Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-005698 09/23/2019

HONORABLE JAMES D. SMITH

CLERK OF THE COURT
P. Culp
Deputy

FELICE R APPELL, et al. JEFFREY H WOLF

v.

LANE & EHRLICH LTD, et al. DONALD WILSON JR.

JUDGE J. SMITH

MINUTE ENTRY

The Court considered Defendants' Motion for Summary Judgment filed May10, 2019, the Response, the Reply, and the lawyers' arguments. The Court also considered Plaintiffs' Motion for Adverse Inference Instruction filed July 24, 2019, the Response, the Reply, and the lawyers' arguments.

MOTION FOR SUMMARY JUDGMENT

Summary judgment "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Id.*; Ariz. R. Civ. P. 56. The Court considers only admissible evidence when ruling on summary judgment. Ariz. R. Civ. P. 56(c)(5) & (6). The Court must view the facts and the reasonable inferences derived from them in the light most favorable to the non-moving party. *Orme Sch.*, 166 Ariz. at 309-10, 802 P.2d at 1008-09.

I. PLAINTIFFS THEORY THAT LANE HAD A CONFLICT IN REPRESENTING WWAZ, APPELL, AND MACHIZ.

No conflict could arise unless Lane represented clients with conflicting interests. If Lane did not represent Appell individually, no conflict existed. Defendants first argued that Plaintiffs lack admissible evidence of Jerry Appell's subjective belief that Lane represented Appell individually. The RESTATEMENT describes evaluating if an attorney-client relationship exists:

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> > (a) the lawyer manifests to the person consent to do so; or
> > (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . .

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14. "The client's intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer." ID. cmt. c.

It is not unusual to rely on circumstantial evidence to prove someone's mental state. Fraud requires proving that a defendant intended to deceive another and knew the representation's falsity. Defendants typically do not admit such things, so plaintiffs rely on circumstantial evidence. Certain defamation claims require proving "actual malice." Again, it is rare that the defendant will admit it knew the statement's falsity or recklessly disregarded whether the statement was true.

The law does not require Plaintiffs to provide a statement from Appell along the lines of, "I believed Robert Lane was my lawyer." Plaintiffs may point to circumstantial evidence. And Plaintiffs did so here. The Court must draw inferences in favor of Plaintiffs when reviewing that evidence. With that standard in mind, Plaintiffs met their burden on summary judgment regarding Appell's subjective belief about an attorney-client relationship with Lane.

Defendants next argued that Plaintiffs cannot show an actual conflict if Lane represented WWAZ, Appell, and Machiz. And "the conflicts must be actual and not a vague appearance of impropriety." 3 RONALD E. MALLEN, LEGAL MALPRACTICE § 26:11 (2019). A substantial risk of compromised representation must exist:

> Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization *if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other*.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 131 (emphasis added).

A disqualifying conflict does not always arise when multiple clients have diverging goals. It often depends on the lawyer knowing that the clients are at odds.

> When multiple clients have generally common interests, the role of the lawyer is to advise on relevant legal considerations, suggest alternative ways of meeting common objectives, and draft instruments necessary to accomplish the desired results. *Multiple representations do not always present a conflict of interest requiring client consent* (see § 121). For example, in representing spouses jointly in the purchase of property as co-owners, the lawyer would reasonably assume that such a representation does not involve a conflict of interest. A conflict could be involved, however, if the lawyer knew that one spouse's objectives in the acquisition were materially at variance with those of the other spouse.

ID. § 130 cmt. c (emphasis added). Illustrations 1, 2, and 3 to that section explain the difference when (1) a lawyer knows the clients are knowledgeable and able to decide independently and (2) it is apparent to the lawyer that the clients may have diverging goals but are *not* able to decide independently. Drawing all reasonable inferences in Plaintiffs' favor, the record has sufficient evidence that Lane knew of a disagreement between Appell and Machiz that the business partners could not resolve independently.

