched by someone other than employee.

Zubulake Revisited

This case is particularly significant in that the court imposed sanctions even though no intentional wrongdoing was found. In fact, the court, specifically noted that this was not a case of “egregious example of . . . destroying evidence.”

Not a One-Way Road

- Make requests to the claimant.
- Passenger vehicles may have event recorders



ONE WAY

Filing of Suit and Written Discovery



Federal Rules of Civil Procedure

- Fed. R. Civ. P. 26: During the initial meet and confer, parties must determine what electronic information could be relevant to the issues of the case, what form it will be retained and produced, and how that information will be preserved during pendency of the litigation.
- Fed. R. Civ. P. 16: Electronic discovery concerns should be raised and addressed by court at pre-trial scheduling conference.



THE JURY IS INSTRUCTED TO IGNORE THE LAW,
JUSTICE, LOGIC AND COMMON SENSE AND CONSIDER
ONLY THE HARMFUL, RANDOM EMAILS BURIED
AMONG THE DEFENDANT'S RECORDS.

Transportation Cases

- Williams v. McCollister, 2009 WL 4250021 (S.D. Tex. Oct. 6, 2009) (facts support determination of spoliation but because it is not a separate cause of action, plaintiff is limited to evidentiary sanction).
- Darling et al. v. J.B. Expedited Services et al., 2006 WL 2238913 (M.D. Tenn. Aug. 3, 2006) (Court ruled that motor carrier had duty to preserve beyond 6 months).

Transportation Cases

- Montemayor v. Heartland Transp. Inc., 2008 WL 4777004 (S.D. Tex. Oct. 30, 2008) (because safety director's testimony indicated retention policies may not have been followed when logs destroyed, spoliation claim survived).
- Frey v. Gainey Transp. Services, Inc., 2006 WL 3734157 (N.D. Ga. Dec. 14, 2006) (Court noted preservation would have been most prudent, but balanced low level of prejudice of conduct).

Transportation Cases

- Mahar v. US Xpress Enterprises, Inc., 688 F. Supp.2d 95 (N.D. N.Y. 2010) (party in possession of the evidence must bear the cost of preservation).
- U&I Corp. v. Advanced Medical Design, Inc., 2008 WL 821993 (M.D. Fla. March 26, 2008) (company sanctioned for failing to document its efforts to locate and produce emails contained on home personal computers of its employees).

Trial



Using Technology As A Sword

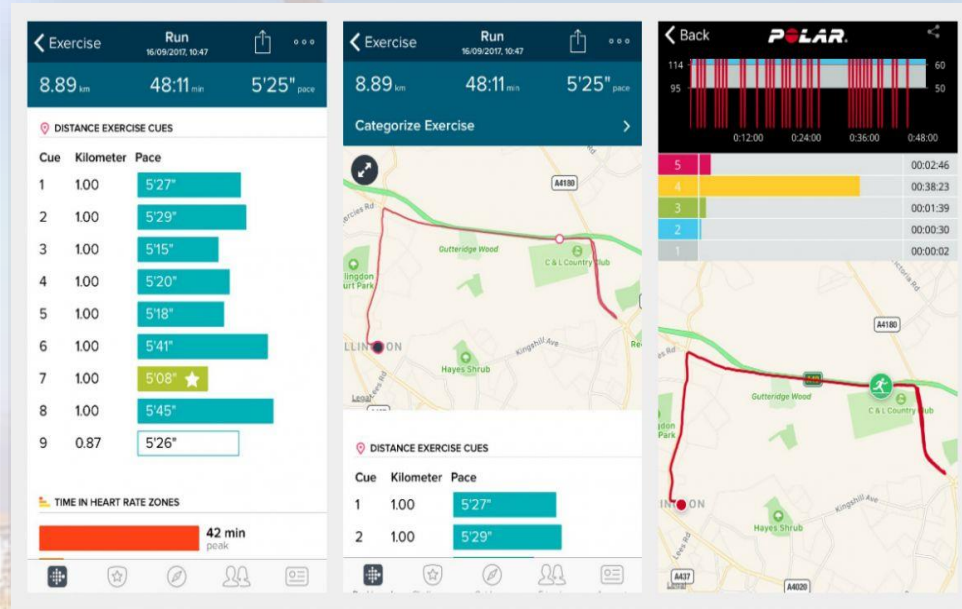
- What is the coaching purpose of the technology? Are you complying with your policy in timely fashion?
- Can failure to comply lead to liability concern?
- Any maintenance issues with equipment?
- When are drivers getting notification of hard stop?

Admissibility Issues

Electronic evidence must clear five potential “hurdles” to establish admissibility:

- Relevance: Rule 401
- Authenticity: Rule 901 and 902
- Hearsay rule: Rule 802
- Best evidence: Rule 1002, 1003 and 1004
- Probative value vs. prejudicial effect: Rule 403

Wearable Technology



Lancaster, PA False Rape Report

- Victim called 911 and reported she was sleeping when she woke up to find her attacker sexually assaulting her.
- During the investigation, the police found the victim's Fitbit on the floor "and when they downloaded its activity, the device became a witness against her."
- The activity data collected by the device revealed that the "victim" was actually awake and moving around the premises at the time she claimed she was attacked.

Evidentiary Challenges

- Reliability concerns
- Ability to misuse
- Data misinterpretation
- Large discrepancies in wearables

Voir Dire

Ask jurors whether they have ever seen or read anything on the internet about the accident and if they have ever commented about the accident on any internet site....especially in a small town.

Monitoring Juror Misconduct at Trial

- The jury is usually instructed to refrain from internet searches and social media communication about trial.
- ABA Formal Opinion 466 suggests that reviewing juror's internet presence or passive review of social media site is permissible, but requesting to friend a juror is a prohibited communication under Rule of Professional Conduct 3.5(6).

Lessons Learned

- Drivers need to be trained that anything written in emails or text messages could end up in front of a jury.
- Create and follow records retention policies.
- Preserve all potentially relevant information if litigation is anticipated.
- When preservation letter is presented....you are on notice.

A night-time photograph of the St. Louis skyline, featuring the Gateway Arch and various skyscrapers with their lights on, reflected in the water of the Mississippi River. The sky is a deep blue with some light clouds.

THANK YOU!!