IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

TRIAL PRACTICES, INC.,
Petitioner,

vs.

HAHN LOESER & PARKS, LLP, as substitute party for Jack J. Antaramian,
Respondent.

_____/

CASE NO.: SC17-2058

Lower Tribunal No(s).:

2D13-6051; 2D14-86;
292006CA005366A001HC

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Trial Practices, Inc., is referred to as "TPI." Respondent, Hahn Loeser & Parks, LLP, the substitute party for Jack J. Antaramian ("Antaramian"), is referred to as "Hahn Loeser."

The clerk of the Circuit Court transmitted 13,474 pages of the trial court's case file to the Second District Court of Appeal as the record of Case No. 2006-CA-005366. The Circuit Court's record will be cited to with the abbreviation "R." followed by the record page number. Petitioner briefed the consolidated appeal, 2D13-6051 and 2D14-86, using the same format of citation to the record.

This brief is being filed before the Second District has completed indexing its record, which will be transmitted to this Court by June 4, 2018. Petitioner's Initial Brief references one order and two documents attached to court papers filed in the Second District. ("Referenced Documents") An interim Appendix, filed separately, contains the Referenced Documents with pages within it cited by either "Appx. #" or with the abbreviation "AX." followed by the indexed page number of the Appendix. Petitioner will replace this Appendix with a table containing pinpoint citations to the record indexed by the Second District when it is available in June 2018.

OVERVIEW: FLORIDA SHOULD NOT REWARD PARTIES AND LAWYERS WHO VIOLATE FLORIDA STATUTES AND BAR RULES

Antaramian prevailed in a case where he secretly paid, or promised to pay, his fact witnesses at trial hundreds of thousands of dollars for case and discovery preparation and testimony, in violation of the Florida Bar Rules and Florida Statutes governing witness payments. After a closing argument at trial that featured the testimony of these witnesses on the core issue in the case but did not disclose substantial payments to these fact witnesses, the jury returned a verdict for Antaramian. As the prevailing party, Antaramian then obtained a multimillion-dollar judgment against TPI for attorneys' fees, costs (including payments to his fact witnesses) and prejudgment interest, and then assigned the judgment to the law firm of one of his paid fact witnesses. This appeal argues the secret payments to fact witnesses were unlawful and that Antaramian and his assignee should not further benefit by an award of nearly two million dollars in prevailing party attorneys' fees and costs.

STATEMENT OF THE CASE AND FACTS

Antaramian hires TPI as a trial consultant in a multi-million-dollar business dispute and promises to pay TPI a fee of five percent of his "gross recovery"

Antaramian and his business partner, David E. Nassif, had a multimillion-dollar business dispute between them over the financial rights in significant

commercial real estate holdings. (R.107; 874-877). Nassif sued Antaramian in federal court for misappropriation of funds. (R.7218). Antaramian moved to dismiss the federal suit and sued Nassif in state court in Collier County, Florida. (R.7218-7220; 7228). Nassif's federal case was dismissed, and Nassif then countersued Antaramian for millions of dollars in the state action. (R.7220; 7233) (the "Nassif lawsuit").

Antaramian's lead counsel, Theodore Tripp, contacted Trial Practices, Inc. ("TPI"), a trial consulting firm, about assisting with the case and trial. (R.337 at ¶5; 486-491). In August 2005, TPI entered into a contract with Antaramian to perform litigation consulting services ("Consulting Agreement") in connection with the Nassif lawsuit. (R.79-83). Antaramian agreed in the Consulting Agreement to compensate TPI with a fee that was the greater of $5,000 or 5% of "the Client's gross recovery" obtained in the Nassif lawsuit. (R.82)

TPI provided litigation support services pursuant to the Consulting Agreement and as directed by Theodore Tripp, organized and conducted focus groups and mock juries to assist Antaramian and his counsel in preparing for trial, and provided jury selection and electronic evidence presentation consulting services at trial. (R.338 at ¶10; R.80-83). The Nassif lawsuit went to trial but resulted in a mistrial. (R.58). The parties settled the lawsuit while awaiting the re-trial. (R.107-152; 338-339; 347). TPI claimed a fee based upon the transfer of valuable assets to Antaramian in the

settlement or the value of Antaramian's damage claims. (R.338-339; 347). Antaramian refused to pay the contingency fee to TPI, denying that there was a "gross recovery" and that he owed a contingency fee for the services TPI had provided to him and his counsel Tripp. (R.57-59; R.67-69 at ¶16; R.85 at ¶16)

TPI sues Antaramian for five percent of the "gross recovery"

On June 21, 2006, TPI sued Antaramian for breaching the Consulting Agreement by failing to pay the contingent fee alleged to be owed for the successful settlement of the lawsuit. (R.57-59). The parties tried the case to a jury commencing in March 2011, on TPI's claim for breach of the Consulting Agreement. The issue for trial was whether Antaramian obtained a "gross recovery" through his settlement with Nassif and, therefore, owed a fee to TPI pursuant to the Consulting Agreement. (R. 7069 line 1-7071, line 7; R.9272 line 3-9273, line 3; R.9871 at p. 11, line 13-p. 12, line 14)

TPI presented evidence from which the jury could have found Antaramian obtained a gross recovery. Expert witness and CPA, Paul Hawkins, testified that based on the settlement agreement Antaramian's gross recovery ranged from $94 to 100 million, (R.7488 at line 8-7489, line 2; R.7584 at lines 1-8), which included the "economic benefit" that Antaramian received because of "cancelation or discharge of indebtedness." (R.7488 at line 8-7490, line 13). Expert witness William H.