The next issue is whether Plaintiffs have admissible evidence that Lane's alleged failure to advise Appell and Machiz of the possible conflict caused harm. "[T]he plaintiff must show that, more likely than not, the attorney's conduct was a substantial factor in causing the unfavorable result. This means producing evidence that, more likely than not, the attorney's conduct caused injury." 4 RONALD E. MALLEN, LEGAL MALPRACTICE § 37:97 (footnotes omitted). "The causal link between the lawyer's conduct and the injury must be based on more than speculation. . . . A possibility that the lawyer's conduct caused harm is still speculative." ID. § 8:20. Legal malpractice plaintiffs must show "but-for" and proximate causation. *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986). "To prove 'but-for' causation, the plaintiff must show that causation by the defendant's act or omission is reasonably likely, not merely possible." *Cecala v. Newman*, 532 F. Supp. 2d 1118, 1136 (D. Ariz. 2007) (applying Arizona law). "When a jury

must pile inference upon inference to reach a verdict, and less than a scintilla of evidence recommends the inferred course of events, summary judgment is proper." *Pactiv Corp. v. Multisorb Techs., Inc.*, 2012 WL 1030258, *4 (N.D. Ill. Mar. 27, 2012) (granting summary judgment in contract action).

Here, Plaintiffs argued that Lane's malpractice was one of omission. That is, Lane did not advise Appell and Machiz to hire independent counsel to analyze the buy-sell provision standoff. "Where the attorney's error was an omission, the inquiry is, assuming the attorney performed the act, would the plaintiff have achieved the claimed benefit?" RONALD E. MALLEN, LEGAL MALPRACTICE § 8.20. Plaintiffs pointed to O'Sullivan's opinion that a lawyer would have identified the errors in the valuation provisions. But that is only part of the analysis. Plaintiffs also must point to admissible evidence that independent counsel's advice or problem-spotting would have led to a change. Their theory required this hypothetical chronology: (1) Lane advised Appell and Machiz of the possible conflict; (2) Appell retained separate counsel; (3) separate counsel identified the problem with the buy-sell provision; (4) Appell and Machiz agreed to amend the shareholders' agreement buy-sell provision; and (5) that amended buy-sell provision was better for Appell.

Plaintiffs' causation theory hinges on inference upon inference that the record does not support. Machiz testified that he and Appell often disagreed on the valuation and whether to sign new certificates of value. Indeed, Lane wrote to both men in 2003 that they "are playing a game of 'Russian Roulette' under which the family of the surviving shareholder benefits from the other's death" because the certificate of value was too low. Meeting minutes showed that Appell also believed the value under the current formula was too low. Nonetheless, Machiz refused to sign a certificate that matched Appell's belief about the value because Machiz believed the company lacked enough insurance to fund a buyout. Appell and Machiz never agreed to modify the shareholders' agreement.

Even under Plaintiffs' theory, the putative conflict only led Lane to be frozen with inaction. Lane never corrected the flawed buy-sell provision (nor could he over one shareholder's objection). Instead, Lane only told Appell and Machiz of the problem without also advising them to seek separate counsel. But Machiz opposed correcting the provision—he feared the cost to the company and his family under a proper valuation. It is too much of an evidentiary stretch on this record to suggest that Lane advising Appell and Machiz to retain separate counsel would have solved the problem. The only admissible evidence in the record is that the two men were at loggerheads and Machiz was intractable. Plaintiffs did not meet their burden of pointing to admissible evidence of causation sufficient to withstand summary judgment on the conflict of interest theory.

IT IS ORDERED granting Defendants' Motion regarding the conflict of interest theory.

II. LANE'S DEPOSITION TESTIMONY IN THE UNDERLYING LITIGATION IS NOT ACTIONABLE.

Plaintiffs argued that Lane did not testify truthfully in his deposition in the Buy-Sell Litigation. But the challenged testimony related to Lane's perception of how Appell and Machiz understood the buy-sell provisions. Lane testified that he did not know what the two men understood the provisions to mean. Lane testified about *Lane's* understanding, though. And although Plaintiffs argued that Lane's testimony "directly contradicted his own representations in prior years" (Resp. at 11:28), their cited facts do not support that proposition. Plaintiffs cited PSOF ¶ 64, but that paragraph referred only to Lane's deposition testimony. In that testimony, Lane declined to opine on what Appell and Machiz understood/believed. There are no facts showing that Lane represented something else in earlier years, that Lane actually recalled such earlier representations, or that Lane prevaricated about the purported earlier representations.

The Court agrees with Defendants that the Ethical Rules do not create a duty that Lane owed Plaintiffs to testify in a particular way or to particular facts. That is especially true when considering that Lane did not represent the Appells or Machizes when he fielded the questions at issue. Plaintiffs did not cite authority suggesting that Lane owed the type of duty they advocated or that Lane's refusal to opine about others' understandings breached a duty (generally or in a legal malpractice setting).

