IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Case No.: SC17-2058
L.T. Case No.: 2D13-6051
Consolidated with:
L.T. Case No.: 2D14-86

L.T. Case No.: 06-CA-5366

TRIAL PRACTICES, INC.	vs.	HAHN LOESER & PARKS, LLP, as Substitute Party for Jack J. Antaramian
Petitioner		Respondent

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

December 27, 2017

Edmond E. Koester
Florida Bar No. 87882
Matthew B. Devisse
Florida Bar No. 119125
COLEMAN, YOVANOVICH & KOESTER, P.A.
4001 Tamiami Trail North, Suite 300
Naples, Florida 34103
Phone: (239) 435-3535
Fax: (239) 435-1218
Email: ekoester@cyklawfirm.com
Email: mdevisse@cyklawfirm.com
Counsel for Respondent

Table of Contents

Table of Citations

CASES

STATUTES

RULES

OTHER AUTHORITIES

Introduction

Petitioner, Trial Practices, Inc. ("TPI"), submits this Court has jurisdiction to hear this case on the merits on two grounds: (i) First, the Second District Court of Appeal ("DCA") has certified a question of great public importance to this Court; and (ii) This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, due to a direct and express conflict with at least two prior decisions from this Court. This Court should decline to exercise its discretion to hear this case on the merits as the question certified by the Second DCA is not a question of great public importance and because the Second DCA's decision does not directly and expressly conflict with *Florida Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003) or *Florida Bar v. Jackson*, 490 So. 2d 935 (Fla. 1986).

Statement of the Case and Facts

The defendant in the underlying lower tribunal case, Jack J. Antaramian ("Antaramian"), and his former business partner, David Nassif ("Nassif"), were embroiled in litigation in connection with disputes arising from various real estate holdings the partners had. Shortly before the litigation proceeded to trial, Antaramian retained TPI as a jury consultant. Antaramian and Nassif agreed to "walk away" from their claims against each other and separate their interests. TPI sued Antaramian for breach of contract, seeking the 5% fee it alleged it was owed under its jury consulting contract with Antaramian. TPI sought voluminous

discovery, and attacked the validity of the various business transactions between Antaramian and Nassif, which spanned decades.

Throughout the litigation in the underlying tribunal case and at the jury trial, TPI aggressively litigated, and pursued an enormous amount of discovery and documents. TPI attempted to attack Antaramian, both personally and professionally, and virtually all of the professionals involved in assisting with the division of Antaramian's interests with Nassif, alleging various conspiracy theories. TPI's *ad hominem* attacks and conspiracy theory driven prosecution of the case necessitated having various witnesses testify in the case and at the jury trial, and assist with responding to voluminous discovery from TPI.

Ultimately, Antaramian prevailed at trial and the trial court awarded Antaramian $2,004,432.58 in prevailing party attorneys' fees and costs. *Trial Practices, Inc. v. Hahn Loeser & Parks, LLP for Antaramian*, 228 So. 3d 1184, 1187 (Fla. 2d DCA 2017) ("TPI Decision"). In awarding the $2,004,432.58, the trial court noted that the fact witnesses[1] Antaramian called at trial, necessitated by TPI's *ad hominem* attacks and conspiracy theory driven prosecution of the case, were entitled to charge their normal hourly rates because they assisted in both case and discovery preparation. *Id.* In affirming, the Second DCA explained, at the time of trial, Rule 4-

[1] These witnesses were professional-hybrid fact witnesses (*e.g.*, accountants, tax attorneys, certified public accountants).

3.4(b) of the Rules Regulating the Florida Bar provided that a lawyer could pay witnesses reasonable compensation to reimburse a witness for lost compensation incurred by reason of preparing for, attending, or testifying at proceedings.[2] *Id.* at 1189.