Simon, Jr., also a CPA, testified that Antaramian recovered "at least $92 million." (R.8136 at line 15-8137, line 1). He also concluded that Antaramian's "debt was assigned to forgiveness," under the settlement agreement. (R.8150 at line 9-8151, line 5). Expert witness Andrew Phillip, an attorney, testified that he considered the extinguishment of Antaramian's "obligation to repay 100-million," a recovery. (R.7733 at lines 14-25; R.7683 at lines 7, 21). TPI notes this not to reargue the underlying case, but to show there was a basis for TPI to prevail, if Antaramian had not violated Florida Statutes and Bar Rules.

Antaramian hires seven fact witnesses to assist him in the TPI case and pays them large fees for case and discovery preparation and trial testimony. All of them advocate from the witness stand on behalf of Antaramian that there was no "gross recovery," and he wins the jury trial.

Antaramian called nine fact witnesses to testify live at trial, seven of whom he secretly paid for their testimony and who testified on the ultimate issue of whether Antaramian received a "gross recovery."[1] The lower court found in the fee and cost taxation hearing that these witnesses were entitled to be paid only $5 per day as expenses to testify, and "TPI could not have foreseen that Antaramian would have

[1] The two live witnesses who were not paid for their trial testimony, Edward and Louis Cheffy, did not testify about the contested issue of "gross recovery." (R.8607-8617). Antaramian presented the testimony of fact witness George Knott by deposition.

paid the witnesses at a rate higher than the rate at which they were entitled to be compensated." (R.13301 at ¶17-18)

Those seven secretly paid fact witnesses who advocated the position there was no gross recovery included two lawyers who represented Antaramian in the Nassif suit, Nassif's lawyer, and three lawyers with the firm that worked for Antaramian drafting the settlement agreement with Nassif, and Antaramian's tax accountant. Their roles and testimony were:

(1) Theodore Tripp**,** lead counsel for Antaramian in the Nassif case and a partner in Hahn Loeser & Parks, LLP, testified that "gross recovery," as used in the Consulting Agreement, meant to him "5 percent of whatever Mr. Nassif ended up paying Mr. Antaramian" if the case "had proceeded to trial, and the jury had awarded damages such that Mr. Antaramian recovered from Mr. Nassif on the claims in the litigation." (R.7214 at lines 17-23; R.7216 at line 12-7217, line 20; R.7228 at lines 7-19; 7264 at lines 4-14). He then opined that Antaramian "did not prevail" because the parties agreed "to separate their financial fortunes," and "not to settle the lawsuit." (R.7268 at line 6-7269, line 13). He testified that he "understood that Mr. Antaramian and Mr. Nassif had a walk-away in terms of their claims" (R.7271 at lines 6-10) and that there was "no recovery from the litigation." (R.7283 at lines 1-8)

(2) Lawrence Farese, Tripp's co-counsel representing Antaramian in the

Nassif lawsuit, testified that Antaramian did not "prevail" or "recover" on the claims in his lawsuit against Nassif. (R.8595-8596; 8597-8598)

(3) Joseph Stewart, an attorney who represented Nassif in the Nassif lawsuit, testified, "both parties were going their own way" and that "[n]either party got anything" through the settlement. (R.8288 at line 21-8289, line 1; 8291 at line 13-8292, line 18). He based that testimony on what he was told by George Knott, lead counsel for Nassif in the Nassif lawsuit. (R.8289; 8303 at line 1-8304, line 7)

(4) Mark Manning, the lawyer with the Burns & Levinson firm in Boston who was the primary drafter of the settlement agreement for Antaramian in the Nassif lawsuit, testified that the settlement agreement was trying to divide the assets equally between Antaramian and Nassif's estate. (R.8620 at lines 6-23; R.8622 at lines 10-14). He went through each provision of the settlement agreement and testified that he did not draft those provisions to provide compensation or a gross recovery to Antaramian in the lawsuit and that they do not provide Antaramian with a gross recovery in the lawsuit. (R.8624 at line 19-8649, line 22)

(5) Howard Medwed, a Burns & Levinson tax attorney who helped to draft the settlement agreement for Antaramian, testified that the settlement agreement did not create "a gross recovery for Mr. Antaramian" (R.8193 at lines 4-22;

R.8204 at lines 6-10; R.8213 at line 21-8214, line 3) and that the settlement with Nassif "didn't result in any recovery whatsoever." (R.8214 at lines 5-6). He testified that "absolutely nothing was recovered that related to any of the claims in the lawsuit. It was an equal exchange of items." (R.8206 at line 21-8207, line 2). Medwed went through each provision of the settlement agreement and testified that none of them resulted in a "recovery" or "gross recovery" for Antaramian. (R.8220-8229)

(6) Robert Weinstein, a real estate attorney with Burns & Levinson, testified that Antaramian's family trust was a party to the settlement agreement for purposes of selling trust property to the estate of Nassif and that this transaction would have proceeded whether or not there was a settlement. (R.8509-8514)