IT IS ORDERED granting Defendants' Motion regarding Lane's deposition testimony in the Buy-Sell Litigation. Lane did not owe Plaintiffs a duty to testify in a particular manner, Plaintiffs lack competent evidence that the testimony was untruthful, and Plaintiffs lack competent evidence that Lane's testimony caused harm.

III. FELICE AND GLENN APPELL'S PERSONAL CLAIMS FAIL.

Defendants challenged Glenn Appell's and Felice Appell's ability to bring claims individually. Glenn and Felice never owned shares of WWAZ. Instead, a variety of trusts held the shares. Glenn and Felice are trustees and beneficiaries of those trusts. Plaintiffs did not cite any authority holding that Glenn and Felice may bring individual actions based on diminution to the trust *res*. Indeed, Glenn's and Felice's status as beneficiaries generally does not allow them to sue for these alleged harms:

> (1) A trustee may maintain a proceeding against a third party on behalf of the trust and its beneficiaries.
> (2) A beneficiary may maintain a proceeding related to the trust or its property against a third party only if:

> (a) the beneficiary is in possession, or entitled to immediate distribution, of the trust property involved; or
> (b) the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest.

RESTATEMENT (THIRD) OF TRUSTS § 107 (2012); *cf.* 10 AMERICAN BAR ASSOCIATION, BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS (Robert L. Haig, Ed. 4th ed. 2018) § 108:48 ("Beneficiaries of trusts and/or estates generally do not have standing to assert a RICO claim for diminution of value because the injury is to the trust or the estate, to be remedied by the trustee or other fiduciary.").

The only alleged harm related to the trust *res*. The trustees may bring claims on the trust's behalf, but the beneficiaries do not have separate claims to pursue. Thus, it makes no difference that Glenn and Felice argued that they also were Lane's clients. [*See* Resp. at 13:9-14:16.] The only party injured by Lane's alleged malpractice was the trust; Glenn and Felice may bring claims in their capacity as trustees but not individually as beneficiaries.

IT IS ORDERED granting Defendants' Motion regarding claims by Glenn and Felice Appell personally. They may, however, pursue claims as trustees of the trusts.

IV. THE FRAUD CLAIM FAILS.

Defendants attacked Plaintiffs' fraud claim in the Motion (at 14:22-16:13). Plaintiffs' counsel conceded at oral argument that Plaintiffs abandoned this claim.

IT IS ORDERED granting Defendants' Motion on the fraud claim.

V. PUNITIVE DAMAGES ARE NOT WARRANTED ON THIS RECORD.

For Plaintiffs to reach the jury regarding punitive damages, they must point to admissible evidence of an intent to injure, wrongful conduct motivated by spite or ill will, or acting to serve one's own interests while consciously disregarding a substantial risk of significant harm to others. The focus is on the wrongdoer's mental state, and "something more is required over and above the mere commission of a tort." *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986) (quotations omitted). Proof by clear and convincing evidence is necessary. It can be appropriate to evaluate the issue as part of summary judgment. *See, e.g.*, *Felipe v. Theme Tech Corp.*, 235 Ariz. 520, 528, ¶ 33, 334 P.3d 210. 218 (App. 2014) (affirming summary judgment eliminating punitive damages); *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, 517, ¶ 39, 144 P.3d 519, 532 (App. 2006) (affirming summary judgment for insurer on punitive damages although bad faith claim remained).

It may be helpful to review instances where our appellate courts held that punitive damages could not arise. They inform the Court of the type of conduct that does not meet the required showing.

Gurule v. Illinois Mutual Life & Casualty Co., 152 Ariz. 600, 734 P.2d 85 (1987), involved a disability insurer improperly terminating benefits. Its investigator did not talk to the insured. The insurer received a letter from the treating doctor confirming the total disability. But the insurer rejected the letter because the doctor did not use the insurer's definition of "disability"—a definition the insurer never gave to the doctor. An IME, however, concluded that the insured could work. "[A]lthough the jury found that Illinois Mutual had insufficient grounds to deny Gurule benefits, we do not believe the evidence is sufficient to allow a reasonable juror to infer that Illinois Mutual acted with an intent to injure, or in conscious disregard of Gurule's rights under his policy." *Id.* at 607, 734 P.2d at 92. The Court reversed a punitive damages award of approximately $385,000.00.