The court then noted that although the 2014 amendment to Rule 4-3.4(b) eliminated the reference to "loss of compensation," the court left intact the portion of the rule permitting payment of reasonable compensation for the witness's time spent preparing for, attending, or testifying at the proceedings. *Id.* at 1190. Importantly, the court declared such payments have long been permitted as long as the **payment is not conditioned on the content of the testimony**. *Id.* (citing ABA Formal Op. 86-402 (1996), Propriety of Payments to Occurrence Witnesses) (**emphasis added**). The court then specifically acknowledged that both versions of Rule 4-3.4(b) recognize the value of a witness' time as it relates to preparing for, attending, and testifying at trial, and emphasized neither version of the rule makes it unethical or illegal for a party to pay fact witnesses for their expenses incurred in attending or testifying at trial or reasonable compensation for their time spent in preparing for, attending, or testifying at trial. *Trial Practices, Inc.*, 228 So. 3d at

[2] Rule 4-3.4(b) was subsequently amended in 2014 and now provides, in part, that a lawyer may pay "reasonable compensation to a witness for time spent preparing for, attending or testifying at proceedings." R. Regulating Fla. Bar 4-3.4(b); *In re Amendments to the Rules Regulating the Fla. Bar*, 140 So. 3d 541, 567 (Fla. 2014).

1190.

In agreeing with the trial court's analysis and specifically rejecting TPI's argument that Antaramian's conduct of paying the witnesses anything more than $5 per day constituted illegal conduct that negated his right to recover prevailing party attorney's fees and costs, the court explained that Section 92.142, Florida Statutes, speaks to payments to witnesses for their attendance and actual testimony at trial while Rule 4-3.4(b) addresses witnesses' expenses incurred in connection with their attendance and testimony at trial and reasonable compensation for the time spent by the witnesses in preparing for, attending, and testifying at trial so long as the payments are not conditioned on the content of the witnesses' testimony. *Id.* at 1190 (emphasis in original). The court then interpreted Rule 4-3.4(b) to mean that a witness may be compensated for the witness' time spent in responding to discovery and appearing at depositions. *Id.* at 1191. Importantly, the court then affirmed the trial court's conclusion that Antaramian was entitled to be reimbursed for his payments to the witnesses for their time spent in responding to discovery and appearing at depositions, "**especially where there was no evidence presented that the payments constituted any sort of bonus or that they were contingent on any type of recovery made by Antaramian**") *Id.* (**emphasis added**).[3]

[3] This is the main reason the TPI Decision does not directly and expressly conflict with the *Wohl* or *Jackson* decisions. In both *Wohl* and *Jackson*, the sanctioned attorneys offered compensation as an inducement for favorable testimony.

Although the court specifically found that both versions of Rule 4-3.4(b) acknowledge the value of a witness's time as it relates to preparing for, attending, and testifying at trial, and recognized the distinction between Rule 4-3.4(b) of the Rules Regulating the Florida Bar and Section 92.142, Florida Statutes, the Second DCA certified the following question of great public importance to this Court:

> 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?

Summary of Argument

In the TPI Decision, the Second DCA clearly delineated between Section 92.142, Florida Statutes, and Rule 4-3.4(b) of the Rules Regulating the Florida Bar. Rule 4-3.4(b) clearly and explicitly allows a witness to be provided reasonable compensation for the witness' time spent preparing for, attending, or testifying at proceedings. Separately, Section 92.142, Florida Statutes, when a witness is summoned (presumably by a subpoena and forced to appear), states, in part, the witness shall be given "for each day's actual attendance $5 and also 6 cents per mile." The statute on its face in no way restricts voluntary attendance at trial or a professional fact witness from being paid his or her lost compensation or a reasonable amount. Therefore, there is no conflict between Rule 4-3.4(b) of the Rules Regulating the Florida Bar and Section 92.142, Florida Statutes.

The question certified by the Second DCA is not a question of great public

importance, as the issue raised does not arise frequently and is not likely to have widespread impact. Further, there is no conflict between the statute and the rule and the rule, in effect at the time of the trial, clearly entitles a witness to reasonable compensation to reimburse the witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

The TPI decision does not directly and expressly conflict with the *Wohl* or *Jackson* decisions. Both *Wohl* and *Jackson* were based on an attorney offering a witness/client compensation as an inducement for favorable testimony. That conduct is clearly barred by both versions of Rule 4-3.4(b). The Second DCA's decision that professionals, whose involvement in the case was necessitated by TPI's *ad hominem* attacks and conspiracy theory driven prosecution of the case, are entitled to charge their normal hourly rates because they assisted in both case and discovery preparation is clearly not in direct and express conflict with *Wohl* or *Jackson*.

Argument

I. This Court should decline to exercise its discretion to hear this case on the merits as the question certified by the Second District Court of Appeal is not a question of great public importance.