(7) Francis Nolan, an accountant who worked on the settlement for Antaramian and prepared Antaramian' federal income tax returns, testified that the settlement with Nassif did not result in cancellation of debt so there was no "discharge of indebtedness" income to Antaramian to report on his tax return. (R.8698 at line 15-8699, line 13)

Antaramian's pretrial disclosures identified Christopher Hughes as his expert witness. (R.4167-4169). Antaramian did not identify any of the above listed seven witnesses as expert witnesses. During the trial, Antaramian's trial counsel

repeatedly referred to them as fact, not expert, witnesses. (R.9281; 9317- 9318). The trial judge likewise stated in the presence of the jury that these were fact witnesses and not expert witnesses. (R.7403-7404; 7643)

Antaramian's attorney featured the testimony of these witnesses during the trial and in his closing. Their testimony consumed 576 pages of the 628 pages of transcript of Antaramian's fact-witness testimony (92%), and Antaramian's trial counsel referenced their testimony by name 88 times during his closing argument to the jury. (R.9271-9312; 13096, 13098)

He contrasted the Plaintiff's and Defendant's evidence on the issue of "gross recovery" by emphasizing his *fact witness* testimony, as follows: "On their side, no fact witnesses documenting any of their theories. On our side, *every fact witness* that came in said it was a walkaway…. Their fact witnesses had nothing to do with the litigation." (R.9318) (emphasis added). He emphasized that TPI's case "presented no fact witnesses at all to say that Mr. Antaramian walked away with money that he should have paid back. They gave no fact witnesses that said he won on his claims." (R.9281)

Antaramian's trial counsel also discussed Antaramian's financial *expert witness*, Chris Hughes, pointing out that he billed Antaramian $75,000 to $80,000 to "review [documents] to come in and testify for you" in trial. (R.9307). He did not disclose, however, that Antaramian's fact witnesses also were billing Antaramian

and being paid.

On April 1, 2011, the jury returned a verdict in favor of Antaramian. (R.4080). The trial court entered a final judgment against TPI and reserved jurisdiction to award attorneys' fees and costs. (R.4510). TPI appealed the decision and the Second District affirmed on September 12, 2012. (R.9536)

Antaramian paid or promised to pay his fact witnesses hundreds of thousands of dollars for their trial testimony and for assisting Antaramian with case and discovery preparation.

On April 19, 2011, Antaramian filed a motion for attorneys' fees and costs. (R.4094-4097). He did not support the motion with affidavits or other evidence of attorneys' fees or costs paid. (*Id.*) He claimed entitlement to attorneys' fees pursuant to a prevailing party fee-shifting provision in the Consulting Agreement and an offer of judgment. (*Id.*; R.82). On November 10, 2011, Antaramian amended his motion for attorneys' fees and costs. (R.7000-7017). He did not support the amended motion with affidavits or other evidence of attorneys' fees or costs paid. (*Id.*)

On October 15, 2012, Antaramian filed affidavits claiming attorneys' fees and costs incurred totaling over $2.48 million, including an affidavit of his comptroller, Robert Frazitta, claiming litigation support costs and expenses. (R.9609-9610; 9580-9614; 9614; 9583-9613). This filing did not provide invoices or billing statements identifying payments. (R.9576 at ¶5; 9679-9687). On February 7, 14 and 20, 2013, twenty-two months after the trial -- and after the appellate affirmance -- Antaramian

finally produced to TPI the invoices and billing records that supported the previously-filed affidavits. (R.9635-9639; 9615-9621; 9660-9663)

These records disclose that Antaramian paid and promised to pay the sum of $236,400.84 to the seven above-listed fact witnesses, (R.12223-12535), at their professional billing rates which far exceeded the $5 per diem provided by Section 92.142(1), Florida Statutes, as follows:

(1) the sum of $176,559.35 for attorneys Medwed, Manning and Weinstein's trial and deposition testimony and other services. (R.12352-12464);

(2) the sum of $10,094.25 for former Nassif attorney Joseph Stewart's trial testimony and other services. (R.12305-12318; 12339-12340);

(3) the sum of $7,092.85 for attorney Farese's trial and deposition testimony. (R.12228-12240);

(4) the sum of $31,404.39 for Hahn Loeser attorney Tripp's trial testimony and other services. (R.12341-12350); and

(5) the sum of $11,250 for accountant Nolan's services, deposition and trial testimony. (R.12336)

Nolan sent her invoice after the TPI trial concluded and billed at what she called a "big rate" of $225 per hour, because Antaramian and his trial lawyer told her they succeeded at trial and that Nolan "aced" her trial testimony and "did a fantastic job." (R.11295-11296 at p. 32, line 5-p. 35, line 12). She thought, therefore,

this was a reasonable invoice "based on the result they got" in the trial. (*Id.*). She has not been paid and assumes that Antaramian will wait until he gets paid by TPI and then he will pay her from those funds. (R.11297 at p. 39, line 20-p. 40, line 6)

Two of Antaramian's attorney-fact witnesses, Edward Cheffy and his partner Louis Cheffy, refused to bill for their trial testimony (which as noted, did not address "gross recovery"). Edward Cheffy testified during the fee hearing *that time spent as a fact witness should not be billed because of the rule prohibiting payments to fact witnesses*. (R.9771 at p. 29, line17-p. 30, line 3; R.9785 at p. 87, line 10-p. 88, lines 5). Cheffy regularly lectures on legal ethics for the Florida Bar, as Antaramian's trial lawyer emphasized during his closing argument to the jury, describing Cheffy as "an extraordinarily good lawyer, he's experienced, he's Board-certified, teaches ethics to the Florida Bar," (R.9289) and is "always honorable, always truthful." (R.9292)