In *Farr v. Transamerica Occidental Life Insurance Co. of California*, 145 Ariz. 1, 699 P.2d 376 (App. 1984), the Court reversed a punitive damages award in an insurance bad faith matter. That insurer erroneously failed to pay medical benefits after childbirth. The insurer also failed to follow its procedures regarding following-up with policyholders while awaiting more information. The conduct "amounted to bungling and negligence," but even the policyholders "were not sure whether or not they were to supply" the additional information to the insurer. *Id.* at 10, 699 P.2d at 385.

Plaintiffs argued that "[p]unitive damages historically have been awarded against attorneys for legal malpractice. *Elliott v. Videan*, 164 Ariz. 113, 118, 791 P.2d 639, 644 (App. 1989)." [Resp. at 14:19-20.] But *Elliott* involved the value of the underlying case that the lawyer's malpractice affected. Those plaintiffs were entitled to recover the full value of the underlying case that they would have recovered if not for the lawyer's malpractice. A viable punitive damages request existed in that underlying case. Thus, the lawyer's malpractice prevented those plaintiffs from recovering a punitive damages award in the underlying case.

In *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 907 P.2d 506 (App. 1995), competent evidence suggested that the lawyer who represented clients in litigation favored one client to the other's detriment. The lawyer acknowledged in correspondence to the favored client's auditor that his strategy could shift all liability to the disfavored client. The lawyer served on the favored client's board and actively concealed his conduct from the disfavored client. The lawyer also had a motive to "sacrifice" the disfavored client because it had declared bankruptcy. The record here does not include similar evidence.

Another Arizona opinion affirming punitive damages in a legal malpractice action described the egregious conduct that met the standard:

> Galusha's [the lawyer's] conduct in agreeing to file liens and then failing to do so *and then demanding additional money to enforce a lien that he never filed* was so aggravated or outrageous as to provide probable cause for criminal charges of theft. The same may be said for Galusha's conduct in *billing the Mamodes for his time spent responding to their complaint against him* with the Better Business Bureau.

Asphalt Eng'rs, Inc. v. Galusha, 160 Ariz. 134, 137, 770 P.2d 1180, 1183 (App. 1989) (emphasis added). Again, this record does not include similar evidence.

Plaintiffs did not point to admissible evidence that Lane either intended to injure anyone or consciously disregarded the substantial risk of significant injury. Viewing the facts most favorably to Plaintiffs, Lane erred when drafting the shareholders' agreement. He failed to catch a potential problem regarding valuation protocols. Under Plaintiffs' theory, Lane should have told Appell and Machiz of a potential conflict of interest. But there is not admissible evidence that Lane consciously took that course to favor one client over the other or to enrich himself.

IT IS ORDERED granting Defendants' motion regarding punitive damages.

MOTION FOR ADVERSE INFERENCE INSTRUCTION

The Court may impose sanctions when a party fails to preserve evidence that it knows or reasonably should know may be relevant. *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 250, 955 P.2d 3, 6 (App. 1997). Sanctions include instructing the jury that it may infer that the destroyed evidence would be adverse to the destroying party. *See Lips v. Scottsdale Healthcare Corp.*, 224 Ariz. 266, 267, ¶ 8, 229 P.3d 1008, 1009 (2010). "[I]ssues concerning destruction of evidence and appropriate sanctions therefor should be decided on a case-by-case basis, considering all relevant factors." *Souza*, 191 Ariz. at 250, 955 P.2d at 6. The "[d]estruction of potentially relevant evidence obviously occurs along a continuum of fault" and "[t]he resulting penalties vary accordingly." *Id.* (citation omitted).

The Court considers many factors regarding possible spoliation sanctions. Those include whether the destruction was intentional or in bad faith. The Court also evaluates whether the destruction prejudiced the other party. *See Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 411, ¶ 30, 207 P.3d 654, 664 (App. 2009) (affirming refusal to give instruction when plaintiff tested and discarded portion of pipe but additional pipe remained for defendants' testing); *Smyser v. City of Peoria*, 215 Ariz. 428, 440, ¶ 38, 160 P.3d 1186, 1198 (App. 2007) (affirming refusal to give

instruction; defendant negligently destroyed data strips regarding decedent's heart monitoring; other data available to show what the strips would have revealed).

