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Paula Schaefer

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**ATTORNEY NEGLIGENCE AND NEGLIGENT SPOILIATION:
THE NEED FOR NEW TOOLS TO PROMPT ATTORNEY
COMPETENCE IN PRESERVATION**

*Paula Schaefer**

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I. INTRODUCTION

The destruction of evidence relevant to pending or anticipated litigation that prevents its use by an opposing party is termed spoliation.¹ Spoliation can occur through negligent or intentional misconduct by a party or its attorney in performing the duty to preserve.²

The cause of intentional spoliation³ is easy to understand and combat. It takes the form of a party acting with the intent to keep harmful documents out of the hands of an opposing party.⁴ In some rare cases, an

1. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999). This common law duty to preserve is now referenced in the Federal Rules of Civil Procedure. FED. R. CIV. P. 37(e).

2. FED. R. CIV. P. 37(e) (distinguishing penalties available for spoliation caused by a party who failed to take reasonable steps to preserve information and spoliation caused by a party who acted with intent to deprive another party of the information's use in the litigation). While courts have sometimes distinguished grossly negligent spoliation and negligent spoliation (*see, e.g.*, Sekisui American Corp. v. Hart, 945 F. Supp. 2d 494, 503 (S.D.N.Y. 2013)), that distinction is not material for purposes of this Article. Here, the only distinction that matters is whether spoliation is negligent or intentional. *See also infra* note 3 (explaining the meaning of "intentional spoliation").

3. In this Article, the phrase "intentional spoliation" is used to refer to spoliation that occurred when a party acted with the intent to prevent the information's use by another party in the litigation. FED. R. CIV. P. 37(e). A party who engages in such spoliation is sometimes described as having acted "intentionally," "willfully," or in "bad faith." *See, e.g.*, CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 501 (S.D.N.Y. 2016) ("Spoliation designed to deprive an adversary of the use of evidence in litigation qualifies as bad faith conduct."); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 530 (D. Md. 2010) (describing the meanings of intentional, willful, and bad faith in spoliation analysis).

4. GN Netcom, Inc. v. Plantronics, Inc., No. CV 12-1318-LPS, 2016 WL 3792833, at *2 (D. Del. July 12, 2016) (explaining that the executive for the defendant in an antitrust case defied litigation hold instructions and deleted more than 40% of his emails for relevant time frame and instructed other employees to delete emails); DVComm v. Hotwire Commc'ns, LLC, No. CV 14-5543, 2016 WL 7018548, at *3 (E.D. Pa. Mar. 31, 2016) (ruling that because court found that party's owner intentionally deleted rough draft of business plan, it was proper to give an adverse inference instruction permitting the jury to infer that the draft plan would have been unfavorable); CAT3, 164 F. Supp. 3d at 499-500 (explaining that plaintiffs intentionally altered emails to remove information that was at issue in the case).

attorney may even encourage and assist in intentional spoliation.⁵ The penalties for intentional spoliation can be severe,⁶ serving as a punishment for the party who engaged in the misconduct and as a disincentive to future parties who might be tempted to do the same.⁷ Attorneys who encourage or facilitate intentional spoliation can expect to be sanctioned⁸ and may even face professional discipline.⁹

Negligent spoliation sounds less sinister, but it can be just as vexing. After all, like intentional spoliation, negligent spoliation compromises evidence that a party was entitled to use to prove its case. The key to negligent spoliation is the failure to act reasonably to preserve information¹⁰ after the preservation duty was triggered.¹¹ Negligent spoliation can encompass a wide variety of actions, including automated deletion and intentional deletion of documents.¹² The important question is not whether the document was deleted intentionally, but whether the party deleted the document with the intent to deprive another party of its use (intentional spoliation) or because the party failed to act reasonably to ensure that the document was preserved (negligent spoliation).¹³

5. *Lester v. Allied Concrete Co.*, 736 S.E.2d 699, 702 (Va. 2013) (explaining that the attorney told his paralegal to direct his client to “clean up” his Facebook page” to prevent harmful pictures being introduced at trial).

6. FED. R. CIV. P. 37(e)(2) (permitting severe sanctions such as dismissal, default, and adverse inference instructions against a party that engages in intentional spoliation).

7. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (“The applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.”); *see, e.g., Lester*, 736 S.E.2d at 703 (sanctioning the attorney \$542,000 and the client \$180,000 to cover the opposing party’s attorneys’ fees and costs addressing spoliation issue and giving the jury adverse inference instruction); *GN Netcom*, 2016 WL 3792833, at *14 (awarding the opponent, in response to intentional spoliation, its fees and costs related to the spoliation, punitive sanction of \$3 million, possible evidentiary sanctions to be determined, and an adverse inference instruction).

8. *Lester*, 736 S.E.2d at 703 (sanctioning attorney Matthew Murray in the amount of \$542,000 for his role in intentional spoliation); *CAT3*, 164 F. Supp. 3d at 502, n.7 (encouraging the plaintiffs to indicate in an objection if they believe their former counsel bears all or some responsibility for the plaintiffs’ intentional spoliation such that the attorneys should pay a proportionate share of the monetary sanction).

9. *See, e.g., Agreed Disposition Mem. Order, In re Murray*, VSB Docket Nos. 11-070-088405 and 11-070-088442 (July 17, 2013) (suspending Matthew Murray’s license for five years as a result of misconduct that included encouraging his client to delete Facebook photographs).

10. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 529 (D. Md. 2010) (“Negligence [in the context of spoliation] . . . is ‘[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation[.]’”) (internal citations omitted).

11. *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008) (explaining that a party has a duty to preserve information when it has notice that the evidence is relevant to litigation or when it knows (or should have known) the evidence may be relevant to anticipated litigation).

12. *Victor Stanley*, 269 F.R.D. at 530 (explaining that an example of negligent spoliation is a party negligently failing to turn off an automatic deletion function).

13. For example, assume that a party’s employee intentionally deletes email messages from

The case *Feist v. Paxfire* provides an example of negligent spoliation.¹⁴ Betsy Feist alleged that defendant Paxfire violated the Wiretap Act by intercepting her internet searches.¹⁵ Ms. Feist sought statutory damages (which take into account the number of violations),¹⁶ but when Paxfire requested evidence of Ms. Feist's internet search history (in order to refute her claim that Paxfire intercepted Feist's searches),¹⁷ it learned that she had destroyed at least some of that information by using cleaning software after filing the litigation.¹⁸ Ms. Feist, through her counsel, initially asserted that the search history was not relevant.¹⁹ She later explained that she regularly used the cleaning software²⁰ and that she did not preserve her browsing history because she had not been asked to preserve it.²¹

In its order imposing spoliation sanctions,²² the *Feist* court ruled that it was "not reasonable that Feist continued to use the [cleaning] software once this lawsuit began."²³ The court asserted that Ms. Feist is "not a novice at computer functioning"²⁴ and expressed that it was troubled by Ms. Feist's assertion that she did not know her browsing history was relevant to her claims under the Wiretap Act.²⁵

her inbox that should have been preserved for litigation. Even though the deletion is intentional, the spoliation is most accurately described as negligent if it was caused by the party's failure to act reasonably (such as by failing to identify the email as information that should be preserved or by failing to communicate a litigation hold to the employee) or intentional if the party's intent was to deprive another party of the use of the information; *see supra* notes 2-3 (defining negligent and intentional spoliation).

14. *Feist v. Paxfire, Inc.*, No. 11CV5436LGSRL, 2016 WL 4540830, at *1 (S.D.N.Y. Aug. 29, 2016).

15. *Id.*

16. *Id.*

17. *Id.* (explaining Paxfire's argument that it needs Feist's "cookies and web browsing history" to defend against her claims).

18. *Id.* at *2. Information was also lost as a result of Feist's computer crashing. *Id.*

19. *Id.* at *1 ("Feist initially objected to production, arguing that the requested information was not relevant.").

20. *Id.* at *2 (explaining that in a deposition Feist admitted using cleaning software after commencement of the lawsuit, but stated that it was used for "computer maintenance").

21. *Id.* at *4 ("[Feist] argues that she had no reason to preserve her browser history because she was not asked to preserve it.").

22. *Id.* at *5.

23. *Id.* at *4. The court later states that it "does not conclude that Feist acted intentionally to deprive Paxfire of all of the information." *Id.* This line may suggest that the court believed that in some respects Feist engaged in intentional spoliation. Nonetheless, this case seems most accurately categorized as a negligent spoliation case given the court's discussion of the lack of reasonableness of Feist's efforts.

24. *Id.* The court earlier noted that Feist published two children's workbooks on basic computer programming and took programming courses in college. *Id.* at *3.

25. *Id.* at *4.

This Article considers the *Feist* case and numerous other negligent spoliation cases to discern why spoliation happens and what can be done to prevent it. While Ms. Feist may appear to be the central character in the spoliation drama in that case, this Article asserts that a more important player is her counsel. Though attorneys seldom receive much attention in negligent spoliation cases, their actions (and more often, their inactions) are central to understanding and addressing negligent spoliation in civil litigation.

Following this introduction, Section II makes the case that attorney negligence is the primary cause of negligent spoliation in modern civil litigation. This Section explains the high level of attorney knowledge and effort necessary to combat spoliation today. While the common law duty to preserve did not change in the ediscovery era, the task became substantially more challenging. Changes in the volume of information (now primarily in the form of electronically stored information (ESI)), its numerous possible storage locations, its ease of deletion, and its relevance to litigation all complicated the task of preservation. Attorney knowledge and effort are necessary to modern preservation, yet cases of negligent spoliation reveal attorneys are taking a hands-off approach to the task. Though attorney negligence is seldom highlighted in these cases, it is undeniably present in the failures courts describe as they impose spoliation sanctions.

Having explained that attorney competence is key to preservation, Section III turns to the question of whether attorneys are motivated—consciously or subconsciously—to perform preservation in a substandard manner. A widely publicized 2015 amendment to the Federal Rules of Civil Procedure (FRCP) explicitly prohibits the harshest sanctions—dismissal, default, and adverse inference instructions—for unintentional spoliation.²⁶ Some may wonder whether, recognizing that severe sanctions are off the table, some attorneys might make a rational economic decision to perform spoliation negligently. Section III starts by considering the sanctions that are imposed for negligent spoliation and concludes that the sanctions would not incentivize a rational attorney to engage in negligent spoliation. But there are other factors that may contribute to attorneys failing to develop competence in this area. The evidence suggests that attorney incompetence may be a product of attorney self-interest and partisan bias. Behavioral legal ethics research provides insight into how even a well-intentioned attorney may misjudge what information should be preserved.