Most of these fact witnesses started billing Antaramian for case preparation and discovery related legal services within several months of TPI filing its lawsuit in 2006. Burns & Levinson, LLP started billing on September 20, 2006, for Medwed (timekeeper HDM) at $400.00 per hour, for Manning (MWM) at $375.00 per hour and for Weinstein (RWW) at $360.00 per hour (R.12353).[2] Robins Kaplan Miller

[2] At the March 2011 trial, however, Medwed's testimony time was billed at $450.00/hr., Manning's at $475.00/hr., and Weinstein's at $425.00/hr. (R.12458)

& Ciresi, LLP started billing for Farese on February 23, 2007, at an hourly rate of $410.00. (R.12229). Joseph D. Stewart, P.A. started billing for Stewart (JDS) on May 31, 2010, at $395.00 per hour, (R.12305), and Hahn Loeser & Parks, LLP billed for Tripp's (TLT) time at $440.00 per hour. (R.12345). The first billing entry of Antaramian's accountant, Frances Nolan, is in August 2009. (R.12336)

The affidavit and accounting records of Robert Frazitta, Antaramian's comptroller, recorded the payments Antaramian made to the fact witnesses as "legal" or "litigation support." (R.12223-12225). The paid fact witnesses invoiced Antaramian for assisting in preparing his case against TPI. For example, Medwed confirmed that he assisted Cheffy's firm, Carlton Fields and Edmond Koester in case preparation. He confirmed that he provided professional services and "drew up two affidavits dealing with various issues in the case." (R.9881 at p. 49, lines 2-20). He "gave some lengthy affidavits about the matter… that was in support of various, maybe summary judgment proceedings or other types of proceedings that were involved in the case." (R.9882 at p. 50, lines 8-19)

In 2009 Medwed charged Antaramian over nineteen hours for reviewing deposition transcripts, preparing memos on them and conferring with Antaramian's expert witness, Chris Hughes. (R.12443-12457). From 2006 through 2008, Manning assisted attorney Cheffy with preparing responses to interrogatories and document requests directed at Antaramian. (R.12356-12422). Weinstein handled discovery

matters and helped Cheffy to prepare Antaramian's response to TPI's motion for partial summary judgment. (R.12401). In 2010, attorney-fact witness Joseph Stewart charged Antaramian for reviewing a motion for summary judgment filed in the TPI case. (R.12305). Stewart also conferred with Antaramian and his counsel seven times before testifying at the TPI trial and charged Antaramian for those services. (R.12306, 12312, 12314-12316)

In January 2011, attorney-fact witness Tripp charged Antaramian to review motions for sanctions, *in limine*, for leave to amend the complaint, for an evidentiary hearing, and to review Antaramian's affidavit. (R.12342). Tripp played a significant role in defending TPI's lawsuit against Antaramian, as reflected in the 154 billing entries of the law firms litigating the case for Antaramian that reference Tripp's participation (79 times by Cheffy Passidomo, 60 by Carlton Fields, 13 by Coleman Yovanovich, and twice by Burns Levinson). The amount billed for these Tripp-related legal services in 2006-2011, totals $101,869.63, excluding invoices by Hahn Loeser for Tripp's own time. (R.11311-12535). Tripp testified that the services he provided to Antaramian in the TPI litigation were "*not for preparing for my testimony at the trial. I was doing what I could to assist the client to resist an ill-considered lawsuit* by Mr. Moore." (R.11244, p 30 lines 10-17) (emphasis added). Tripp described the time he spent testifying at trial as "services rendered," (R.11242 at p. 22, lines 2-23), yet he considered himself to be a fact witness at trial. (R.11247

at p. 43, lines 16-19)

Attorney Farese gathered electronic files for documents in the TPI case from March through May 2007. (R.12229-12235). In August 2009, Nolan reviewed deposition materials and the opinion letters of TPI's financial expert witness, Paul Hawkins. (R.12336)

None of the paid fact witnesses testified that they lost compensation and were seeking reimbursement for lost compensation, and five of them testified they did not lose compensation by reason of preparing for, attending or testifying at trial. (R.11243 at p. 28 line 18-11244 at p. 29, line 11 (Tripp); R.11291 at p. 14, line 11-p. 15, line 22 (Nolan); R.9886 at p. 69, lines 5-24 (Medwed, Manning and Weintstein))

The lower court awards prevailing party fees, costs, and prejudgment interest to Antaramian

In May and July 2013, the circuit court held a two-day evidentiary hearing on Antaramian's amended motion for fees and costs. (R.9762-9856; 9867-9968). Antaramian's counsel changed the position he had repeatedly stated during the trial that the attorneys and accountant were "fact witnesses" and now argued that they were expert witnesses or "testifying witnesses with expertise in factual knowledge," (R.9826 at p. 176, line 22-9827 at p. 179, line 10; R.9828 at p. 182, lines 15 - 24) or "like treating physicians or something." (R.9826 at p. 177, lines 18-24; R.9827 at p.