Article V, Section 3(b)(4) of the Florida Constitution and Rule 9.030(a)(2)(A)(v) of the Florida Rules of Appellate Procedure provide this Court with discretionary jurisdiction to review and pass upon a question certified to be of great public importance. Although the Court possesses discretionary jurisdiction to

review and pass upon a question certified to be of great public importance, Florida law is clear the answer to the certified question must benefit more parties than the present litigants. *See Young v. State*, 678 So. 2d 427, 429 (Fla. 4th DCA 1996) (certifying question relating to whether a defendant is entitled to credit for time spent on probation/community control because the issue in the case "**arises frequently and affects numerous criminal defendants within this district and throughout this state**"); *Gibbs v. State*, 676 So. 2d 1001, 1006 (Fla. 4th DCA 1996) (certifying question of great public importance "**because the issue in this case arises frequently throughout the state and affects numerous prosecutions in this and other districts**"); *Beach v. Great Western Bank*, 670 So. 2d 986, 994 (Fla. 4th DCA 1996) (declaring it was certifying question to Supreme Court of Florida because the certified question **had the potential to affect thousands of mortgages in the State of Florida**) (**emphases added**).

Pursuant to established precedent, the question certified by the Second DCA does not seem to meet the criteria to be deemed a question of great public importance. As the issue raised does not arise frequently and is not likely to have widespread impact, this Court should exercise its discretionary power and decline to hear this Case.

II. The Second District Court of Appeal's Decision Does Not Directly and Expressly Conflict With *Florida Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003) or *Florida Bar v. Jackson*, 490 So. 2d 935 (Fla. 1986).

Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure and Article V, Section 3(b)(3) of the Florida Constitution provide this Court with discretionary jurisdiction to review and pass upon a decision of another district court of appeal or of the supreme court that expressly and directly conflicts with the same question of law. Conflict between decisions must be express and direct, *i.e.*, it must appear within the four corners of the majority decision. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). One of the tests of express and direct conflict is whether the opinions are irreconcilable. *Aravena v. Miami-Dade Co.*, 928 So. 2d 1163, 1166 (Fla. 2006).

In *Wohl*, this Court found Edward H. Wohl's ("Wohl") participation in developing an agreement by which an employee would be paid for her assistance in the case violated Rule 4-3.4(b). *Wohl*, 842 So. 2d at 811-12. The facts of *Wohl* are extremely dissimilar to the facts in this Case. The agreement between *Wohl* and the fact witness included compensation to the witness of $25,000 for her first fifty hours of assistance, a potential "bonus" ranging between $100,000 and over $1,000,000, depending on the "usefulness of the information provided," and additional hours of assistance would be paid at $500 per hour. *Id.* This Court's opinion that an attorney may not enter into an agreement with a fact witness agreeing to compensate the

witness a set amount of compensation as an inducement for favorable testimony clearly does not expressly and directly conflict with the Second DCA's opinion that a witness may be compensated for time spent responding to discovery and appearing at depositions. *Trial Practices, Inc.*, 228 So. 3d at 1191.

The focus of both this Court's analysis in the *Wohl* case and the Second DCA's analysis in the TPI Decision is the prohibition against offering a fact witness compensation as an inducement for favorable testimony. *See Wohl*, 842 So. 2d at 816 ("**[O]ffering financial inducements to a fact witness is extremely serious misconduct**"); *Trial Practices, Inc.*, 228 So. 3d at 1191 ("[W]e find no error in the trial court's conclusion that Antaramian was entitled to be reimbursed for his payments to the witnesses for those items, **especially where there was no evidence presented that the payments constituted any sort of bonus or that they were contingent on any type of recovery made by Antaramian**") (**emphases added**). The Second DCA's opinion does not permit parties to hire and pay fact witnesses and provide them with a financial inducement for testimony, as TPI claims. Rather, the Second DCA simply explained, pursuant to Rule 4-3.4(b), that a witness is entitled to reasonable compensation for the time spent by the witness in preparing for, attending, and testifying at trial so long as the payments are not conditioned on the content of the witnesses' testimony. *Id.* (emphasis in original)[4]. This distinction

[4] *See also Trial Practices, Inc.*, 228 So. 3d at 1190-91 ("[T]hus we interpret the rule

is the best evidence of the absence of a direct and express conflict between the opinions.