26. FED. R. CIV. P. 37(e).

Typically, attorneys face substantial legal incentives to develop competence. Malpractice liability, sanctions, and professional discipline all play a part in encouraging attorneys to develop the knowledge and to act with the skill of a competent attorney. Section IV explains why these common legal deterrents to incompetence do not motivate attorneys in this area.

Finally, Section V considers where pressure can be applied to incentivize attorney competence in preservation. This Section explains how amending the FRCP to require preservation efforts to be revealed in initial disclosures would change attorney behavior and result in attorneys developing competence in preservation. Even in the absence of such a change to the FRCP, there are steps opposing counsel and judges can take under current rules to address the reasons attorneys act negligently, resulting in better preservation.

II. ATTORNEY COMPETENCE AND NEGLIGENT SPOILIATION

A. *The Relative Simplicity of Preservation in the Past*

In order to appreciate the complexity of preservation today, it is helpful to understand preservation in the not-so-distant past. Just 25 years ago, negligent spoliation was relatively rare.²⁷ A search of 1992 federal cases reveals only 19 cases that contain the term “spoliation.”²⁸ Of these, only four²⁹ contain an allegation that an opposing party in litigation engaged in spoliation.³⁰ Two of these involve allegations that a party intentionally destroyed evidence to deprive another party of its use in the

27. See generally Lawrence B. Solum & Stephen J. Marzen, *Destruction of Evidence*, 16 No. 1 LITIG. 11 (1989) (describing the novelty of discovery sanctions for destruction of evidence and exclusively citing cases involving intentional but not negligent spoliation).

28. Westlaw search in all federal database in the date range January 1, 1992 to December 31, 1992. Search result on file with the author.

29. *Jeanblanc v. Oliver Carr Co.*, No. Civ. A. 91-0128(JHG), 1992 WL 189434 (D.D.C. July 24, 1992), *aff'd*, 62 F.3d 424 (D.C. Cir. 1995); *Gen. Envtl. Sci. Corp. v. Horsfall*, 141 F.R.D. 443 (N.D. Ohio 1992), *vacated*, 25 F.3d (6th Cir. 1994); *Cassity v. Atchison, Topeka & Santa Fe Ry. Co.*, No. Civ. A. 91-2153-O, 1992 WL 88018 (D. Kan. Mar. 18, 1992); *Lee v. Boyle-Midway Household Prod., Inc.*, 792 F. Supp. 1001 (W.D. Pa. 1992).

30. As to the other cases of the 19, in four of the cases, a party alleged a cause of action for spoliation. *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 365 (9th Cir. 1992); *Cort v. Am. Arbitration Ass'n*, 795 F. Supp. 970 (N.D. Cal. 1992); *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966 (W.D. La. 1992); *Foster v. Lawrence Mem'l Hosp.*, 809 F. Supp. 831 (D. Kan. 1992). Of the remaining 11 cases, there is one criminal case and the others contain a reference to spoliation in a headnote, statute, or in a quote from a cited case, but do not appear to involve an allegation of spoliation. See *supra* note 28.

case.³¹ The other two involve allegations of negligent spoliation. In one, a party's attorney negligently lost a container of drain cleaner that was a key piece of evidence in the case.³² In the other, a party claimed that the opposing party "failed to exercise due diligence" to preserve physical evidence relevant to the case.³³

The reason spoliation allegations were so rare in 1992 is that preservation was easy. It required very little knowledge or effort on the part of a lawyer. As today, a competent lawyer should have informed the client of the client's duty to preserve anything relevant to pending or anticipated litigation.³⁴ The nature of the pre-1992 documents made it unlikely that a lawyer or client would make a mistake. Even when a mistake was made, it was seldom irreversible.

A significant reason was the number of documents. The volume of documents possibly relevant to a case was relatively modest by today's standards. Email was not widely used in business. In 1992, only 21 federal cases contained a reference to "email" (or "e-mail" or "electronic mail").³⁵ The communication method was so new that courts sometimes felt it necessary to explain the term.³⁶ In this era, most conversations were not memorialized in writing (people talked on the phone or in person), and most conversations that were in writing took the form of a letter or notes from a meeting.³⁷ Most documents subject to discovery in a case (whether communications or otherwise) were in paper form.³⁸ They were typically

31. *Jeanblanc*, 1992 WL 189434, at *2 ("Jeanblanc systematically, purposefully, fastidiously, and willfully destroyed every scrap of paper in his possession that pertains to the subject matter of the instant suit."); *Gen. Envtl. Sci. Corp.*, 141 F.R.D. at 451 (explaining that the defendants allegedly destroyed documents while a motion to compel production of those documents was pending).

32. *Lee*, 792 F. Supp. at 1004.

33. *Cassity*, 1992 WL 88018, at *1.

34. *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) ("Sanctions may be imposed against a litigation who is on notice that documents and information in its possession [that are] relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence . . .").

35. Westlaw search in "all federal" database in the date range January 1, 1992 to December 31, 1992. Search result on file with the author.

36. *See, e.g., Saxton v. Am. Tel. & Tel. Co.*, 785 F. Supp. 760, 763 (N.D. Ill. 1992) ("After the May 15 meeting a series of computer-transmitted correspondence (E-mail) was volleyed between Holmes and Saxton."), *aff'd*, 10 F.3d 526 (7th Cir. 1993). In one 1992 case, the government argued that email messages were not "records" for purposes of the Freedom of Information Act. *Armstrong v. Bush*, 807 F. Supp. 816, 821 (D.D.C. 1992).

37. *See, e.g., Trailer Rental Co. v. Buchmeier*, 800 F. Supp. 759, 760 (E.D. Wis. 1992) (describing the key letter in the case); *Borschow Hosp. & Med. Supplies, Inc. v. Burdick-Siemens Corp.*, 143 F.R.D. 472, 484 (D.P.R. 1992) (describing four letters produced by the plaintiff); *Perceptics Corp. v. Societe Electronique et Systemes Trindel*, 907 F. Supp. 1139, 1141 (E.D. Tenn. 1992) (describing a letter that discussed attached meeting notes).

38. *See, e.g., Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, No. Civ. 89-1701 (CSF), 1992

stored in boxes, drawers, or file cabinets in the client's office.³⁹

Another reason negligent spoliation was unlikely in this era was that automated processes did not result in document destruction. Though corporate clients had document retention policies, nothing about executing those policies was automatic.⁴⁰ Employees had to make an effort to locate and destroy documents consistent with a document retention policy.⁴¹ There was a greater risk that employees would forget about the document retention policy than employees being so diligent in following the policy that they might accidentally shred documents that should have been preserved for litigation.

Further, in the recent past, preserving relevant documents was largely within the capabilities of a lawyer's client.⁴² So long as the lawyer explained the duty to preserve and the categories of documents relevant to the case, then finding and preserving that information was relatively easy. A client could easily locate the relatively small number of relevant documents. Collecting documents entailed walking to physical locations in the office or offsite storage where documents may be located and asking questions of the people who generated or kept those documents. And significantly: if something relevant was missed initially, it could likely be located later because there was no automatic deletion.

B. The High Level of Attorney Competence Needed to Avoid Negligent Spoliation in the Modern Era

Though the legal duty of preservation is unchanged in the modern era—a client must preserve relevant information when it reasonably

WL 183712, at *1 (D.N.J. July 20, 1992) (describing the “extensive” discovery in the case, with the plaintiff producing approximately 50,000 “pages of documents”); *Lert v. Nielsen*, No. 92 C 2216, 1992 WL 212592, at *1 (N.D. Ill. Aug. 27, 1992) (showing that the plaintiff produced 2,700 pages of documents in response to the defendant's request for production of documents).

39. *See, e.g., Meredith v. Beech Aircraft Corp.*, No. 89-1592-K, 1992 WL 190675, at *3 (D. Kan. July 10, 1992) (showing that the plaintiff produced original, handwritten performance reviews that had been located in a file cabinet), *aff'd in part, rev'd in part*, 18 F.3d 890 (10th Cir. 1994); *Murphy v. Williams*, 145 F.R.D. 76, 77 (E.D. Mich. 1992) (discussing the review of 26 file cabinets to locate documents).

40. *See, e.g., Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1447 (C.D. Cal. 1984) (explaining that relevant paper and electronic records were destroyed by company employees after they were prompted by the company president to continue following the company's “document retention or destruction policies or practices”).

41. *Id.*

42. When the term “client” is contrasted with “attorney” in this Article, the in-house attorney is treated not as a client but as an attorney. In other words, when the Article references the abilities or inabilities of “clients” to preserve evidence, those references are to lay clients or to the lay agents of organizational clients.

anticipates litigation⁴³—allegations of spoliation are on the rise. While only 19 federal cases contained the term spoliation in 1992, the same search reveals 677 cases in 2016 and 649 cases in 2017.⁴⁴ Further refining the search to seek cases that reference the spoliation sanctions rule, FRCP 37(e), and the terms “spoliation,” “preserve,” or “preservation,” reveals 96 cases in 2016 and 87 cases in 2017.⁴⁵ The increase in cases with allegations of spoliation is largely attributable to the character of ESI.⁴⁶ The volume of information, how and where it is stored, its vulnerability to deletion, and the sometimes complex issue of which categories of ESI are relevant to claims and defenses are all new wrinkles in the modern era. Each of these factors makes preservation substantially more complex.

First, consider the volume. Electronic documents are created at a substantially higher rate than the paper documents of the past.⁴⁷ Conversations that once would have occurred in person or by phone (or not at all) are now recorded in email, text message, and other electronic formats.⁴⁸ In contrast to the 21 federal cases that referenced email or

43. *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) (“A party’s duty to preserve evidence comes into being when the party has notice that the evidence is relevant to the litigation or should have known that the evidence may be relevant.”); *see also* FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment (explaining that the new Rule 37(e) does not create a new duty to preserve but relies upon the duty as established by case law).

44. Westlaw search for the term “spoliation” in the “all federal” database in the date range January 1, 2016 to December 31, 2016 and in the same database in the date range January 1, 2017 to December 31, 2017. Search result on file with the author.

45. Westlaw search for “37(e)” and either “spoliation” or “preserve!” in “all federal” database in the date range January 1, 2016 to December 31, 2016 and in the same database in the date range January 1, 2017 to December 31, 2017. Search result on file with the author.

46. *See, e.g., Rinkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (“But applying them to determine when a duty to preserve arises in a particular case and the extent of that duty requires careful analysis of the specific facts and circumstances.”).