178, lines 12-20)

The circuit court entered an Order and Judgment awarding $2,467,142.39 to Antaramian against TPI for prevailing party attorneys' fees, costs, and pre-judgment interest. ("Fee Judgment"). (R.13312-13313). Of that, $317,873.64 was for the fees, costs, and expenses (including the fees paid to the six attorneys and one accountant fact witnesses for trial testimony and case preparation and discovery assistance), testified to by Frazitta. (R.13310 at ¶43(vii))

The Order found the substance of the trial testimony given by attorneys Tripp, Stewart, Farese, Medwed, Manning, and Weinstein and by accountant Nolan was "factual," but that Antaramian paid these fact witnesses fees commensurate with expert witness rates, which is barred by Florida Statute §92.142 and *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002), limiting fact witness payments to $5 per day. (R.13301 at ¶17)

The court found that TPI could not have reasonably anticipated that Antaramian would pay an expert witness fee to fact witnesses. (*Id*.). The Order states these paid fact witnesses "were not called upon as expert witnesses at trial." (*Id*.). The court ruled that "attorneys who testify at trial as a fact witness are not entitled to the same hourly fee to which they would be entitled if they were testifying as an expert witness." (*Id*.) He ruled that Antaramian could not recover "the total fee" that he paid to the fact witnesses for their trial testimony but only a "reasonable fee for

fact witness testimony." (*Id*. at ¶18)

The Order said that Antaramian's paid fact witnesses worked on case and discovery preparation and, therefore, were "consulting experts" for which the court would permit "recovery of certain fees charged." (*Id*. at ¶19). The Order, however, does not identify the "reasonable fee for fact witness testimony," the "certain fees charged" when the fact witnesses acted as consulting experts, or the number of hours expended in either role. The Order awards payment of those fees as expenses listed in the Frazitta Affidavit. (R.11851-11853; R.13308-13310 at ¶41(d) and ¶43(vii))

The Order states the lodestar standard "does not apply to … attorneys' fees imposed pursuant to a private contract." (R.13302 at ¶23). The court made no finding regarding the reasonableness of the number of hours spent or the hourly rates of the attorney and accountant fact witnesses. (R.13298-13311)

The appeal and substitution of fact-witness Tripp's law firm, Hahn Loeser, to oppose the appeal

TPI appealed the Fee Order and Fee Judgment. (2D13-6051 at R.13296-13311; 2D14-86 at R.13344-13347). On November 13, 2014, TPI filed its initial brief. (Florida District Courts of Appeal Online Docket, 2D13-6051). On December 17, 2014, Antaramian assigned the Fee Judgment, but not the Consulting Agreement, to fact-witness Tripp's law firm, Hahn Loeser & Parks, LLP, as part of a bankruptcy settlement agreement. (Appx. 1 at AX001-9, and Appx. 2 at AX010-27) (R.79-83).

The Assignment was made pursuant to a confidential settlement agreement between Hahn Loeser and Antaramian that reveals Antaramian owed Hahn Loeser more than six million dollars. (Appx. 1 at AX004). Antaramian died soon thereafter, on February 2, 2015, and about sixteen months later, on July 7, 2016, the Second District substituted Hahn Loeser & Parks, LLP for Jack J. Antaramian as the appellee in the 2D16-5361/2D14-86 consolidated appeal. (Appx. 3 at AX028)

The Second District on appeal agreed with the trial court that Antaramian violated section 92.142(1) Florida Statutes, which "restricts payments to witnesses for their attendance and thus presumably their actual testimony at trial," but said the statute does not prohibit payments to fact witnesses for assisting a party with case and discovery preparation. *Trial Practices, Inc. v. Hahn Loeser & Parks, LLP*, 228 So. 3d 1184, 1190-1191 (Fla. 2d DCA 2017).

The district court also discussed Rule 4-3.4(b) of the Rules Regulating the Florida Bar. It recognized that the rule in effect during the 2011 TPI trial prohibited payments to fact witnesses with three exceptions, including payment of "reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings." *Id*. at 1191. The Second District noted the rule was amended in 2014 to eliminate the "loss of compensation" requirement.

The opinion did not expressly mention that seven fact witnesses were paid for the 2011 trial despite suffering no loss of compensation. The Second District said that, despite the pre-2014 "loss of compensation" limitation, the party paying the witness need not prove "loss of compensation" by the witness by "reason of preparing for, attending, and testifying at proceedings." *Id.* at 1190, n.3. The opinion concluded the rule allows payments to fact witnesses for "assistance with case and discovery preparation." *Id.*

The Second District affirmed the attorneys' fee and fact witness payment awards and reversed and remanded the cost and prejudgment interest awards for further proceedings, as explained in the Opinion. The Second District also certified to this Court the following question of great public importance:

> 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.

Id. at 1191. The Second District answered the question in the affirmative, concluding that assistance with case and discovery preparation is part of "preparing for … and testifying at proceedings," which is permitted by Rule 4-3.4(b) of the Rules Regulating the Florida Bar. *Id.*

SUMMARY OF THE ARGUMENT

Rule 4-3.4(b) prohibits *any* payments to fact witnesses except as specifically provided for in the three exceptions to the rule. Payment of hundreds of thousands of dollars to fact witnesses for "case and discovery preparation" is not one of the exceptions. Antaramian's secret payments to the seven fact witnesses who testified on the core issue of gross recovery, therefore, violated the rule; a violation this Court has described as "extremely serious misconduct." *Florida Bar v. Wohl*, 842 So. 2d 811, 815 (Fla. 2003).