Similarly, the TPI Decision and this Court's decision in *Jackson* are also not in direct and express conflict. In *Jackson*, an attorney was subject to a disciplinary proceeding for contacting a New York attorney and requesting that his clients be paid $50,000 for their testimony in a pending insurance claim case in New York. *The Florida Bar v. Jackson*, 490 So. 2d 935, 936 (Fla. 1986). The *Jackson* decision is predicated on an attorney proactively contacting a New York attorney and offering the attorney's clients a financial inducement in exchange for favorable testimony. *Id.* Similar to *Wohl*, this fact is the best evidence the TPI Decision and the *Jackson* decision are not in direct and express conflict.

Conclusion

This Court should decline to exercise its discretion to hear this Case on the merits as the question certified by the Second DCA is not a question of great public importance and because the Second DCA's decision does not directly and expressly conflict with *Florida Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003) or *Florida Bar v. Jackson*, 490 So. 2d 935 (Fla. 1986).

(Signature Block found on the following page.)

---

to mean that witnesses may be compensated not only for travel related expenses, such as airfare, car rentals, and hotel expenses, but also for a witness's time spent in responding to discovery and appearing at depositions.")

Dated this 27th day of December 2017.

Respectfully submitted,

By: */s/ Edmond E. Koester*

Edmond E. Koester
Florida Bar No. 87882
Matthew B. Devisse
Florida Bar No. 119125
COLEMAN, YOVANOVICH
& KOESTER, P.A.
4001 Tamiami Trail North, Suite 300
Naples, Florida 34103
Phone: (239) 435-3535
Fax: (239) 435-1218
Primary: ekoester@cyklawfirm.com
Primary: mdevisse@cyklawfirm.com
Secondary: dsiegler@cyklawfirm.com
Secondary: mcaswell@cyklawfirm.com
Attorneys for Respondent,
Hahn Loeser & Parks LLP

(Certificate of Service found on the following page.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December, 2017, I transmitted a true and correct copy of the foregoing document by electronic mail, through the Florida Courts E-Filing Portal, to:

G. Donovan Conwell, Jr., Esq.
Conwell Business Law, P.A.
12610 Race Track Road, Ste. 200
Tampa, FL 33626
813-282-8000
813-855-2631 Facsimile
Primary:
dconwell@conwellbusinesslaw.com
Secondary:
eservice@conwellbusinesslaw.com
Counsel for Petitioner, Trial Practices, Inc.

Andrew J. Wozniak, Esq.
Kevin Carmichael, Esq.
Wood, Buckel & Carmichael, PLLC
2150 Goodlette Road N, 6th Floor
Naples, FL 34102
239-552-4100
ajw@wbclawyers.com
k2c@wbclawyers.com
bnr@wbclawyers.com
jlh@wbclawyers.com
Counsel for Curator, Joseph D. Stewart, Esq., of the Estate of Jack J. Antaramian

COLEMAN, YOVANOVICH & KOESTER, P.A.

By: */s/ Edmond E. Koester*
Edmond E. Koester
Florida Bar No. 87882
Matthew B. Devisse
Florida Bar No. 119125
4001 Tamiami Trail North, Suite 300
Naples, FL 34103
239.435.3535
239.435.1218 Facsimile
Attorneys for Respondent, Hahn Loeser & Parks LLP

Primary: ekoester@cyklawfirm.com
Primary: mdevisse@cyklawfirm.com
Secondary: dsiegler@cyklawfirm.com
Secondary: mcaswell@cyklawfirm.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief on Jurisdiction was filed and submitted in Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) (2015).

COLEMAN, YOVANOVICH & KOESTER, P.A.

By: */s/ Edmond E. Koester*

Edmond E. Koester
Florida Bar No. 87882
Matthew B. Devisse
Florida Bar No. 119125
4001 Tamiami Trail North, Suite 300
Naples, Florida 34103
239.435.3535
239.435.1218 Facsimile
Attorneys for Respondent,
Hahn Loeser & Parks LLP

Primary Email Addresses:
ekoester@cyklawfirm.com
mdevisse@cyklawfirm.com
Secondary Email Addresses:
dsiegler@cyklawfirm.com
cykservice@cyklawfirm.com