47. The first edition of the *Sedona Principles*, published in 2003, recognized how electronic information caused an increase in the volume of information subject to discovery: “[E]lectronic documents are created at much greater rates than paper documents. As a result, the amount of information available for potential discovery has exponentially increased with the introduction of electronic data.” *The (2004) Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 5 SEDONA CONF. J. 151, 154 (Fall 2004) (post-public comment version to March 2003 version) [hereinafter *Sedona Principles*]. The introduction to the current edition notes that it was necessitated by “an even greater explosion in the volume and diversity of forms of electronically stored information.” *The Sedona Conference Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 8 (forthcoming 2018) [hereinafter *Sedona Principles* (3d ed. Oct. 2017)].

48. A lack of communications produced in modern litigation is cause for concern. *See, e.g., Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, No. EDCV141926JAKSPX, 2016 WL 6609208, at *2 (C.D. Cal. July 12, 2016) (“At the heart of the controversy [regarding preservation and document production] lies the lack of communications produced by [plaintiff] . . .”), *rep. and recommendation adopted*, No. EDCV1401926JAKSPX, 2016 WL 6901696 (C.D. Cal. Sept. 2, 2016).

related terms in 1992,⁴⁹ the same search in 2017 reveals 10,000 cases.⁵⁰

Second, storage is an issue in the modern era. Most documents no longer take the form of paper in a file cabinet.⁵¹ They are electronic pieces of information in various formats that may be found on a server,⁵² on a computer (at home or at work),⁵³ on a mobile phone or tablet,⁵⁴ on social media platforms,⁵⁵ in the cloud,⁵⁶ on a thumb drive,⁵⁷ in the search history on a web browser,⁵⁸ or any number of other locations.⁵⁹ Because storage becomes less expensive each year, it is possible to keep large volumes of information for long periods of time, making it especially difficult to locate and preserve all of the information relevant to any given case.

Third, unlike the paper document era, today's information is easily

49. See *supra* note 35 and accompanying text.

50. Westlaw search in "all federal" database in the date range January 1, 2017 to December 31, 2017. Search result on file with the author.

51. Of course, even in the modern era, parties to litigation also maintain paper documents in physical files. See, e.g., *Zbyski v. Douglas Cty. Sch. Dist.*, 154 F. Supp. 3d 1146, 1157 (C.D. Colo. 2015) (describing the practice of placing copies of materials in the official files for each teacher located in the school's main office and the principal's habit of taking notes in meetings and putting them in her desk).

52. See, e.g., *Arrowhead Capital Fin., Ltd. v. Seven Arts Entm't, Inc.*, No. 14 Civ. 6512 (KPF), 2016 WL 4991623, at *20 (S.D.N.Y. Sept. 16, 2016) (discussing a party's loss of access to relevant information on a third party's server when it was delinquent in paying for use of the server), *reconsideration granted in part*, No. 14 Civ. 6512 (KPF), 2017 WL 1653568 (S.D.N.Y. May 2, 2017).

53. See, e.g., *Lexpath Techs. Holdings, Inc. v. Welch*, No. 13-CV-5379-PGS-LHG, 2016 WL 4544344, at *2 (D. N.J. Aug. 30, 2016) (explaining that the plaintiff claimed defendant deleted evidence on a laptop).

54. See, e.g., *In re Ethicon, Inc.*, No. 2:12-CV-00497, 2016 WL 5869448, at *1 (S.D.W. Va. Oct. 6, 2016) (explaining that the plaintiff alleged spoliation of ESI stored on an employee's company-issued devices); *Stinson v. City of New York*, No. 10 Civ. 4228 (RWS), 2016 WL 54684, at *5 (S.D.N.Y. Jan. 5, 2016) (finding that the defendant made no effort to preserve text messages on smart phones).

55. See, e.g., *Thurmond v. Bowman*, No. 14-CV-6465W, 2016 WL 1295957, at *2 (W.D.N.Y. Mar. 31, 2016) (explaining that the defendants asserted spoliation of Facebook posts by plaintiff), *rep. and recommendation adopted*, 199 F. Supp. 3d 686 (W.D.N.Y. 2016).

56. See, e.g., *Earthbound Corp. v. MiTek U.S.A, Inc.*, No. C16-1150 RSM, 2016 WL 4418013, at *3, *12 (W.D. Wash. Aug. 19, 2016) (describing cloud-based storage used by the defendant and ordering the defendant not to delete, destroy, or move any data from any cloud-based storage account); Cindy Pham, *E-Discovery in the Cloud Era: What's A Litigant to Do?*, 5 HASTINGS SCI. & TECH. L.J. 139, 142 (2013) ("[C]loud computing [including cloud storage] is an Internet-based service which provides users access to software, resources, and information stored elsewhere and managed by someone else, anytime and anywhere.").

57. See, e.g., *First Am. Title Ins. Co. v. Nw. Title Ins. Agency*, No. 2:15-CV-00229, 2016 WL 4548398, at *5 (D. Utah Aug. 31, 2016) (discussing the loss of a thumb drive containing evidence).

58. See, e.g., *Marten Transp., Ltd. v. Plattform Advert., Inc.*, No. 14-CV-02464-JWL-TJJ, 2016 WL 492743, at *3 (D. Kan. Feb. 8, 2016) (explaining that the defendant claimed spoliation when plaintiff did not preserve the internet search history on one of its computers that would have revealed whether its employee had accessed the plaintiff's website).

59. See, e.g., *Storey v. Effingham Cty.*, No. CV415-149, 2017 WL 2623775, at *3 (S.D. Ga. June 16, 2017) (discussing jail video evidence).

deleted.⁶⁰ In any of its possible storage locations, ESI is vulnerable to automated change or deletion⁶¹ (such as deletion of emails or other electronic documents after a set time period)⁶² or an individual's innocent decision to delete files at the touch of a button (such as to deal with space limits for email storage).⁶³

Finally, modern-day ESI complicates the relevance determination. There is so much information in so many locations that it can be difficult for clients to determine what is relevant to a case.⁶⁴ As a result, a lawyer's simple instruction to a client to preserve what is "relevant" is often insufficient guidance.⁶⁵ It may be particularly difficult for a client to assess what information would be relevant to an *opponent's* claims and defenses.⁶⁶ Because lawyers are in a superior position to their clients to understand the legal claims and defenses that the lawyer or opposing counsel has asserted and the character of information potentially relevant,

60. Timothy J. Chorvat, *E-Discovery and Electronic Evidence in the Courtroom*, 17 BUS. LAW. TODAY (Sept./Oct. 2007) (explaining that in the ediscovery era, ESI can be "destroyed in new and different ways, sometimes without . . . conscious awareness" of those responsible).

61. *Sedona Principles*, *supra* note 47, at 155 ("[C]omputer information, unlike paper, has dynamic content that is designed to change over time even without human intervention.").

62. *Barnett v. Deere & Co.*, No. 2:15-CV-2-KS-MTP, 2016 WL 4544052, at *2-3 (S.D. Miss. Aug. 31, 2016) (describing three categories of documents that the defendant electronically destroyed within set time periods pursuant to its document retention policies); *Matthew Enter., Inc. v. Chrysler Grp. LLC*, No. 13-CV-04236-BLF, 2016 WL 2957133, at *2 (N.D. Cal. May 23, 2016) (explaining that the customer communication database records were automatically deleted after 25 months); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 333 (D.N.J. 2004) (explaining that emails were deleted automatically when litigation hold was not in place).

63. *Stinson v. City of New York*, No. 10 Civ. 4228 (RWS), 2016 WL 54684, at *2 (S.D.N.Y. Jan. 5, 2016) (describing size limits on officers' email inboxes that necessitated that they delete emails when they reached the limit); *First Am. Title Ins. Co. v. Nw. Title Ins. Agency*, No. 2:15-CV-00229, 2016 WL 4548398, at *3 (D. Utah Aug. 31, 2016) (explaining that the party's wife testified that she randomly deleted emails in family email account to deal with the high volume of emails—over 10,000 messages—in the account).

64. *See, e.g., Feist v. Paxfire, Inc.*, No. 11CV5436LGSRL, 2016 WL 4540830, at *1-2 (S.D.N.Y. Aug. 29, 2016) (explaining that the defendant claimed the plaintiff had engaged in spoliation by failing to preserve web search history and cookies on her computer in a case in which the plaintiff claimed the defendant intercepted her searches in violation of the Wiretap Act); *Epicor Software Corp. v. Alt. Tech. Sols., Inc.*, No. SACV1300448CJCJCGX, 2015 WL 12734011, at *1 (C.D. Cal. Dec. 17, 2015) (explaining that the plaintiff sought spoliation sanctions against the defendant in a copyright infringement case in which the defendant allegedly destroyed imaged copies of software that were allegedly improperly hosted on the defendant's computers).

65. *See, e.g., Best Payphones, Inc. v. City of New York*, No. 1-CV-3924 (JG) (VMS), 2016 WL 792396, at *1 (E.D.N.Y. Feb. 26, 2016) (explaining that counsel instructed the client's principal to preserve "relevant" information, but he incorrectly determined certain evidence was irrelevant and deleted it).

66. *See, e.g., Feist*, 2016 WL 4540830, at *4 (explaining that in opposition to motion for spoliation sanctions, the plaintiff asserted "she had no reason to preserve her browser history," which the defendant asserted it needed for its defense, because she was not told to do so). It is also more difficult for an attorney to make this assessment. *See also infra* Section III.C.

lawyers must take the lead in determining what is relevant in any given case.⁶⁷

Recognizing at least some of these challenges, courts in the ediscovery era now provide more direction about preservation. Courts have emphasized the need for a party to issue a written litigation hold to its own employees, to talk to those employees and its IT personnel to locate and preserve relevant information, and to monitor compliance with the litigation hold.⁶⁸ Some of these decisions explicitly note that *attorneys* should take the lead on these matters.⁶⁹ This decisional law stressing the steps in the preservation process does not establish a new duty to preserve, but a new emphasis on the knowledge and effort that are necessary to fulfill the common law duty to preserve in the ediscovery era.⁷⁰

C. Evidence of Attorney Negligence in Preservation in the Modern Era

Even in this more complex environment, negligent spoliation cases reveal attorneys taking a hands-off approach that results in the spoliation of evidence.⁷¹ Lawyers' failings in this regard are revealed in case law in two ways. In some cases involving preservation mistakes, courts are explicit in distinguishing the preservation steps taken by counsel and client.⁷² For example, in *Best Payphones, Inc. v. City of New York*, the court explained that a client's principal destroyed documents even though

67. Nichols v. Keller, 15 Cal. App. 4th 1672, 1684 (1993). This quote from a legal malpractice case, though arising in another context, is apt: "The rationale [of a duty on the part of the attorney] is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs."

