

IN THE SUPREME COURT OF FLORIDA  
TALLAHASSEE, FLORIDA

TRIAL PRACTICES, INC.,

Petitioner,

CASE NO.: SC17-2058

vs.

HAHN LOESER & PARKS, LLP, as  
Substitute Party for Jack J. Antaramian,

L.T. CASE NO.: 2D13-6051  
Consolidated with:  
L.T. CASE NO.: 2D14-86  
L.T. CASE NO.: 06-CA-5366

Respondent.

---

---

**PETITIONER'S BRIEF ON CONFLICT JURISDICTION**

---

G. Donovan Conwell, Jr.  
Florida Bar No. 0371319  
Florida Bar Board Certified in Civil Trial  
Law, Business Litigation and  
Intellectual Property Law  
**CONWELL BUSINESS LAW, LLLP**  
12610 Race Track Road, Suite 200  
Tampa, FL 33626  
Tel. (813) 282-8000  
*Counsel for Petitioner Trial Practices, Inc.*

John F. Romano  
Florida Bar No. 175700  
**ROMANO LAW GROUP**  
1005 Lake Avenue  
Lake Worth, FL 33460  
Tel. (561) 533-6700  
*Co-Counsel for Petitioner Trial Practices,  
Inc.*

December 7, 2017

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES.....III**  
**STATEMENT OF THE CASE AND FACTS..... 1**  
**SUMMARY OF THE ARGUMENT ..... 4**  
**ARGUMENT..... 5**  
**CONCLUSION ..... 9**  
**CERTIFICATE OF SERVICE ..... 11**

# TABLE OF AUTHORITIES

## Cases

*The Florida Bar v. Wohl*,  
842 So. 2d 811 (Fla. 2003)..... 5, 6, 7, 8, 9

*In Re Amendments to the Rules Regulating The Florida Bar*,  
916 So. 2d 655 (Fla. 2005).....7

*In Re Amendments to the Rules Regulating The Florida Bar*,  
140 So. 3d 541 (Fla. 2014).....7

*Florida Bar re Amendments to Rules Regulating the Florida Bar*,  
644 So. 2d 282 (Fla. 1994).....7

*Florida Bar v. Jackson*,  
490 So. 2d 935 (Fla. 1986).....9

## OTHER AUTHORITIES

### Statutes

§ 92.142(1) Florida Statutes (2013).....2, 4

### Rules

Rule 4-3.4(b) Rules Regulating the Florida Bar  
(2011).....3, 4, 5, 6, 7, 8, 9

## **INTRODUCTION**

The Court has jurisdiction on two grounds to hear this case on the merits. First, the Second District has certified to this Court a question of great public importance. Second, the Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv) Fla. R. App. P. due to a direct and express conflict with at least two decisions from this Court, as discussed below.

## **STATEMENT OF THE CASE AND FACTS**

The Defendant, Jack Antaramian<sup>1</sup>, prevailed over the Plaintiff, Trial Practices, Inc. (“TPI”), in a jury trial over a contract dispute in which Antaramian paid all his fact witnesses at expert witness rates for their preparation for, and testimony during, the trial. (A.3-4, 8). He also hired and paid all his fact witnesses as consultants for assisting him with “discovery and case preparation. (A.4). The trial court awarded attorneys’ fees and costs to Antaramian as the prevailing party pursuant to a fee shifting provision in the parties’ contract. (A.3-4). Antaramian sought to tax as costs against TPI the fees that he paid to each of his testifying fact witnesses at expert witness rates as if they were expert witnesses. (A.3-4, 8). Most of Antaramian’s witnesses

---

<sup>1</sup> The Respondent, Hahn Loeser & Parks, LLP, is a law firm that was substituted for Antaramian, who is now deceased. (A. 1).

at trial were attorneys testifying as fact witnesses who Antaramian paid as expert witnesses for their trial testimony. (A. 4, 8).

The trial court agreed with Trial Practices that it was improper for Antaramian to pay fact witnesses as if they were expert witnesses, in violation of section 92.142(1) Florida Statutes (2013), and that attorneys who testify at trial as fact witnesses are not entitled to the same hourly fee as an expert witness. (A. 4, 8). Instead, they are entitled only to \$5 per day, the amount of witness compensation provided for in section 92.142(1). (A.8). The Second District agreed, stating that section 92.142(1) “restricts payments to witnesses for their attendance and thus presumably their actual testimony at trial.” (A.10).