The second exception permits payment for the "professional services" of an "expert witness," but none of these exceptions permit hiring and paying a "fact witness" to provide professional services to assist a party with "case and discovery preparation." Such a practice impermissibly provides a financial inducement to testify in favor of the hiring party, turning the fact witness into an *advocate* for the hiring party.

The third exception does not permit paying fact witnesses for professional services to assist a party with case and discovery preparation either. It permits only payment of "reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending and testifying at a proceeding." This refers to preparation of the witness to testify, not preparation of a party's case for trial.

The Second District's broad interpretation of the third exception, permitting a party to hire and pay a witness to help prepare the hiring party's case, goes far beyond the limited scope of the exception, allowing every fact witness to become a hired gun for the party willing to pay the most money for case and discovery preparation assistance. "Case and discovery preparation" is so broad and undefined that the exception would swallow the rule, allowing payments to fact witnesses for virtually anything. Florida courts have never allowed justice to be bought and sold like this and should not do so now.

The Florida Statutes also prohibit Antaramian's payments to fact witnesses. Chapter 92, Florida Statutes, which governs payments to witnesses, does not permit payments of consulting fees to fact witnesses. Section 92.142(1) Florida Statutes provides for payment of only $5.00 per day to witnesses for attending a proceeding to testify. Permitting a party to hire and pay fact witnesses to assist the party with case and discovery preparation would nullify the $5 per day limitation on payments to fact witnesses for attending trials by permitting payment of hundreds of thousands of dollars to the witnesses before trial, as occurred in this case.

For these wrongs, there should be a remedy. Antaramian won the trial following the testimony of these seven secretly paid fact witnesses and a closing argument that featured their testimony without disclosing the witness payments. Violations of Rule 4-3.4(b), and the Florida Statutes, should not be further rewarded

by awarding prevailing party attorneys' fees and costs to Antaramian or his assignee, Hahn Loeser, whose attorney, Tripp, was among the fact witnesses improperly paid or promised to be paid.

ARGUMENT

I. Antaramian's payments to fact witnesses violated the Florida Bar Rules governing payments to witnesses.

a. Rule 4-3.4(b) prohibits paying fees to fact witnesses for case and discovery preparation.

This Court holds that a witness "may not be paid unless the payments *fall within the clearly delineated exceptions* in Rule 4-3.4(b)." *Wohl*, 842 So. 2d at 815 (emphasis added). The version of Rule 4-3.4(b) controlling from 2006 when TPI sued Antaramian through the trial in 2011 listed three specific exceptions to the prohibition against providing a witness an inducement to testify: payment of (1) a witness reasonable expenses incurred by the witness in attending or testifying at proceedings, (2) a reasonable, non-contingent fee for professional services of an expert witness; and (3) reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending and testifying at a proceeding. *In Re Amendments to the Rules Regulating The Florida Bar*, 916 So. 2d 655 (Fla. 2005). The Comment to Rule 4-3.4(b) states that: "The common law rule in most jurisdictions is that it is improper to pay an occurrence witness *any fee*

for testifying and that it is improper to pay an expert witness a contingent fee." (emphasis added).

In 2014, the rule was changed to omit the limiting words in the third exception, "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 to assist a party with case and discovery preparation (as opposed to time the witness may spend preparing for the witness's own testimony). Under both versions of the rule, paying a *fact witness* for *assisting a party with case preparation and discovery* is not one of the enumerated exceptions, as the district court acknowledged in its opinion. 228 So. 3d at 1191. Such payments, therefore, are a prohibited inducement to testify.

The rule cannot be reasonably interpreted to permit such payments to "fact witnesses" by implication either, as the district court has done. Rule 4-3.4(b) deals with this subject in the second exception and permits the payment of a reasonable fee to a witness for "professional services" to assist a party, but only in the case of an "expert witness." If the rule intended to provide such an exception for case assistance provided by a "fact witness" then it would have said so. The rule did not, so it is not reasonable to imply the same exception for the payment of "fact witnesses" who provide case assistance services.

The district court nonetheless found that paying fact witnesses to help a party with case preparation and discovery was preparing for trial and fell within the scope of the third exception. *Id.* This is wrong factually and legally. It is wrong factually because most of the services at issue here began nearly five years before the trial and were legal services preparing Antaramian's defense of the lawsuit, not preparation for the witnesses to give trial testimony. Statement of Facts, pp. 9-11, *supra*. For example, Tripp, the first fact witness called by Antaramian at trial, admitted that his services were not preparation to testify at trial but were to defend Antaramian in the TPI lawsuit. (R.11244). But he was not counsel of record in the TPI suit – rather he testified as a fact witness and was paid his regular hourly rates for that and many years of case preparation.

The district court's conclusion is wrong legally because preparation for trial under Rule 4-3.4(b) is limited to preparation of the witness for trial, not preparation of the paying party's case for trial. That is the context and logical interpretation of the rule, which allows compensation to reimburse a witness for compensation lost by reason of "preparing for, attending, and testifying at proceedings."