68. See, e.g., *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (explaining the requirement to put in place a litigation hold); *Stinson*, 2016 WL 54684, at *2 (noting, in whether the City engaged in spoliation of evidence, that the City did not issue a litigation hold for more than three years after the litigation was filed and that, even then, the litigation hold was not effectively communicated to the officers listed in the City's initial disclosures).

69. *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 431-34 (S.D.N.Y. 2004) (discussing an attorney's role in preservation); *Shaffer v. Gaither*, No. 514CV00106MOCDSC, 2016 WL 6594126, at *2 (W.D.N.C. Sept. 1, 2016) ("[C]ounsel failed to take reasonable steps to preserve . . . [relevant] text messages . . . such as . . . cloning the phone or even taking possession of the phone and instructing the client to simply get another one.").

70. *Best Payphones*, 2016 WL 792396, at *1 (explaining that the duty to preserve existed "well before" case law regarding litigation holds in the ediscovery era).

71. See, e.g., *Stinson*, 2016 WL 54684, at *6 (explaining that no litigation hold was issued for at least three years after litigation was filed and once it was issued, no one monitored compliance with the hold).

72. See, e.g., *Nacco Materials Handling Grp., Inc. v. Lilly Co.*, 278 F.R.D. 395, 398, 404 (W.D. Tenn. 2011) (explaining that counsel issued written litigation hold to client's president, but did nothing to ensure that discoverable information was identified and preserved); *Knickerbocker v. Corinthian Colls.*, 298 F.R.D. 670, 674 (W.D. Wash. 2014) (explaining that counsel for defendant did not issue a company-wide litigation hold, resulting in email accounts for plaintiffs being deleted).

his attorneys told him to retain all “relevant” business records.⁷³ The court noted that the client’s principal made mistakes by not asking the attorneys before deleting the documents, and it also noted mistakes by the attorneys for failing to advise the client “not to delete any records relating to his business.”⁷⁴

More often, though, courts discuss generally the errors made by a party (not distinguishing the failures of attorney and client)⁷⁵ in actions such as: not issuing a litigation hold,⁷⁶ not communicating preservation requirements to key players,⁷⁷ not stopping automated deletion processes,⁷⁸ not protecting certain repositories of information (such as laptops or mobile phones),⁷⁹ and not preserving certain categories of relevant information.⁸⁰

In many of these cases, the courts’ language suggests or explicitly states that it is the client who acted negligently.⁸¹ Returning to the *Best*

73. *Best Payphones*, 2016 WL 792396, at *8.

74. *Id.*

75. Of course, a court may not know or care about the role played by attorney or client in negligent spoliation. The court is only concerned that there was negligence. For the reasons discussed in Section V, this Article suggests that information about preservation efforts should be revealed in litigation and courts should be explicit in discussing attorney failures.

76. *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 333 (D.N.J. 2004) (explaining that a litigation hold was not put in place); *Stinson*, 2016 WL 54684, at *6 (describing the City’s failure to issue any litigation hold for three years after it was sued and improperly implementing its litigation hold once it was issued).

77. *NuVasive, Inc. v. Madsen Med., Inc.*, No. 13CV2077 BTM RBB, 2015 WL 4479147, at *2 (S.D. Cal. July 22, 2015) (finding that texts were deleted because plaintiff did not ensure that its employees complied with its litigation hold), *vacated*, No. 13CV2077 BTM(RBB), 2016 WL 305096, (S.D. Cal. Jan. 26, 2016) (applying the newly amended FRCP 37(e)(1) to the finding of non-intentional spoliation and vacating a prior order to give an adverse inference instruction for the spoliation).

78. *Nacco Materials Handling Grp., Inc. v. Lilly Co.*, 278 F.R.D. 395, 404 (W.D. Tenn. 2011) (“[A]fter the duty to preserve was triggered, Lilly failed to timely issue an effective written litigation hold, to take appropriate steps to preserve any existing electronic records, to suspend or alter automatic delete features and routine overwriting features, and to timely and effectively collect ESI.”).

79. *See, e.g., Shaffer v. Gaither*, No. 514CV00106MOCDCS, 2016 WL 6594126, at *2 (W.D.N.C. Sept. 1, 2016) (“[P]laintiff and her counsel failed to take reasonable steps to preserve those texts as they apparently resided only on plaintiff’s phone.”).

80. *Matthew Enter., Inc. v. Chrysler Grp. LLC*, No. 13-CV-04236-BLF, 2016 WL 2957133, at *3 (N.D. Cal. May 23, 2016) (“Stevens Creek does not dispute that it should have preserved the emails [and other ESI] . . . Stevens Creek took literally no action to preserve the information.”).

81. *NuVasive*, 2015 WL 4479147, at *2 (“NuVasive clearly did not take adequate steps to make sure that its employees complied with the litigation hold.”); *Feist v. Paxfire, Inc.*, No. 11CV5436LGSRL, 2016 WL 4540830, at *4 (S.D.N.Y. Aug. 29, 2016) (“The Court is troubled by Feist’s assertion that she did not know her browsing history could be relevant to this litigation. Her allegations under the Wiretap Act involve the interception of her internet searches. She is not a novice at computer functioning, and reasonably should have known that evidence of her internet history, including her cookies, would be relevant to this action.”).

Payphones case, even though the court noted preservation mistakes by the client and its counsel, the court ordered the client to pay the opposing party's attorneys' fees incurred "because of [the client's] negligent conduct."⁸²

Undoubtedly, under basic agency principles, the client is legally responsible to an opposing party for spoliation whether caused by client or lawyer.⁸³ But it is significant for purposes of this Article that the primary cause of negligent spoliation in most cases is the lawyer. After all, the lawyer is in the superior position to understand the claims and defenses, determine which categories of information are relevant to them, and take steps to locate and preserve that information.⁸⁴ The client is an integral part of preservation because the client (often through its various agents) knows what information exists and where it is located. But it is the lawyer who must guide the conversation about what is relevant, ask the questions necessary to locate and preserve that information, and explain the consequences of failing to do so.⁸⁵

If a reasonable lawyer should take such steps to ensure preservation, then the failure to do so amounts to professional negligence.⁸⁶ A scenario in which a client ignores an attorney's guidance would be different.⁸⁷ But when there is an absence of sufficient instruction or effort to preserve, that failure is the lawyer's.

82. *Best Payphones, Inc. v. City of New York*, No. 1-CV-3924 (JG) (VMS), 2016 WL 792396, at *8 (E.D.N.Y. Feb. 26, 2016).

83. Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEBRASKA L. REV. 347, 360 (2007).

84. For example, in imposing spoliation sanctions in the *Feist* case, the court stated that it was troubled by Feist's assertion that she did not know browsing history would be relevant to a claim under the Wiretap Act. *Feist*, 2016 WL 4540830, at *4. But as between Feist and her attorney, surely the attorney bears primary responsibility for the mistake. Feist's attorney—and not Feist—drafted a complaint that included a claim under the Wiretap Act. *Id.* at *1. It was Feist's attorney who responded to discovery requests seeking search history and cookies with an objection that the information was not relevant. *Id.* Finally, Feist asserted (in opposing spoliation sanctions) that she was never asked to preserve her browsing history. *Id.* at *4.

85. This knowledge divide between attorney and client—and division of responsibility—is no different than drafting a complaint. Even though the client knows the facts, the lawyer is responsible for knowing the law, eliciting the key facts from the client, and preparing the complaint.

86. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 (2000) (describing a cause of action for professional negligence for lawyer's failure to exercise care—namely, the "competence and diligence normally exercised by lawyers in similar circumstances").

87. In fact, ignoring those instructions may amount to intentional spoliation. One benefit of requiring more information about preservation efforts made in a case will be that a court will be in a better position to know when a lawyer acted reasonably to preserve information but the client ignored the lawyer's instructions. *See infra* Section V.

III. POSSIBLE REASONS FOR ATTORNEY NEGLIGENCE IN PRESERVATION

Understanding the reasons that lawyers perform preservation incompetently is important to determining how to address negligent spoliation. This Section considers possible motivations and explanations and examines the supporting evidence.

A. *Rational Choice in the Client's Interest?*

Recent amendments to the FRCP provide that negligent spoliation cannot be punished as harshly as intentional spoliation.⁸⁸ Some might wonder whether the penalties for negligent spoliation are so insignificant that attorneys might make a rational choice—in the interest of their clients—to forego the research, time, and effort necessary to competently prevent spoliation.

Prior to December 1, 2015, the FRCP did not address the penalty for engaging in spoliation of evidence.⁸⁹ Federal courts relied upon their inherent authority to impose spoliation sanctions,⁹⁰ and they disagreed about whether severe sanctions such as dismissal, default, and adverse inference instructions should be imposed for negligent spoliation.⁹¹ Amendments to the FRCP effective December 1, 2015 were aimed at providing uniformity in spoliation sanctions in cases involving ESI.⁹² Under the amended FRCP 37(e), when there is spoliation of ESI,⁹³ courts may impose severe sanctions of default, dismissal, or adverse inference instruction only when there is proof that the evidence was destroyed

88. FED. R. CIV. P. 37(e).

89. The prior version of Rule 37(e), in effect from 2006 to 2015, provided, “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

90. *See, e.g.,* *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 611 (S.D. Tex. 2010); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010), *abrogated by* *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012).

91. *Rimkus*, 688 F. Supp. 2d at 614 (explaining that an adverse inference instruction is not appropriate in the absence of intentional spoliation); *Pension Comm.*, 685 F. Supp. 2d at 478 (ordering an adverse inference instruction to address grossly negligent preservation).

92. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment; *see also* *Matthew Enter., Inc. v. Chrysler Grp., LLC*, No. 13-CV-04236-BLF, 2016 WL 2957133, at *1 (N.D. Cal. May 23, 2016) (discussing reasons for 2015 amendment to Rule 37(e)).

93. FED. R. CIV. P. 37(e) providing, “[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.” FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment (explaining that if those questions are answered in the affirmative, to determine which sanctions are appropriate, the court must determine if: (1) the other party was prejudiced; or (2) if the spoliation was intentional).

