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New Court Decision Highlights Importance of Preserving Text Messages

by Jana M. Landon and Peter Bogdasarian

When planning and executing a preservation and collection strategy, it is important to consider text messages as another potential source of electronically stored information. Failure to identify, preserve and collect text messages can have negative consequences for the organization and their case. A recent example comes out of California, where a U.S. District Court granted an adverse inference for the plaintiff's failure to preserve text messages. *NuVasive, Inc. v. Madsen Medical, Inc.*, 2015 WL 4479147 (S.D. Cal., July 22, 2015).

In *NuVasive*, the defendant company (Madsen Medical, Inc. (MMI)) sought access to text messages which could potentially supply evidence of coordination between NuVasive and former employees of MMI. The defendant alleged these text messages would show coordination aimed at terminating MMI's contractual relationship with NuVasive and the hiring of MMI's sales personnel at NuVasive. The defendants informed NuVasive of their interest in evidence of communications between NuVasive and MMI employees in August 2012. NuVasive issued a litigation hold in August 2012 and a follow-up hold in September 2013, but failed to ensure compliance by its employees with the terms of the hold. Phones were recycled or wiped before imaging in late 2013 and early 2014, and, in one instance, an employee testified that he may have deleted relevant text messages before turning his phone in to be imaged.

The Court held a properly tailored adverse inference instruction to be an appropriate remedy. This holding is consistent with similar cases concerning text messages seen in other District courts, such as *Calderon v. Corporacion Puertorrique de la Salud*, 2014 WL 171599 (D.P.R. Jan. 16, 2014), and *United States v. Suarez*, 2010 WL 4226524 (D.N.J. Oct 21, 2010). The defendants in *NuVasive* also sought attorney fees and costs, which the Court denied because the defendants were partially at fault for not taking steps to preserve the former employees' texts – the employees left the company after the date on which MMI informed NuVasive of its interest in its communications with MMI employees.

This case shows the importance of both issuing a robust legal hold and, once the hold is in place, acting to collect data which may be potentially at risk. Many mobile phones are programmed to automatically delete text messages after a certain period of time or upon reaching a certain volume of messages, and users can also manually delete texts (as was done in all three of the cases mentioned above). Many employers recycle old mobile phones when issuing new upgrades

to employees, which may make it impossible to locate the original device. Even where the device is in hand, forensically retrieving deleted text messages from a mobile phone is an uncertain exercise and mobile providers typically preserve only the time and phone number of incoming and outgoing texts, rather than the substance of the communication, which means the carrier will not be able to backfill gaps in the preservation. For these reasons, if there is potentially relevant ESI stored on mobile devices, its preservation and collection should be assigned a high priority in a litigation or investigation.



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