Defendants objected to the timing of Plaintiffs' Motion but did not point to any authority supporting that argument. The Court cannot see a reason to forgo addressing alleged spoliation when the complaining party files a motion. If the complaining party does not make a sufficient record, that will redound to the opposing party's benefit. Plaintiffs included a declaration from M. Todd Smith regarding what documents Plaintiffs received from Defendant Lane and his former firm. The Court agrees that Smith cannot testify at trial if Plaintiffs did not disclose him as a witness. But the Court can consider Smith's declaration as an inventory of what Plaintiffs received to evaluate the spoliation arguments. Defendants had ample opportunity to show that Smith/Plaintiffs overlooked materials that Defendants provided.

There is no dispute that Defendant Lane destroyed an external hard drive after he received the summons and complaint. Defendants argued that "Mr. Lane did not receive a litigation hold request from Plaintiffs' counsel (or anyone else) at any time." [Defs.' Resp. at 3:23-24.] True—Plaintiffs did not serve a document titled "litigation hold" or "preservation request." But receiving the summons and complaint triggered the duty to preserve. Ariz. R. Civ. P. 37(g)(1)(A). Both sides agree that the data are lost and not recoverable. Thus, the Court cannot order that Defendants restore the data. *See* Ariz. R. Civ. P. 37(g)(2). Instead, the Court must evaluate whether other sanctions are warranted.

I. PREJUDICE TO PLAINTIFFS.

The Court must find prejudice to Plaintiffs to impose sanctions. Ariz. R. Civ. P. 37(g)(2)(A). Lane argued that the discarded hard drive did not contain any data different from the hardcopy files already produced. Of course, Plaintiffs cannot test that assertion to show prejudice. And Lane conceded that he "did not study the contents of the hard drive before" he discarded it. [Defs.' Resp. at 3:23-24.] Nonetheless, "Mr. Lane acknowledges that emails were also likely on the hard drive." [*Id.* at 4:25-26.]

The Advisory Committee Notes to the comparable federal rule explain that "[d]etermining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair." Fed. R. Civ. P. 37(e) Advisory Comm. Note 2015 Amendment. In *Moody v. CSX Transportation, Inc.*, 271 F. Supp. 3d 410, 430 (W.D.N.Y. 2017), the court did not require the plaintiff to prove that destroyed data would have been favorable to her. That defendant failed to preserve data (a train's event data recorder) in its exclusive control. That personal injury plaintiff alleged that a train began moving without sounding its horn or giving a warning. The plaintiff and her friend both testified to that effect. "Under these circumstances, it is plausible that the data from the event recorder would have

supported Moody's case." *Id.* "The prejudiced party must not be held to too strict a standard of proof regarding the likely contents of the destroyed or unavailable evidence, because doing so would allow parties who have destroyed evidence to profit from that destruction." *Ottoson v. SMBC Leasing & Fin., Inc.*, 268 F. Supp. 3d 570, 580 (S.D.N.Y. 2017) (quotations omitted).

Lane delivered hardcopy versions of his files to Plaintiffs' counsel in August 2015 and December 2016 as part of the buy/sell litigation. Plaintiffs served Lane with the complaint here in April 2017. Lane discarded a hard drive with data from his prior firm about two or three months later. Plaintiffs argued that the destroyed hard drive might have held data showing that Lane "prepared, or considered preparing, written terms of engagement, fee agreements, conflict waivers or joint representation agreements . . . ." [Pls.' Mot. at 5:22-24.] But Plaintiffs acknowledged that their files do not contain such things nor do the files transferred to Plaintiffs' counsel. Nothing in Lane's testimony hinted that he contemplated preparing such documents. In fact, Plaintiffs' theory hinges on Lane's failure to recognize the alleged conflict of interest he faced. Plaintiffs' spoliation theory requires that Lane actually contemplated this issue, did not mention it to Appell or others, prepared relevant documents to address the issue, but then did not send the documents to Appell. Lane then had to keep the never-sent Word documents on the system. The billing records Plaintiffs relied on do not suggest that Lane created specific documents relevant to these issues. For example, there are not entries like, "Email G. Appell re: conflict waiver" or "Prepare letter for G. Appell and B. Machiz re: conflict and need for separate counsel." This is unlike *Moody* where other evidence suggested that the missing data contained relevant information.[1]

Emails arguably could be a different matter. Neither side suggested that the hard dive included a personal storage table (.pst file), which is a comprehensive collection of data from certain Microsoft programs, including the ubiquitous Outlook. Nonetheless, Lane conceded that the hard drive likely contained some email. Even so, however, Plaintiffs acknowledged that they did not maintain all of their emails with Lane over the years. [Pls.' Mot. at 6:17-18.] They did not offer a reason to conclude that Lane or his prior firm preserved email in perpetuity or transferred substantial email data to the hard drive for Lane's move to another firm.