“[w]ith the intent to deprive another party of the information’s use in the litigation.”⁹⁴ In the absence of proof of intentional spoliation, a party must prove it was prejudiced by the loss of information and a court “[m]ay order measures no greater than necessary” to cure that prejudice.⁹⁵

While comparatively less severe, the punishment for negligent spoliation of ESI is still significant.⁹⁶ The punishment is aimed at curing the prejudice the spoliation caused to an opponent.⁹⁷ Making an opponent whole often comes at a steep cost, including some or all of the following. Additional discovery (including expensive forensic examinations) may be ordered at the spoliating party’s expense.⁹⁸ In other cases, the spoliating party will be precluded from introducing certain evidence at trial.⁹⁹ While the jury will not be given an adverse inference instruction based on the negligent spoliation, it may have the opportunity to consider evidence of spoliation in its deliberations.¹⁰⁰ A party who engaged in negligent spoliation is also typically required to pay an opponent’s attorneys’ fees

94. FED. R. CIV. P. 37(e)(2).

95. FED. R. CIV. P. 37(e)(1).

96. Of course, in some cases in which paper documents were negligently spoliated, an adverse inference instruction may still be granted. *See, e.g., Stinson v. City of New York*, No. 10 Civ. 4228 (RWS), 2016 WL 54684, at n.5 (S.D.N.Y. Jan. 5, 2016) (ordering permissive adverse inference instruction for grossly negligent spoliation and not applying FRCP 37(e) because spoliation motion was fully briefed before effective date of the rule and because part of the spoliated documents were not ESI).

97. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment (“In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court . . .”).

98. *Nacco Materials Handling Grp., Inc. v. Lilly Co.*, 278 F.R.D. 395, 406-07 (W.D. Tenn. 2011) (ordering the defendant to pay the cost of forensic examination and analysis and the cost of mirror imaging certain hard drives).

99. *First Am. Title Ins. Co. v. Nw. Title Ins. Agency, LLC*, No. 2:15-CV-00229, 2016 WL 4548398, at *6 (D. Utah Aug. 31, 2016) (noting serious penalties for non-intentional spoliation, including forbidding the spoliating party from presenting evidence at trial); *Storey v. Effingham Cty.*, No. CV415-149, 2017 WL 2623775, at *5 (S.D. Ga. June 16, 2017) (precluding evidence that spoliated video would have corroborated spoliating party’s version of events).

100. *See, e.g., First Am. Title*, 2016 WL 4548398, at *6 (explaining that an argument about nonintentional spoliation may be presented to the jury and the jury may receive instructions regarding that evidence and argument); *Storey*, 2017 WL 2623775, at *5 (ordering that parties will be allowed to provide evidence and argument about the defendant’s spoliation of video and that jury will be instructed that it can consider that evidence); *Epicor v. Alt. Tech. Sols., Inc.*, No. SACV1300448CJCJCGX, 2015 WL 12734011, at *2 (C.D. Cal. Dec. 17, 2015) (holding that where evidence could support a reasonable finder of fact determining spoliation was intentional or negligent, the court would allow the jury to resolve the issue); *Matthew Enter., Inc. v. Chrysler Grp., LLC*, No. 13-CV-04236-BLF, 2016 WL 2957133, at *5 (N.D. Cal. May 23, 2016) (describing circumstances in which evidence of spoliation can be presented to the jury); *NuVasive, Inc., v. Madsen Med., Inc.*, No. 13CVV2077 BTM(RBB), 2016 WL 305096, at *3 (S.D. Cal. Jan. 26, 2016) (allowing presentation of evidence regarding loss of evidence and stating that the court will instruct the jury that it may consider the evidence in making its decision).

necessary to address the spoliation issue.¹⁰¹ Beyond that, a client who engaged in negligent spoliation must also pay its own attorney for the time necessary to respond to motions addressing the issue.

Of course, other factors may be part of an attorney's cost-benefit analysis.¹⁰² But to the extent that the penalty for negligent spoliation is a motivating factor, rational attorneys should not favor incompetent preservation practices. When addressed by a court, the cost of complying with an order will outweigh any short-term savings experienced by not taking reasonable steps to preserve relevant information.

B. An Attorney's Self-Interested Motives for Not Developing Competence

Some attorneys may have self-interested reasons for not developing competence in modern preservation practices.¹⁰³ Even though an opposing party and the lawyer's own client may have a strong interest in the lawyer competently guiding the preservation process, it may be difficult for the lawyer to think beyond his or her own self-interest in the matter.¹⁰⁴ These interests do not apply to all lawyers, but depend upon each lawyer's abilities, level of engagement, and circumstances of a given case.

Pride can be a factor—for new and experienced attorneys alike—in refusing to admit that they do not know how to preserve electronic evidence. For experienced attorneys, it can be embarrassing to admit that litigation has changed and the way that they once did things no longer

101. See, e.g., *Zbyski v. Douglas Cty. Sch. Dist.*, 154 F. Supp. 3d 1146, 1172 (C.D. Colo. 2015) (explaining that upon a finding of unintentional spoliation of some documents, the court awarded half of the plaintiff's reasonable attorneys' fees and costs incurred in filing the motion); *Matthew Enter.*, 2016 WL 2957133, at *5 (awarding reasonable attorneys' fees in bringing motion for spoliation sanctions); *Nacco Materials*, 278 F.R.D. at 407 (awarding reasonable costs, including attorneys' fees, incurred in seeking ruling that defendant engaged in negligent spoliation).

102. Though, legally, an attorney should not consider the likelihood of getting caught in determining whether to engage in misconduct, it would be rational to do so. Further, if a category of documents is likely bad for the client's case, that too could be part of the attorney's rational—though legally misguided—calculation in determining whether to act competently to preserve the information.

103. See generally Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757, 788-91 (2016) (describing how overconfidence bias facilitates a person unwittingly favoring his or her self interest in decision making).

104. See generally DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY* 67-95 (Harper Perennial 2012). In chapter three, *Blinded by Our Own Motivations*, Ariely explains how a conflict of interest between a person's own interests and a client's interests often result in a person favoring his own interests—without consciously weighing the conflicting interests. *Id.*

works.¹⁰⁵ New attorneys may be embarrassed to reveal that despite their comfort and familiarity with technology, they do not understand the steps necessary to determine what is relevant and how to preserve it.¹⁰⁶

As a result, these attorneys may be afraid to admit their knowledge and skill deficits and fail to seek training in preservation and other aspects of ediscovery practice.¹⁰⁷ For the same reason, these attorneys may also hesitate to bring in more knowledgeable attorneys or an ediscovery vendor.¹⁰⁸ While it is not logical for attorneys to think the problem will solve itself if they ignore it, they may believe that someone else will step in and take responsibility for preservation. This may explain why attorneys sometimes send a client a litigation hold letter but do nothing else to ensure the client takes the steps necessary to preserve relevant evidence.¹⁰⁹ Asking questions of a client (including its key custodians) is necessary to locate and preserve relevant information,¹¹⁰ but if a lawyer is afraid that those questions will reveal ediscovery ignorance, the lawyer

105. For example, a 2011 California ethics opinion addresses the problem of experienced attorneys ignoring their lack of ediscovery competence. The factual scenario addressed involves an attorney making decisions in a case involving ediscovery without developing the competence to do so or associating with a competent expert. The opinion concludes: “[A] lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery, absent curative assistance under rule 3-110(C), even where the attorney may otherwise be highly experienced.” State Bar of Cal. Standing Comm. on Prof’l Responsibility and Conduct, Formal Op. Interim No. 11-0004 (2014).

106. The generation of lawyers who grew up with technology still must develop (and do not naturally possess) competence as lawyers in the use of technology in practice. See Darth Vaughn & Ivy B. Grey, *The Myth of the Digital Native: Establishing Competence and Eliminating Tech Bias in the Modern Law Firm* (May 18, 2017), <https://www.2civility.org/wp-content/uploads/The-Myth-of-the-Digital-Native-Establishing-Competence.pdf> [<https://perma.cc/M5BR-DLU3>]; see Darth Vaughn, *Establishing Confidence Eliminating Tech Bias in the Modern Law Firm*, (2017), <https://www.2civility.org/future-is-now-legal-services-2017/darth-vaughn/> [<https://perma.cc/KFE7-5TR7>] (“The pernicious myth of the digital native lets decision makers treat tech skill as a talent, rather than a bundle of learned skills acquired through time and deliberate practice . . .”).

107. See generally Darth Vaughn & Casey Flaherty, *Tech comes naturally to ‘digital native’ millennials? That’s a myth*, ABA JOURNAL (Oct. 13, 2016), http://www.abajournal.com/legalrebels/article/tech_comes_naturally_to_digital_native_millennials_thats_a_myth [<https://perma.cc/D79K-NTV5>] (explaining that training in technology is essential to developing competence necessary for the modern delivery of legal services).

108. There are resources available to help attorneys gain the knowledge necessary to select an ediscovery vendor. See, e.g., The Sedona Conference, *The Sedona Conference Guidance for the Selection of Electronic Discovery Providers*, 18 SEDONA CONF. J. 60 (Apr. 2017).

109. See, e.g., *Nacco Materials Handling Grp., Inc. v. Lilly Co.*, 278 F.R.D. 395, 398 (W.D. Tenn. 2011).

110. The Sedona Conference has provided resources to prompt attorneys to think about the topics to discuss in these conversations. Ariana Tadler et al., *The Sedona Conference “Jumpstart Outline”: Questions to Ask Your Client and Your Adversary to Prepare for Preservation, Rule 26 Obligations, Court Conferences & Requests for Production* (Mar. 2016); *Sedona Principles* (3d ed. Oct. 2017), *supra* note 47, Principle 3.

may choose to do nothing.

Beyond pride, people can be lazy, and attorneys are no exception. It takes significant effort in civil litigation to determine what is relevant, find it in its various locations, and preserve it.¹¹¹ Beyond that effort, most attorneys do not perceive that preservation is interesting or intellectually stimulating. As a result, they may choose to disengage.¹¹² It is unsurprising that attorneys of this mind would choose to focus on other issues and ignore or neglect preservation.

Finally, lawyers want to be valued by their clients and do not like to be the bearer of bad news.¹¹³ Clients do not appreciate hearing about the time and cost that need to be incurred in preservation, particularly for categories of information more likely to benefit an opponent than the attorney's own client.¹¹⁴ It can also be difficult to tell a client that the lawyer needs to take custody of a client's device to preserve information the client would rather not reveal, such as text messages relevant to litigation.¹¹⁵ In an effort to stay in the client's good graces, some attorneys may choose to avoid these tough conversations and wait until opposing counsel or the court forces the issue.¹¹⁶ In the interim, though, irreversible spoliation can occur.

