

In *Nuvasive, Inc. v. Kormanis*, 2019 WL 1171486 (M.D. N.C. Mar. 13, 2019), Magistrate Judge L. Patrick Auld awarded attorney's fees and expenses as a sanction for defendant's failure to preserve relevant text messages but deferred a decision on further curative measures and left to the jury the issue whether defendant destroyed the relevant ESI with the intent to deprive plaintiff of its use.

The defendant, a North Carolina medical products distributor, left his job on March 3, 2018, with InoSpine, the exclusive distributor of plaintiff's products, and joined Alphatech, a competitor. InoSpine, concerned that the defendant might sell competing Alphatech medical products in the same geographic region as he had for InoSpine, wrote defendant a letter on March 9, 2018, stating that it would bring legal action if it learned that defendant was engaging in such conduct in violation of his noncompete agreement. The plaintiff also instructed the defendant to "refrain from the destruction of relevant evidence ... including ... text messages and to take steps to preserve all such information." *Id.* at \*3. Plaintiff subsequently filed suit.

During discovery, defendant signed an affidavit stating that he had taken steps to back up data on his phone to preserve messages. When the defendant thereafter provided data to the plaintiff, however, he was not able to produce text messages prior to August 2018. He subsequently stated that he had unknowingly enabled a setting on his phone that erased text messages older than 30 days, and defendant testified that he was not aware that this setting was enabled until his counsel asked for the text messages during the litigation. The defendant later claimed that the feature may have been enabled by a Verizon store employee working on the phone's video functions, but he was unable to identify which store he visited or when the visit took place. *Id.* at \*5. When asked during his deposition about the affidavit stating that he had taken steps to preserve the phone messages, the defendant acknowledged that he had not taken any steps other than to stop deleting emails and to back up his phone, but he did not know how to check whether the text messages had actually been uploaded.

As a threshold matter, the magistrate judge considered the plaintiff's claim that the court could invoke its inherent authority in sanctioning defendant. Magistrate Judge Auld indicated that the plain text of Rule 37(e) and the advisory committee's notes of Rule 37 precluded the court's use of its inherent authority to order spoliation sanctions and concluded that its authority was limited by the requirements set forth in Rule 37. *Id.* at \*3. The magistrate judge then determined that at a minimum, the defendant failed to implement even the most rudimentary litigation hold or confirm that his phone settings were configured in a manner that would ensure message preservation after he received the plaintiff's preservation notice.

After holding that the defendant failed to take reasonable steps to preserve his texts, the magistrate judge turned to the sanctions to be imposed. He noted that "[f]rom its inception, this litigation has revolved around the question of whether [the defendant] marketed Alphatech's products to doctors to whom he formerly marketed Plaintiff's products, in violation of his [non-compete] contract." *Id.* at \*11. Magistrate Judge Auld held that attorney's fees and expenses associated with litigating the loss of the messages were appropriate to cure some of the prejudice caused by the defendant's failure to preserve them but deferred ruling on whether further sanctions were necessary to fully cure the prejudice caused by the defendant's spoliation until the factual record was further developed during trial.

Finally, the magistrate judge ruled that the evidence supported but did not compel a finding that the defendant destroyed the relevant ESI with the intent to deprive plaintiff of its use, and he therefore left that issue for resolution by the jury. If the fact-finders determined that the spoliation was intentional, the court would instruct them to presume that the lost messages contained information that was unfavorable to the defendant. *Id.* at \*12.