The Court questions whether the destroyed data likely would have included relevant email as well. The Fifth Amendment to the shareholders' agreement is dated November 2003. Absent any information about a document/data retention policy by Lane's prior firm, it is a reach to suggest that the firm would have preserved the data for 13 years or more and migrated the data to the hard drive. The Sixth Amendment to the shareholders' agreement arose in December 2013. It is more feasible to suggest that email from that era may have existed and made its way to the hard drive. Again, however, this record is very thin to conclude that relevant email existed and that

[1] Notably, the billing records often are barely legible. The Court recommends providing the relevant text in the brief or an appendix that recreates the relevant text.

Lane failed to preserve them. No evidence suggested that Lane routinely emailed with Appell, Machiz, or others on these issues. Even the billing entries relating to email are benign and relatively few.

It is difficult to identify prejudice to Plaintiffs following the summary judgment rulings. Any remaining claims relate to drafting errors regarding the amendments to the shareholders' agreement. The amendments say what they say; from Plaintiffs' perspective, the amendments are flawed on their face. Indeed, Plaintiffs' spoliation papers focused on the potential prejudice relating to the allegedly-conflicted representation arguments, not the flawed drafting. Thus, it is difficult to identify the prejudice to Plaintiffs. Of course, Plaintiffs could not know the Court's summary judgment ruling when they prepared the spoliation motion. Furthermore, the Court does not know all of Defendants' possible arguments at trial. Defendants' arguments may open the door to Plaintiffs demonstrating prejudice from the lack of the hard drive. The Court may reevaluate this issue as the defenses come into focus with the joint pretrial statement or evidence/argument at trial.

II. WHETHER LANE INTENDED TO DEPRIVE PLAINTIFFS OF THE DATA.

Another inquiry is whether Lane intended to deprive Plaintiffs of the hard drive's information here. Ariz. R. Civ. P. 37(g)(2)(B). "[A] court that has made that finding of intent need not make an independent finding of prejudice (as is required under Rule 37(e)(1)) in order to support action under Rule 37(e)(2). The finding of intent, standing alone, can support a finding of prejudice as to lost information." 8B RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2284.2 (3d ed. 2019) (footnote omitted). The *Moody* court found no credible explanation for destroying those data. The recording plainly was relevant and crucial to the issues. Moreover, that defendant did nothing over four years to ensure it preserved the data, uploaded the data to a central hard drive, or preserved a laptop that also contained the data. 271 F. Supp. 3d at 431. That court agreed to give an adverse inference instruction.

It defies explanation that Lane destroyed the hard drive—full stop. Plaintiffs had served him, any reasonable person would understand that the hard drive may have relevant information, the burden to preserve it was minimal, and the destruction was not the result of an automated data retention process. His age, purported lack of litigation experience, or belief about what the hard drive contained do not justify his actions. Courts expect non-lawyers to preserve potentially-relevant evidence so this Court certainly expects that Lane would have preserved the hard drive. If nothing else, he should have provided it to his counsel.

"Sanctions should be designed to deter parties from engaging in spoliation, place the risk of an erroneous judgment on a party who wrongfully created the risk, and restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by

the opposing party." *Ottoson*, 268 F. Supp. 3d at 580. That case involved a plaintiff who deleted emails about her claims with witnesses. She could not recall taking any steps to preserve electronic data. That defendant received some of the emails directly from one witness, so evidence showed that the communication occurred. That court concluded that "[a]n adverse inference instruction is warranted here because Defendants have provided sufficient evidence that additional communications between Plaintiff and her witnesses likely existed, were not produced, and were relevant." *Id.* at 584.

Unlike *Moody* and *Ottoson*, however, the Court does not conclude that the most likely explanation for destroying the ESI was to prevent Plaintiffs from obtaining it (as opposed to negligence). The existing documents and ESI give little reason to believe that the hard drive would have contained other relevant ESI. Nonetheless, should the trial presentations suggest any prejudice to Plaintiffs on the drafting error theory, the Court will use an instruction to remedy the harm. This likely would be a more traditional instruction regarding the loss of evidence rather than an adverse inference. In essence:

> allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice.

Fed. R. Civ. P. 37 Advisory Comm. Note 2015 Am. Final resolution of this issue requires case development as the matter proceeds to trial.

IT IS ORDERED denying the motion for an adverse inference instruction without prejudice.