The trial court and the Second District nonetheless rejected TPI’s argument that Antaramian should not be awarded prevailing party fees and costs because he prevailed by improperly paying all his fact witnesses at expert witness rates for their testimony, far more than the \$5 per day permitted by the statute. (A.8). The only consequence to Antaramian for improperly paying for fact witnesses testimony at trial was that the court capped his recovery from TPI for those improper payments at \$5.00 per day. *Id.*

The trial court also awarded Antaramian “certain fees charged” by his fact witnesses for their “assistance” in both “case and discovery preparation”

which the trial court found “rendered them consulting expert witnesses.” (A.4). The fees Antaramian paid to fact witnesses for their trial testimony and case and discovery preparation were part of a \$317,873.64 cost award. (A.3). TPI appealed the judgment for attorneys’ fees and costs.

The Second District reversed in part, affirmed in part, remanded and certified to this Court the following question of great public importance (A. 12,18):

**DOES RULE 4-3.4(B) OF THE RULES REGULATING  
THE FLORIDA BAR PERMIT A PARTY TO PAY A  
FACT WITNESS FOR THE WITNESS’S ASSISTANCE  
WITH CASE AND DISCOVERY PREPARATION.**

The Second District answered the question in the affirmative, concluding that assistance with case and discovery preparation is part of "preparing for . . . proceedings," which rule 4-3.4(b) permits. (A. 9-12). The version of rule 4-3.4(b) in effect at the time of trial prohibited payment to witnesses except that a lawyer could pay "reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings." (A. 9).

The Second District held that payment of “reasonable compensation to witnesses for the loss of compensation incurred by reason of preparing for, attending, and testifying at proceedings” includes payment to fact witnesses as consultants for “assistance with case and discovery preparation.” (A.12).

The Second District also held that the party paying the witness need not prove “loss of compensation” by the witness by “reason of preparing for, attending, and testifying at proceedings,” notwithstanding the express language in rule 4-3.4(b) restricting compensation to witnesses “*for the loss of compensation* incurred by reason of preparing for, attending and testifying at proceedings.” (A.11, N.3, emphasis added).

The Second District also found that paying fact witnesses as expert witness consultants does not conflict with the statutory \$5 per day limitation on payments to witnesses because section 92.142(1) applies to witness payments for attending and testifying at trial while rule 4-3.4(b) applies to paying witnesses for their time spent preparing for trial. (A. 10-12).

### **SUMMARY OF THE ARGUMENT**

The Second District’s opinion fundamentally changes trial practice in Florida by permitting litigating parties to hire and pay fact witnesses as “consultants” to assist with “discovery and case preparation” and paying them at expert witness rates for their trial testimony. This directly conflicts with decisions from this Court prohibiting the retention of fact witnesses as “consultants,” paying them for case “assistance” and providing a financial

inducement for fact testimony. It also violates this Court's adoption of rule 4-3.4(b) of the Rules Regulating the Florida Bar which does not permit hiring fact witnesses as consultants and paying them fees for discovery and case preparation.

## ARGUMENT

### **I. The Second District's opinion conflicts with *Florida Bar v. Wohl*, where this Court held that a party may not hire a fact witness as a consultant and pay the fact witness for assisting with case preparation.**

This Court in *The Florida Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003) condemned the practice of hiring a fact witness as a "consultant" and paying her for case "assistance," describing that practice as "extremely serious misconduct." 842 So. 2d at 814-816. The respondent, Wohl, was an attorney involved in drafting and negotiating an agreement with a fact witness, Kerr, who was to provide "assistance" to Wohl's client in pending litigation for a substantial fee. *Id.* at 813. The fee was based on the amount of time Kerr spent assisting and on the usefulness of information she provided. *Id.* Wohl argued that when they drew up the agreement he considered Kerr to be a consultant and only later did he realize she would be a testifying fact witness. *Id.* at 814.