The district court's overly broad interpretation would permit parties to hire and pay every fact witness to provide case and discovery assistance to the hiring party. Such a role is so broad and undefined it could mean anything, allowing the exception to the rule against paying fact witnesses to swallow the rule. This would

provide a significant opportunity for abuse and taint the testimony of the fact witness, whose role is to give an unbiased account of facts, not case preparation assistance. This "adversely affects credibility and fact-finding functions," the concerns that motivated this Court's adoption of Rule 4-3.4(b). *Wohl,* 842 So. 2d at 815.

b. This Court holds a party may not hire a fact witness as a consultant and pay the witness for case "assistance."

This Court in *Wohl* considered the propriety of hiring a fact witness as a consultant and paying the witness for case assistance and "condemned the practice. . . in no uncertain terms." Rather than treat this as permissible compensation of a fact witness for trial preparation, the Court found such practice to be "extremely serious misconduct." 842 So. 2d at 816.[3]

The respondent-lawyer in *Wohl* helped to draft and negotiate 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.*

[3] 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.

Wohl argued that when they drew up the agreement he considered Kerr to be a consultant and only later realized 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. *Id.* 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.* Moreover, whether Kerr testified was immaterial because Rule 4-3.4(b) applies to every witness, whether testifying or not. *Id.*

This Court concluded 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). Since "none of the exceptions to the rule [were] present," Wohl was found guilty of violating Rule 4-3.4(b). Therefore, under *Wohl* and a plain reading of Rule 4-3.4(b) the certified question should be answered in the negative.

The policy against paying fact witnesses beyond what the Bar rules expressly provide is so strong that not even "the taint" of purchasing witness testimony will be tolerated. *Florida Bar v. Jackson*, 490 So. 2d 935, 936 (Fla. 1986). In *Jackson*, where an attorney sought to negotiate a payment for his client's testimony, this Court held, "[j]ustice 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." *Id.*

Other courts in Florida considering the hiring of fact witnesses as paid case consultants have found that such conduct violates the Florida Bar Rules. In *Rentclub, Inc. v. Transamerica Rental Finance Corp*., 811 F. Supp 651, 653-654, 658 (M.D. Fla. 1992), *aff'd* 43 F. 3d 1439 (11th Cir. 1995), the court disqualified counsel who hired a fact witness-former employee of the opposing party as a "trial consultant" in the pending litigation. One of the bases for the court's disqualification was that "there was a reasonable possibility that [the attorney] acted improperly by paying [the fact witness] for factual testimony under the pretext of retaining him as a "trial consultant" in violation of the Florida Bar Rules. *Id.* at 655. The opinion makes clear that you cannot do indirectly what the Bar rules prohibit you from doing directly. The three limited exceptions to paying witnesses in Rule 4-3.4(b) would be meaningless if every fact witness could be hired and paid as a consultant to

provide case and discovery assistance, easily circumventing the prohibitions of the rule.

Similarly, the court in *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association*, 865 F. Supp. 1516, 1524, 1526 (S.D. Fla.1994), excluded evidence as a sanction against Lloyds of London for paying substantial sums of money to multiple fact witnesses to testify "truthfully" in a civil action to recover insurance proceeds, finding that the payments violated Rule 4-3.4(b). The court noted that "the Comment to Rule 4-3.4(b) indicates that the rule applies to any payments to fact witness, without distinguishing between false and truthful testimony," citing the Comment's language that "it is *improper to pay an occurrence witness any fee for testifying…." Id.* at 1524.

The dangers of giving near carte blanche to parties to pay fact witnesses are evident in this case. Not only did Antaramian pay hundreds of thousands of dollars to his fact witnesses, which certainly would provide an inducement to testify in his favor, one of his witnesses *admitted* to setting her rate of compensation based upon how much she thought her services helped Antaramian win the case. Statement of Facts, supra, at p. 10. Nolan said that she charged a "big fee" because she "aced" her testimony and opined that her bill was reasonable "based on the result that [Antaramian] got." *Id.* She also admitted that she did not expect payment until Antaramian collected her fee from TPI, which is akin to a contingent fee. *Id.* Fact

witnesses should not be paid, let alone set their compensation based upon results achieved.

c. Courts across the country similarly hold that a party may not hire and pay a fact witness for case assistance.

In *U.S. v. Cinergy Corp*., 2008 WL 7679914 *1, 5 (S.D. Ind. Dec. 18, 2008), a United States District Court granted a motion for new trial based upon the defendant hiring and paying one of its former employees as a consultant to assist the defendant in the case with "advice and live testimony." The defendant did not disclose the consulting arrangement to the plaintiff and then at trial defendant's counsel contrasted plaintiff's paid expert witness testimony with that of defendant's unpaid fact witnesses, including the fact witness hired by the defendant as a consultant. *Id.* The court concluded, "[t]his theme [paid experts vs. non-experts] was only made possible if [defendant's] witnesses were, in fact, not paid." *Id.* at *11. "The relevant statute and ethical rules that allow for compensation of fact witnesses never contemplated the hiring of a consultant, who is to be directed by the party's counsel, to provide advice and live testimony." (citing to 18 U.S.C. §201 and Ind. R. Prof. Conduct 3.4(b)). *Id.* at *12. [4]

[4] 18 U.S.C. §201(c)(2) and (d) makes it unlawful to pay a person for testimony under oath as a witness at trial or other proceeding before any court, except for payments for reasonable cost of travel and subsistence during the trial or other proceeding and the reasonable value of the time lost in attendance at the trial or proceeding.