Of course, there are self-interested reasons why an attorney should develop competence in preservation. Attorney competence ensures preservation of documents the client needs to prove its own case.¹¹⁷ Such

111. See *supra* Section II. B-C.

112. See, e.g., Rhys Dipshan, *Large Legal Departments Likely to Excel at Legal Holds, Preservation: Survey*, LEGALTECH NEWS (Sept. 20, 2017), <https://www.law.com/legaltechnews/sites/legaltechnews/2017/09/20/large-legal-departments-likely-to-excel-at-legal-holds-preservation-survey/> [https://perma.cc/4KNM-RH8G]. (describing a segment of in-house attorneys and legal departments—who responded to a preservation practices survey—as “disengaged from the e-discovery process” and stating that they “don’t seem to take their preservation obligations seriously”).

113. Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. L. REV. 1107, 1117, 1128-29 (2013) (describing how lawyers' interest in pleasing a client can contribute to unethical conduct).

114. Judge Shira Scheindlin has explained the difficult news that a lawyer should give to her client about the cost of complying with discovery obligations: “[O]utside counsel always has the difficult burden of explaining the realities of our system . . . of litigation to the client. And we’ve got to explain that we don’t have a loser-pay system, so the client must generally bear his or her own costs.” Laura E. Ellsworth & Kathleen M. Massey, *Ten Tips for Electronic Discovery [A Special Interview with Judge Shira A. Scheindlin]*, 23 No. 1 ASS’N OF CORP. COUNSEL DOCKET 56, 61 (Jan. 2005) (large portion of Mar. 24, 2004, Sedona, Ariz., interview published).

115. See, e.g., *Shaffer v. Gaither*, No. 514CV00106MOCDCS, 2016 WL 6594126, at *2 (W.D.N.C. Sept. 1, 2016) (suggesting that counsel could have taken possession of client’s phone in order to preserve text messages).

116. See *infra* Section V. B. (discussing how opposing counsel can prompt attorneys to address the issue).

117. See *infra* note 130 and accompanying text (noting that the times when attorneys face

competence also helps clients avoid sanctions and high litigation costs.¹¹⁸ An attorney who causes a client to incur such costs would seemingly face negative repercussions, such as losing a client's business and malpractice liability.¹¹⁹ However, attorney incompetence in preservation is not always apparent to clients. This is particularly true of clients who are not frequently involved in litigation.¹²⁰ As a result, attorneys may never face adverse consequences or have the corresponding self-interested reason to develop competence.

C. Partisan Bias and the Difficulty of Making Preservation Decisions in the Interest of an Opposing Party

Lawyers who are hired to play a partisan role in litigation may be less able than a neutral third party to make decisions about preservation that would benefit an opposing party. Partisanship research reveals that team allegiance influences the way fans view calls in a football game¹²¹ and that political partisanship shades the way an individual views a proposal from the opposing party.¹²² Accountants in a study were more likely to find problems in a company's financial reports in a hypothetical audit if they are told to imagine that a prospective investor in a company had hired them rather than if they were told they were the company's accountant.¹²³

It should be unsurprising that an attorney who is retained as a

malpractice liability for spoliation is when the destruction of evidence hinders the client's ability to prove his or her own case). There is reason to believe that attorneys are better equipped to preserve evidence helpful to a client's case than they are able to preserve evidence helpful to an opponent's case. *See infra* Section III. C.

118. Attorneys with clients who frequently face preservation challenges (including in-house attorneys) are likely to develop competence because it is in their (and their clients') interest to do so. In a recent study comparing the abilities of in-house attorneys and legal departments involved in litigation holds, the attorneys most competent at addressing preservation were those whose companies were most at risk for spoliation sanctions, who felt the most client pressure to efficiently achieve good results in preservation, and who were repeat players in defending their preservation practices. Dipshan, *supra* note 112.

119. Indeed, these perceived risks may motivate some attorneys to develop ediscovery competence. *See id.*

120. *See supra* note 118 (explaining that attorneys who are most motivated to develop preservation competence are the ones with clients who are repeat players in litigation and understand the stakes of getting preservation wrong).

121. Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 *IND. L. J.* 1639, 1651 (2015) (describing a 1954 study in which researchers observed material differences in the way fans of Dartmouth and Princeton viewed penalty calls in a game between their teams).

122. Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 *PSYCH. REV.* 789 (2004); *see also* Perlman, *supra* note 121, at 1652 (describing the impact of political partisanship on perceptions of policy proposals).

123. Perlman, *supra* note 121, at 1655.

partisan—who not only roots for a win, but who is paid to work to achieve a win—will find it difficult to be objective when making decisions about the information that should be preserved for the benefit of an opposing party.¹²⁴ The documents preserved in litigation may theoretically benefit (or hurt) either party in the litigation. But in most cases, there are categories of documents a lawyer will know are more likely to be helpful to the client’s case and to take reasonable steps to preserve them. It can be much more difficult to make a reasonable judgment about the documents needed by an opponent to prove its case.¹²⁵ The answer of what is reasonable is far from black and white, and this ambiguity further enhances the risk of a poor decision by an attorney whose objectivity is clouded by his allegiance to his client.¹²⁶

It follows that without intending to do so, an attorney may be less competent in preserving the categories of documents more likely to be needed by an opposing party. The premise underlying Rule 37(e)’s prohibition on adverse inference instructions for negligent spoliation is that, unlike intentional spoliation, negligent spoliation does not support the inference that the evidence was unfavorable.¹²⁷ The logic is that negligently lost information “[m]ay have been favorable to either party, including the party that lost it.”¹²⁸ But partisan bias research brings this theory into question.

IV. THE ABSENCE OF THE USUAL LEGAL DETERRENTS TO ATTORNEY INCOMPETENCE

The usual legal deterrents to incompetence—professional negligence liability, sanctions, and professional discipline—are unlikely to motivate attorneys in this area. This Section explains the reasons why attorneys

124. See generally *id.* at 1656 (asserting that lawyers are likely particularly vulnerable to lack objectivity when making ethical decisions in the context of a representation, in part because of their institutional function of making the best case for their client).

125. See, e.g., *Nacco Materials Handling Grp., Inc. v. Lilly Co.*, 278 F.R.D. 395, 402 (W.D. Tenn. 2011) (explaining that no steps were taken to preserve server logs, internet history, and other information which would have revealed whether Lilly’s employees accessed opposing party’s secure server as alleged in the case).

126. Perlman, *supra* note 121, at 1660-61 (arguing that a lawyer’s judgment is most likely to be affected when the law or facts are ambiguous); Eldred, *supra* note 103, at 782 (explaining that confirmation bias influences lawyers to interpret information in ways that are consistent with a desired course of action).

127. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

128. *Id.*; see also *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 526 (D. Md. 2010) (“The more logical inference [from negligent spoliation] is that the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful.”).

who negligently perform preservation rarely face a penalty under these legal authorities.

A. *Professional Negligence*

Logically, fear of malpractice liability should motivate incompetent lawyers to develop competence in preservation. Generally speaking, lawyers know that they may be held liable if their lack of competence causes a client to suffer damages.¹²⁹ Thus, if attorney negligence in advising a client about preservation—or negligence in *failing* to advise a client about preservation—causes a client to suffer an injury, a lawyer might reasonably expect to be sued by the client.

But it appears that clients seldom pursue malpractice claims based on their attorneys' negligent preservation advice. The setting in which clients have pursued this claim is when the lawyer's negligence allegedly resulted in spoliation of key evidence the *client* needed for its own claim.¹³⁰ Research has not revealed a reported case in which a client pursued a malpractice claim against a lawyer when the client suffered adverse consequences arising out of negligent spoliation of evidence requested by an opponent in litigation.

It is the latter type of spoliation that is the subject of this Article—spoliation of evidence that deprives an *opponent* of its use in litigation.¹³¹ The lack of legal malpractice cases in this setting is significant: attorneys tend not to face liability for failing to competently preserve evidence needed by an adversary, even when the client is penalized for that failure.¹³²

129. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 48, 52 (2000) (stating that a lawyer is civilly liable for professional negligence (also known as malpractice) if the lawyer fails to exercise the competence and diligence normally exercised by lawyers in similar circumstances and that failure is the legal cause of injury to the client).

130. *See, e.g.*, Rangel v. Lapin, 177 S.W.3d 17, 19-20 (Tex. App. 2005) (alleging claims for malpractice and spoliation of evidence based in part on the law firm's advice to the client's father to dispose of the vehicle which was the subject of the underlying claim, thus preventing the client from pursuing a products liability claim based on the vehicle's passive restraint system); Spaise v. Dodd, No. A03-1430, 2004 WL 1191942, at *3 (Minn. Ct. App. June 1, 2004) (providing that a client pursued a malpractice claim against his lawyer for failing to take steps to preserve the client's vehicle which was allegedly needed to pursue a vehicle defect claim); Galanek v. Wismar, 68 Cal. App. 4th 1417, 1420 (1999) (providing that a client sued her lawyer for malpractice asserting that her lawyer's failure to take reasonable steps to prevent the destruction of the client's vehicle resulted in the client's loss of a meritorious products liability claim against an automobile manufacturer).

131. *See supra* note 1 (defining "spoliation"). The Minnesota Court of Appeals in the *Spaise* case, described in note 130, explains that "spoliation" is destruction of evidence or failure to preserve evidence for another's use. Thus, spoliation penalties are ordinarily sought by an opposing party in litigation. *Spaise*, 2004 WL 1191942, at *11.

132. Attorneys are also unlikely to face liability to the opposing party in litigation harmed by

There are likely several reasons for the dearth of such cases. One reason may be that the client does not perceive the damages to be so significant as to justify filing suit against the lawyer.¹³³ Still another explanation is that even though clients suffer a temporary injury in such cases, lawyers may ultimately bear the cost, such as by not charging the client for time spent responding to a motion for sanctions or by paying a monetary penalty entered against the client. Finally, another reason for the lack of such claims could be one discussed earlier: the spoliation cases tend not to highlight that the lawyer was negligent and often suggest that the client was negligent.¹³⁴ As a result, the client may not understand that there is a possible claim against the lawyer.

B. Attorney Sanctions Under Procedural Rules

The December 1, 2015 amendments to the FRCP delineated the range of sanctions available for spoliation, including a prohibition against severe sanctions for negligent spoliation.¹³⁵ Though sanctions against lawyers are provided for elsewhere in the FRCP,¹³⁶ Rule 37(e) does not explicitly state that lawyers can be sanctioned for spoliation.¹³⁷

While attorney spoliation sanctions awarded pursuant to a court's inherent authority would appear to be an option, the advisory committee note to Rule 37(e) discourages courts looking to inherent authority to address spoliation.¹³⁸ Another option for attorney spoliation sanctions would be for spoliation that violates a court order.¹³⁹ In such a case, Rule 37(b) explicitly provides that an attorney, client, or both can be

the spoliation. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000), Duty of Care to Certain Nonclients, cmt. c (“A lawyer representing a party in litigation has no duty of care to the opposing party under this Section, and hence no liability for lack of care. . .”).