The Court rejected Wohl’s argument, finding Kerr to be a fact witness, not a consultant, because she had personal knowledge about the facts in dispute in the litigation. *Id.* Also, the agreement specified that Kerr would assist Wohl’s client in identifying and recovering assets and damages related to and arising from the diversion of assets and other misconduct at issue in the litigation, conduct to which she was a witness. The Court characterized this as “compensating for what [Kerr] had witnessed,” rather than consulting services, and held that “paying an individual who has personal knowledge of the facts is to pay a witness, whether or not that person is expected to testify.” *Id.* The Court further held that “a witness may not be paid, unless the payments *fall within the clearly delineated exceptions* in rule 4-3.4(b)” of the Rules Regulating The Florida Bar. *Id.* at 815 (emphasis added).

Rule 4-3.4(b) of the Rules Regulating The Florida Bar does not provide an exception for paying witnesses “for their assistance with case and discovery preparation.” The version of Rule 4-3.4(b) in effect at the relevant time in 2011 provided in relevant part that:

[a] lawyer shall not: (b) fabricate evidence, counsel or assist a witness to testify falsely or offer an inducement to a witness except that a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings, a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending or testifying at proceedings.

*In Re Amendments to the Rules Regulating The Florida Bar*, 916 So. 2d 655 (Fla. 2005) (emphasis added).<sup>2</sup>

The Second District’s opinion improperly *expanded* the exceptions in rule 4-3.4(b) to broadly include “deposition and case assistance,” yet expressly acknowledged that “the rule does not expressly state that witnesses may be paid for “assistance with case and discovery preparation.” (A.12).

The opinion also improperly *failed* to apply the limiting language from rule 4-3.4(b), “to reimburse a witness for the *loss of compensation* incurred by reason of preparing for, attending and testifying at a proceeding.” (A.11 at N 3, emphasis added). The Second District expressly held that compensation may be given to a witness “even where no lost monetary amount is proven.” This conflicts with *Wohl’s* express holding that “a witness may not be paid, unless the payments fall within the clearly delineated exceptions in rule 4-3.4(b).”<sup>3</sup> The version of rule 4-3.4(b) in effect at the relevant time *required*

---

<sup>2</sup> In 2014, the rule was changed to omit the limiting words, “to reimburse a witness for the loss of compensation.” *In Re Amendments to the Rules Regulating The Florida Bar*, 140 So. 3d 541 (Fla. 2014). The amended rule still *does not* permit paying a fact witness for deposition and case assistance.

<sup>3</sup> The “clearly delineated exceptions” in rule 4-3.4(b) in effect when this court decided *Wohl* are the same exceptions in the version of rule 4-3.4(b) in effect in 2011 when Antaramian paid expert witness fees to his fact witnesses. *Florida Bar re Amendments to Rules Regulating the Florida Bar*, 644 So. 2d 282 (Fla. 1994); *Wohl*, 842 So. 2d at 816.

a showing of “*loss of compensation incurred by reason of* preparing for, attending or testifying at proceedings.” (emphasis added). The Second District’s opinion, therefore, expressly conflicts with this Court’s adoption of rule 4-3.4(b).

The Second District’s opinion further conflicts with *Wohl* and this Court’s adoption of rule 4-3.4(b) by refusing to impose any consequence upon Antaramian or his successor, Hahn Loeser, for improperly hiring and paying fact witnesses as expert witnesses *for their trial testimony*, conduct that this Court has held to be “extremely serious misconduct.” 842 So. 2d at 814-816. The Second District acknowledged that Antaramian’s payments to his fact witnesses at expert witness rates were “improper,” yet rewarded Antaramian for his serious misconduct by affirming the trial court’s award to him of prevailing party attorneys’ fees and costs. A. 8, 11-12.

Paying expert witness hourly rates to fact witnesses who are entitled to only \$5.00 per day for preparing to testify and testifying at trial, is an inducement to testify, particularly when there was no evidence presented that the witnesses lost compensation by preparing to testify and testifying. This Court has condemned such practices in the strongest terms:

The very heart of the judicial system lies in the integrity of the participants.... *Justice must not be bought or sold*. Attorneys have a solemn responsibility to assure that not even the taint of impropriety exists as to the procurement of testimony before courts of justice.

