

Pension Committee v. Banc of America Securities
2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)
Judge Scheindlin

Judge Scheindlin, the foremost e-discovery expert, is the first to draw lines between negligent and grossly negligent conduct in the context of e-discovery sanctions. Although each case must turn on its own facts, the following distinctions will likely influence the future analysis of sanctionable conduct.

Negligent Conduct

A party is negligent if it fails to meet its obligation to participate meaningfully and fairly in the discovery process. A party may be negligent even if it acted with good intentions.

The following conduct will likely be deemed negligent:

- A failure to obtain records from all employees (presumably relates only to relevant but non-key-player employees)
- A failure to take all appropriate measures to preserve evidence
- A failure to assess the accuracy and validity of selected search terms

When evidence is lost as a result of negligent conduct, the court will issue an adverse inference instruction only if the innocent party can prove that the lost evidence was relevant to its claims or defenses and that the loss prejudiced its case. The innocent party need not, however, provide overwhelming evidence of such relevance or prejudice. The court may also shift the costs of production to or issue monetary fines against the spoliating party.

Grossly Negligent Conduct

A party is grossly negligent if it fails to exercise even the most basic discovery obligations.

The following conduct will likely be deemed grossly negligent:

- A failure to issue a written litigation hold to prevent the destruction of email or backup tapes
- A failure to identify all key players
- A failure to collect records from all key players
- A failure to cease deletion of and/or collect from a former employee when his or her files remain in the party's possession, custody, or control
- A failure to preserve backup tapes when they are the sole source of records, or when they relate to the key players and such records are not available from a readily accessible source

When evidence is lost as a result of grossly negligent conduct, the court may issue either a mandatory presumption or a permitted presumption of relevance and prejudice.

Mandatory Presumption

A mandatory presumption instructs the jury to presume that lost evidence would have been relevant to the innocent party's claims or defenses and that the loss was, therefore, prejudicial to its case. Such a presumption is rebuttable: the spoliating party may submit evidence to show that the lost evidence was not relevant to the innocent party's claims or defenses.

Permitted Presumption

A permitted presumption, also known as a spoliation charge, is an instruction to the jury that it *may*, but need not, presume that the lost evidence was relevant and favorable to the innocent party. The presumption is still subject to the spoliating party's rebuttal.

Intentional Conduct

Most courts group willful, wanton, and reckless conduct into a single category characterized by intentional conduct. A willful, wanton, or reckless party acts with either the purpose to destroy evidence or a conscious indifference to a high likelihood that evidence could be destroyed.

The following conduct will likely be deemed willful, wanton, or reckless:

- The intentional destruction or deletion of evidence
- The intentional tampering with or falsification of evidence

When evidence is lost as a result of intentional conduct, the harshest sanctions may be applied, up to and including default judgment or dismissal. Courts often, however, impose lesser sanctions, such as fines, adverse instructions, or the preclusion of evidence offered by the spoliating party. An adverse instruction imposed as a sanction for intentional spoliation will likely instruct the jury that certain facts detrimental to the spoliating party are to be accepted as true, and the spoliating party will not be offered an opportunity to rebut the instruction.

Application in Pension Committee v. Banc of America Securities

Of the thirteen parties accused of spoliating evidence, Judge Scheindlin found seven negligent and six grossly negligent. The negligent parties had installed a litigation hold but had not done so immediately after their preservation duty arose. Their preservations were inadequate because they missed key players, key files, and/or conducted searches without the supervision of counsel. Judge Scheindlin imposed only monetary sanctions on the negligent parties.

The grossly negligent parties either did not install a litigation hold or failed to search the appropriate key players. In addition, most of the parties had submitted misleading declarations stating that they had conducted adequate searches and produced all responsive documents, assertions that were later determined to be false. Judge Scheindlin imposed a permitted presumption allowing the jury to presume that the lost evidence was relevant and favorable to the defendants.