133. This is not to say that the client's injury is not significant. *See supra* Section III. A. But it may not be perceived to be so significant that the client seeks out another lawyer to pursue a malpractice claim.

134. *See supra* Section II. C.

135. FED. R. CIV. P. 37(e).

136. FED. R. CIV. P. 11(c)(1) (“[T]he court may impose an appropriate sanction on attorney, law firm, or party that violated the rule or is responsible for the violation.”); FED. R. CIV. P. 37(a)(5)(A) (requiring a court to order the “party or attorney advising that conduct or both” to pay the expenses of a party whose motion for protective order was granted); FED. R. CIV. P. 37(b)(2)(C) (providing for monetary sanctions against a party, attorney, or both if the court sanctions a party for failing to obey a discovery order).

137. FED. R. CIV. P. 37(e).

138. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment (providing that the amendment “forecloses reliance on inherent authority or state law” to address spoliation of ESI).

139. The court order could be a scheduling order describing preservation efforts required in the case. FED. R. CIV. P. 16.

sanctioned.¹⁴⁰ This suggests a tool that opposing counsel and judges could employ to encourage competent preservation; this is discussed in Section V.

C. *Attorney Professional Conduct Rules and Discipline*

For jurisdictions whose professional conduct rule 3.4 tracks the language of the ABA Model Rule of Professional Conduct, an attorney can be disciplined for even negligent spoliation of evidence.¹⁴¹ Rule 3.4 provides that it is misconduct for an attorney to “unlawfully alter, destroy or conceal” evidence, to “knowingly disobey an obligation under the rules of a tribunal,” and to “fail to make a reasonably diligent effort to comply with a legally proper discovery request.”¹⁴² An attorney’s role in spoliation—in violation of this rule—could be intentional or negligent; the rule itself does not make a distinction.¹⁴³

Though judges can refer attorneys for discipline, they seldom make such referrals for discovery misconduct.¹⁴⁴ In the rare cases in which attorneys have been punished for their role in spoliation of evidence, the punishment has been for intentional and not negligent spoliation.¹⁴⁵ Attorneys whose conduct results in negligent spoliation have little reason to fear discipline and are thus unlikely to be motivated by the prospect of discipline.

V. APPLYING PRESSURE TO ENCOURAGE ATTORNEY COMPETENCE IN PRESERVATION

A. *The FRCP Could Prompt Better Preservation by Requiring Parties to Reveal Preservation Efforts in Initial Disclosures*

Amending FRCP 26(a)(1) to require parties to disclose their

140. FED. R. CIV. P. 37(b)(2)(C) (“Instead of or in addition to [other sanctions for not obeying a discovery order] the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure.”).

141. MODEL RULES OF PROFESSIONAL CONDUCT R. 3.4 (AM. BAR ASS’N 1983).

142. MODEL RULES OF PROFESSIONAL CONDUCT R. 3.4(a), (c), (d) (AM. BAR ASS’N 1983).

143. *Id.*

144. See Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 GEO. J. LEGAL ETHICS 1, 19-21 (2017) (discussing the lack of disciplinary referrals and discipline resulting from discovery misconduct in federal court).

145. See, e.g., Agreed Disposition Mem. Order, *In re Murray*, VSB Docket Nos. 11-070-088405 and 11-070-088442 (July 17, 2013) (finding that attorney violated Virginia Rule of Professional Conduct 3.4(a) when he instructed his client to delete photographs from Facebook); see also Schaefer, *supra* note 144, at 21 (discussing the small number of cases of discipline arising from discovery misconduct in federal civil cases, none of which involve negligent spoliation of evidence).

preservation efforts in initial disclosures could prompt better preservation in all cases.¹⁴⁶ Since 1993, the rule has required a party to reveal defined information about witnesses, documents, damages, and insurance without awaiting a discovery request.¹⁴⁷ The goal of those requirements is to prompt the exchange of basic information needed in every case.¹⁴⁸ In the modern era in which parties should not and cannot assume appropriate preservation by an opponent, a description of preservation efforts should be a required disclosure.¹⁴⁹

A new subpart in the initial disclosure rule could provide:

Rule 26(a)(1) Initial Disclosure

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

....

(v) a description of the steps taken to preserve discoverable information in the case, including: (a) a list of custodians who have been provided written litigation hold instructions, including the date such instructions were provided to each listed custodian; (b) a list of custodians whose documents have been collected or otherwise preserved and for each custodian provide (i) the date of collection and a description of what was collected and (ii) the date of preservation and description of how the information has been preserved; (c) a signed declaration from a party's information technology employee or other knowledgeable agent describing steps taken to collect and preserve discoverable information not otherwise previously described in this disclosure; and (d) if

146. A preservation initial disclosure requirement could be tested as part of the current Mandatory Initial Discovery Pilot Project. In this three-year pilot project, parties to litigation in participating courts must turn over both favorable and unfavorable information relevant to their claims and defenses in their initial disclosures. *Mandatory Initial Discovery Pilot Project Model Standing Order*, FEDERAL JUDICIAL CENTER (Apr. 6, 2017), <https://www.fjc.gov/content/320224/midpp-standing-order> [https://perma.cc/3SZ8-6DCJ].

147. FED. R. CIV. P. 26 advisory committee's note to 1993 amendments, subdiv. (a).

148. *Id.* ("A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives.")

149. Some have suggested that discovery about discovery is not appropriate until there is evidence of discovery misconduct. *See, e.g.,* Stephanie A. Blair et al., *Discovery on Discovery*, PRACTICAL LAW ARTICLE, available at 2014 WL 4-560-9646 ("[D]iscovery on discovery is permitted where counsel has reasonably grounded concerns of discovery misconduct."). But the proposed approach is superior in that it is not particularly costly, it prompts the responding attorney to fulfill his or her preservation duty in a timely manner, and it allows a problem to be detected before extensive damage has been done. For a discussion of possible work product concerns, *see infra* notes 151-55 and accompanying text.

applicable, a signed declaration from each third party vendor describing steps taken to collect and preserve discoverable information not otherwise previously described in this disclosure.

This disclosure rule builds upon the proactive approach found in the standing orders of some federal courts that prompt attorneys to reveal preservation efforts as part of the 26(f) conference.¹⁵⁰ Requiring (through the FRCP) that attorneys disclose preservation efforts in writing prior to the 26(f) conference should make for even more efficient discovery planning meetings.

It has been suggested that informal discussion of preservation efforts, such as required in the noted standing orders, is superior to discovery about preservation because discovery potentially implicates issues of attorney-client privilege and work product protection.¹⁵¹ But this is not a sound reason to reject a rule requiring initial disclosure of preservation efforts. The proposed initial disclosure rule does not call for the disclosure of privileged information,¹⁵² and work product concerns are not a reason to resist adopting the rule.¹⁵³ As a threshold matter, information about preservation efforts is not the sort of work “prepared in anticipation of litigation” that work product doctrine was meant to protect.¹⁵⁴ In contrast

150. See, e.g., *In re Pilot Project re Case Mgmt. Techniques for Complex Civ. Cases*, No. 11 Misc. 388 (S.D.N.Y. Oct. 31, 2011 and Nov. 14, 2014) (prompting parties to discuss the scope and methods of preservation); 7th Circuit Electronic Discovery Pilot Program, [*Proposed Standing Order Relating to the Discovery of Electronically Stored Information*, DISCOVERYPILOT.COM (Jan. 31, 2018), https://www.discoverypilot.com/sites/default/files/StandingOrder8_10.pdf [<https://perma.cc/K2QW-965B>] (prompting parties to discuss preservation issues as they create a discovery plan); 7th Circuit Electronic Discovery Committee, *Principles Relating to the Discovery of Electronically Stored Information*, DISCOVERYPILOT.COM (Jan. 31, 2018), Principles 2.01, 2.03, 2.04, https://www.discoverypilot.com/sites/default/files/Principles8_10.pdf [<https://perma.cc/SG3Q-3CKS>].

151. 7th Circuit Electronic Discovery Committee, *Principles Relating to the Discovery of Electronically Stored Information*, DISCOVERYPILOT.COM (Jan. 31, 2018), Principle 2.04(b) https://www.discoverypilot.com/sites/default/files/Principles8_10.pdf [<https://perma.cc/SG3Q-3CKS>] (“Discovery concerning the preservation and collection efforts of another party . . . may inappropriately implicate work product and attorney-client privileged matter.”).

152. The proposed rule does not require the disclosure of an attorney’s litigation hold letter (or other written instructions) to his or her client out of concern about the attorney-client privilege. The goal of the proposed rule is to require a disclosure of preservation efforts, but not the content of privileged communications about preservation between attorney and client.

153. FED. R. CIV. P. 26(b)(3) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative” absent a showing of substantial need except for “mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

154. The *Hickman* court explained: “[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble[s] information, sift what he considers to be the relevant from

to other work product, preservation is work done for the benefit of the opposing party. Even if there is a proper “work product” argument to resist discovery about preservation, the adoption of a Federal Rule of Civil Procedure can take away work product protection for this category of information.¹⁵⁵

In addition to amending the initial disclosure rule to add this subpart (v), the timing could be improved by requiring initial disclosures to be made at least 14 days before the parties’ Rule 26(f) conference.¹⁵⁶ The rule currently requires initial disclosures to be made at or within 14 days after the Rule 26(f) conference.¹⁵⁷ Requiring the disclosure of preservation efforts prior to the 26(f) conference should result in a more meaningful discussion of preservation at the conference.¹⁵⁸ In turn, parties may learn sooner that they have a disagreement about preservation and may be able to seek guidance from the court in a timely manner, such as in the scheduling conference.

Requiring lawyers to provide information about the steps they have taken to preserve discoverable information addresses several of the causes of negligent spoliation addressed in this Article. As a threshold matter, it provides a roadmap to the basics of competent preservation: it prompts every attorney—at the outset of the case—to issue a written litigation hold,¹⁵⁹ to preserve and collect discoverable information from key custodians, and to consider the need for assistance from the client’s IT professionals or an ediscovery vendor.¹⁶⁰ Beyond that, a preservation initial disclosure rule lessens an attorney’s short-term, self-interested motive to ignore the issue.¹⁶¹ With an initial disclosure requirement, an attorney would have no choice but to address the issue early in the case.