*Wohl*, 842 So. 2d at 816, citing *Florida Bar v. Jackson*, 490 So. 2d 935 (Fla. 1986) (emphasis added). The Second District's Opinion allows litigants to buy justice through hiring fact witnesses as consultants and paying them expert witness rates for case assistance and fact testimony, in direct conflict with *Wohl*, *Jackson* and rule 4-3.4(b) of The Rules Regulating The Florida Bar. This Court should exercise its discretion to correct this significant departure from established Florida Supreme Court precedent.

### **CONCLUSION**

This Court's opinions forbidding parties from hiring and paying fact witnesses and providing them a financial inducement for testimony cannot be reconciled with the Second District's opinion permitting such conduct in this case. This Court should exercise its jurisdiction to resolve the conflict between the Second District's opinion and the above-cited opinions of this Court and rule 4-3.4(b) of the Rules Regulating the Florida Bar.

Dated: December 7, 2017.

Respectfully Submitted,

By: /s/ G. Donovan Conwell, Jr.

G. Donovan Conwell, Jr.

Florida Bar No. 0371319

Florida Bar Board Certified in Civil

Trial Law, Business Litigation and

Intellectual Property Law

**CONWELL BUSINESS LAW, LLLP**

12610 Race Track Road, Suite 200

Tampa, FL 33626

Tel. (813) 282-8000; Fax (813) 855-2631

[dconwell@ConwellBusinessLaw.com](mailto:dconwell@ConwellBusinessLaw.com)

[eservice@ConwellBusinessLaw.com](mailto:eservice@ConwellBusinessLaw.com)

*Counsel for Petitioner, Trial Practices, Inc.*

John F. Romano

Florida Bar No. 175700

ROMANO LAW GROUP

1005 Lake Avenue

Lake Worth, FL 33460

Tel. (561) 533-6700; Fax. (561) 533-1285

[john@romanolawgroup.com](mailto:john@romanolawgroup.com)

*Co-Counsel for Petitioner Trial Practices,  
Inc..*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December, 2017, a true and correct copy of the above and foregoing has been filed via the Florida Court's E-Filing Portal which will send an Electronic Mail notification of same to the following:

Edmond E. Koester, Esq.  
Matthew M. Jackson, Esq.  
Coleman, Yovanovich & Koester, P.A.  
4001 Tamiami Trail North, Suite 300  
Naples, FL 34103  
[ekoester@cyklawfirm.com](mailto:ekoester@cyklawfirm.com)  
[mjackson@cyklawfirm.com](mailto:mjackson@cyklawfirm.com)  
[mcaswell@cyklawfirm.com](mailto:mcaswell@cyklawfirm.com)  
[cykservice@cyklawfirm.com](mailto:cykservice@cyklawfirm.com)  
*Counsel for Appellee, Jack J. Antaramian*

And

Andrew J. Wozniak, Esq.  
Kevin Carmichael, Esq.  
Wood, Buckel, & Carmichael, PLLC  
2150 Goodlette Road North, Sixth Floor  
Naples, FL 34102  
[ajw@wbclawyers.com](mailto:ajw@wbclawyers.com)  
[k2c@wbclawyers.com](mailto:k2c@wbclawyers.com)  
[bnr@wbclawyers.com](mailto:bnr@wbclawyers.com)  
[jlh@wbclawyers.com](mailto:jlh@wbclawyers.com)  
*Counsel for Curator, Joseph D. Stewart,  
Esq., of the Estate of Jack J. Antaramian*

Edward K. Cheffy  
David A. Zulian  
Andrew H. Reiss  
Cheffy Passidomo, P.A.  
821 5th Avenue South  
Naples, FL, 34102  
Primary: [ekcheffy@napleslaw.com](mailto:ekcheffy@napleslaw.com)  
Primary: [dazulian@napleslaw.com](mailto:dazulian@napleslaw.com)  
Primary: [ahreiss@napleslaw.com](mailto:ahreiss@napleslaw.com)  
[raricci@napleslaw.com](mailto:raricci@napleslaw.com)  
Secondary: [ftharper@napleslaw.com](mailto:ftharper@napleslaw.com)  
Secondary: [slreveter@napleslaw.com](mailto:slreveter@napleslaw.com)  
Secondary: [jjprint@napleslaw.com](mailto:jjprint@napleslaw.com)  
*Counsel for Appellee*