The proposed initial disclosure rule also addresses the problem of

the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is [necessary] to promote justice and to protect their clients’ interests.” *Hickman*, 329 U.S. at 510-11.

155. 28 U.S.C. § 2072 (providing the United States Supreme Court the power to prescribe rules of procedure).

156. The rule would be amended as follows: A party must make the initial disclosures ~~at or within 14 days after~~ at least 14 days before the parties’ 26(f) conference FED. R. CIV. P. 26(a)(1)(C).

157. *Id.*

158. The discovery planning conference is supposed to include discussion of preservation. FED. R. CIV. P. 26(f)(3)(C).

159. *See supra* note 152.

160. This guidance is helpful to attorneys who may not be aware of the steps they need to take to preserve discoverable information. *See supra* Section II. B-C.; *see also Sedona Principles* (3d ed. Oct. 2017), *supra* note 47.

161. *See supra* Section III. B.

partisan bias in preservation.¹⁶² Even though the preserving attorney must still make a judgment call about what is preserved, a rule requiring transparency about preservation decisions provides a check against bias in the process. If the opposing attorney sees deficiencies in the preservation process, the attorney can raise the issue in the Rule 26(f) conference and if that does not work, raise it again in the scheduling conference.¹⁶³ Further, a full disclosure of the required preservation information is not hindered by attorney bias favoring her client's position. The rule does not require the attorney to disclose information harmful to her client's case, just the effort made to preserve information in the case.¹⁶⁴

B. Opposing Attorneys Can Use Existing Rules to Prompt Appropriate Preservation Efforts by Counsel

Even in the absence of a preservation initial disclosure rule, opposing attorneys can urge competent preservation by communicating with counsel and using the tools provided by current procedural rules.

Sending a preservation letter to opposing counsel before filing suit or immediately after suit is filed can accomplish two things.¹⁶⁵ First, it can clarify the trigger for the duty to preserve, particularly when the letter is sent before litigation is filed.¹⁶⁶ Second, if it is not a boilerplate letter, it can educate an opponent about the specific types of information that should be preserved.¹⁶⁷ This may result in preservation (which is the goal), or, if not, it can be evidence that the opponent knew (or at least should have known) the extent of its preservation obligation.¹⁶⁸

Early discovery requests are another important tool opposing counsel

162. See *supra* Section III. C.

163. FED. R. CIV. P. 16; FED. R. CIV. P. 26(f).

164. In this way, the proposed disclosure of preservation effort is similar to the disclosure of friendly witnesses or helpful documents under the current rule. FED. R. CIV. P. 26(a)(1)(A)(i), (ii). Even if an attorney cannot be objective about judging what information its opponent should receive to prove its case, that attorney can be trusted to report steps taken to preserve discoverable information and to reveal people and documents helpful to his or her own case.

165. See, e.g., *Konica Minolta Bus. Sols., U.S.A. Inc. v. Lowery Corp.*, No. 15-CV-11254, 2016 WL 4537847, at *4 (E.D. Mich. Aug. 31, 2016) (describing the plaintiff's litigation hold letter to the defendants sent the day after litigation was filed).

166. See *supra* note 11 and accompanying text (describing when the preservation duty is triggered).

167. See, e.g., *Konica*, 2016 WL 4537847, at *4 (concluding that "there is no ambiguity" in plaintiff's litigation hold letter to defendants; the letter listed specific categories of information to be preserved and noted the need to discontinue routine deletions).

168. *Id.* (citing plaintiff's litigation hold letter as the basis for rejecting defendants' arguments that they did not know they had a duty to preserve or the scope of the duty).

can use to encourage proper preservation. The 2015 amendments to the FRCP permit counsel to serve early requests for production of documents on a party.¹⁶⁹ To make meaningful use of this tool, an attorney must determine which categories of documents are needed in the case and communicate that in its first request for production of documents before the Rule 26(f) conference.¹⁷⁰ This early request should prompt the receiving attorney to either preserve the requested information or openly question whether such discovery (and preservation) is needed.

All of this leads up to the Rule 26(f) conference. The current Rule 26(f) prompts attorneys to discuss and include in their plan “[a]ny issues about . . . preservation of electronically stored information.”¹⁷¹ Litigation hold letters and early document requests should result in a more productive Rule 26(f) conference. Having a conversation about specific categories of documents will allow opposing counsel to understand how proactive counsel is being to preserve information. If the answer is that counsel is not being proactive enough, opposing counsel can educate the attorney about expectations and include those expectations—framed as steps that will be taken to preserve information—in the 26(f) report.¹⁷² If the attorneys disagree about whether certain categories of information should be preserved or which steps should be taken to preserve information, that disagreement should be presented to the court (again, in the 26(f) report) as a matter for the court’s resolution.¹⁷³

This, in turn, will result in a more useful scheduling conference and scheduling order that should detail expectations for preservation in the case.¹⁷⁴ An opposing attorney who has given thought to these issues and provides a reasonable plan to the court is likely to see that plan integrated into the court’s scheduling order.¹⁷⁵ The benefits of the court order are

169. FED. R. CIV. P. 34(b)(2)(A).

170. *Id.*

171. FED. R. CIV. P. 26(f)(3)(C). Sedona Conference publications provide detailed guidance for attorneys preparing to talk to opposing counsel about preservation in a 26(f) conference. *See supra* note 110.

172. FED. R. CIV. P. 26(f).

173. *Id.*

174. FED. R. CIV. P. 16(b)(3)(B) (listing the permitted contents in a scheduling order, which includes preservation).

175. It is not too late to seek the court’s assistance in ensuring preservation even if the request was not made in the 26(f) report. If an attorney comes to realize that an opponent’s preservation efforts are lacking, the attorney should seek an order requesting information about the steps taken and/or requiring that certain steps be taken. *See, e.g., Bagley v. Yale Univ.*, 315 F.R.D. 131, 153 (D. Conn. 2016) *as amended* (June 15, 2016) (providing that when document production appeared incomplete and plaintiff’s counsel feared spoliation, plaintiff’s counsel requested and the court ordered the defendant to provide proof of preservation efforts including, among other things, the date of the litigation hold and a list of individuals informed of the hold).

twofold. First, an attorney and client are more likely to comply with specific direction found in a court's order than they are to develop their own reasonable preservation plan. Second, if the order is violated, an attorney is more likely to face sanctions than under FRCP 37(e).¹⁷⁶ Thus, the order can create an incentive for attorneys.

C. Courts Can Play a Role in Encouraging Competent Preservation and in Effectively Addressing Negligent Spoliation

Finally, judges can draw on the foregoing lessons to encourage attorney competence in preservation. Judges can adopt standing orders that require the disclosure of preservation efforts made in a case at the time other initial disclosures are made.¹⁷⁷ Alternatively (or in addition), a standing order could require that parties include in their 26(f) report a description of preservation efforts made by each side in the case.

All of this information will assist the court in entering a scheduling order that resolves preservation disputes and provides meaningful guidance about preservation obligations.¹⁷⁸ In appropriate cases, the court may choose to highlight the possible sanctions for both the attorney and client if the order is violated¹⁷⁹ and possible professional discipline that can be expected if the attorney does not fulfill her preservation obligations.¹⁸⁰

When spoliation occurs despite these efforts, judges can make a difference with their response. First, judges can call attorney negligence "negligence" in these cases. While it is common for court decisions not to distinguish between a client's actions and counsel's actions,¹⁸¹ courts

176. FED. R. CIV. P. 37(b) (allowing sanctions against an attorney for violating a court order); FED. R. CIV. P. 37(e) (not explicitly permitting sanctions against an attorney for spoliation).

177. The order could incorporate the suggested initial disclosure language found in Section V. A.

178. FED. R. CIV. P. 16(b)(3)(B). As Judge Shira Scheindlin has explained, one of the most important things a judge can learn in a Rule 16 conference is "if the parties have identified the people who really know where the electronic records are, how to access them and how to preserve them," whether counsel has talked to key individuals about preservation, whether a litigation hold has been developed, and whether the preservation obligation has been communicated to employees who must implement it. Ellsworth & Massey, *supra* note 114, at 64.

179. In addition to any penalty available under Rule 37(e), the court may order a party or attorney to pay an opponent's expenses that arise out of violating the court's order. FED. R. CIV. P. 37(b)(2)(C).

180. Schaefer, *supra* note 144, at 34-38 (encouraging judges to preview possible discipline in scheduling orders and to impose discipline for discovery misconduct in appropriate cases).

181. This is understandable because the attorney is the client's agent. However, failing to make a distinction in this context contributes to attorneys' perception that they are not responsible for competent preservation and to the client's perception that the attorney is not to blame. *See, e.g.,* Stinson v. City of New York, No. 10 Civ. 4228 (RWS), 2016 WL 54684, at *6 (S.D.N.Y. Jan. 5,

should revisit this convention in the preservation context. Calling out attorney preservation negligence can help educate attorneys about what they did wrong and where they have room to improve in the future. Further, describing attorney negligence in this area may make this issue salient for other attorneys, particularly those practicing in a given judge's court.¹⁸² In all of these ways, judges can have an impact on educating attorneys about preservation expectations.

VI. CONCLUSION

The current system has provided insufficient incentives for some lawyers to develop the competence necessary to prevent negligent spoliation of evidence. An attorney's partisan bias and self-interest will continue to contribute to some attorneys failing to provide their clients appropriate advice about preservation. An effective counter to these influences has not been found in current sources of law, but could be developed through rulemaking and the influence of opposing counsel and courts.

An initial disclosure rule that requires attorneys to disclose their preservation efforts would prompt appropriate preservation steps to be taken early in a case. The disclosure of those steps would allow an opposing attorney to determine if any aspect of preservation is problematic. Even without such a rule, opposing attorneys and courts can use current law to encourage better preservation. Opposing attorneys are in a better position to appreciate their own clients' needs in terms of what information an opposing party should preserve. They must communicate these needs to an opponent's attorneys and guide preservation rather than wait, hope for the best, and then react to spoliation. Judges, too, have a role to play in encouraging better preservation. In addition to encouraging early discussion of preservation, judges can educate attorneys by calling out attorney negligence in preservation rather than attributing it generally to clients. All of these tools could contribute to more competent preservation by attorneys and a reduction in negligent spoliation.

2016) (describing "the City's" failure to issue any litigation hold for three years after it was sued and improperly implementing its litigation hold once it was issued).

182. See generally Robbennolt & Sternlight, *supra* note 113, at 1158-59 (explaining that when ethics issues are salient to lawyers, they are more likely to make ethical decisions).