Antaramian employed a similar tactic in the TPI trial, pointing out during closing argument that the parties' *expert witnesses were paid* to prepare their testimony, (R.9278, 9307), yet not disclosing that Antaramian was paying every fact witness that he called to trial to testify on the crucial "gross recovery" issue. TPI, unlike the plaintiff in *Cinergy*, could not move for a new trial based upon the rule violation because Antaramian did not disclose the unlawful payments until after the deadline for moving for a new trial.

In *Roucheux Intern. of New Jersey v. U.S. Merchants Financial Group, Inc.* 2009 WL 3246837 *1, 3 (D. N. J. Oct. 5, 2009), the court excluded plaintiff's designated expert witness as a sanction because he was an improperly paid fact witness. The court cited Rule 3.4(b) of the New Jersey Rules of Professional Conduct, which forbids a lawyer from offering an inducement to a witness that is prohibited by law, except that lawyers may compensate fact witnesses for (1) reasonable expense incurred by a witness to attend the trial, and (2) reasonable compensation for the loss of the witness's time in attending the trial to testify. *Id.* at *3.

The court found the subject of the witness's testimony was factual, not expert, and paying him "clearly runs afoul of the longstanding prohibition against payment of fact witnesses." *Id*. at *4. The court held that "[w]itnesses brought before a court are duty-bound to tell the truth, and the payment of witnesses for their testimony

'leans toward the procurement of perjury; toward the raising up of a class of witnesses who, for a sufficient consideration, will give testimony that shall win or lose the lawsuit, toward the perversion of justice; and toward corruption in our courts.'" *Id.* citing *Hamilton v. Gen. Motors Corp*., 490 F. 2d 223, 227-29 (7th Cir. 1973).

Hamilton held that any express or implied agreement to pay a fact witness-former employee for assisting his former employer on issues in the litigation would violate public policy, even though his assistance concerned areas in which he had expertise and first-hand knowledge. *Id.* The court examined the public policy against paying fact witnesses found in federal law, general common law and Illinois state law. The only witness payments permitted under federal law are payment of witness fees as provided by law, payment of the reasonable value of time lost in attendance at a proceeding and payment of a reasonable fee to an expert witness. *Id.* at 227.

The federal policy is also a common law policy. 14 Williston on Contracts, §1716 (3rd ed. 1972):

> As it is the duty of a citizen, when required to do so, to testify in court concerning facts within his knowledge for the compensation allowed him by law, a bargain to pay one who is amenable to process a further sum for his attendance as a witness is invalid both on grounds of public policy and for lack of consideration.

See also, Restatement of Contracts §552(1) (1932); 6A Corbin, Contracts § 1430 (1952); Calamari & Perillo, Contracts § 369 (1970). *Hamilton*, 490 F. 2d at 228.

Finally, the *Hamilton* court explained that payment to a fact witness for case assistance services also violates Illinois public policy, citing *Wright v. Somers*, 125 Ill. App. 256 (1906). The court in *Wright* held that paying fact witnesses "would give ground for witnesses to extort unreasonable fees for their testimony; and might make it impossible for a poor suitor to obtain his rights." 125 Ill. App. at 257-258. The *Wright* court also explained that the legislature of Illinois (like the Florida legislature) had declared that a witness is entitled to receive a per diem for attendance and mileage reimbursement. *Id.* The *Wright* court concluded, "[t]his is all the witness is entitled to receive. To demand more is forbidden by the policy and the spirit of this statute." *Hamilton*, 490 F. 2d at 228, citing *Wright* 125 Ill. App. at 257-258. The court warned of the dangers in allowing witness payments: "[s]uch a ruling leans toward the procurement of perjury; toward the raising up of a class of witnesses who, for a sufficient consideration, will give testimony that shall win or lose the lawsuit, toward the perversion of justice; and toward corruption in our courts." *Id.*

Courts in other states agree. *Goldstein v. Exxon Research & Engineering Co*., 1997 WL 580599 * 2 (D. N. J. Feb. 28, 1997) ("The commentators agree that, beyond the three categories above [the three exceptions for paying witnesses], any

contract to pay a fee for testimony is *unenforceable as against public policy* and for lack of consideration.") (emphasis added); *Alexander v. Watson*, 128 F. 2d 627 (4th Cir. 1942) (prohibiting payment of more than an ordinary witness fee to a lawyer and accountant seeking payment of their professional fees who were called to testify by receiver of corporation about their personal knowledge acquired by them as agents of the corporation and holding that "any agreement to pay them additional compensation for such testimony would have been void as lacking in consideration and also as contrary to public policy."); *Beard v. Ragan*, 51 Va. Cir. 229 (Cir. Ct. Va. 2000) (contract to pay witness more than the Virginia witness fee statute allows is against public policy of Virginia); *Miller v. Anderson*, 183 Wis. 163, 196 N.W. 869, 871 (Wis. 1924) (contract to pay fact witness more than the statutory witness fee for appearing and testifying as to facts within his knowledge is "contrary to public policy and void."); *State ex. rel. Spillman v. First Bank of Nickerson*, 114 Neb. 423, 207 N.W. 674 (Neb. 1926) (The Nebraska statutes fix the amount to be paid to fact witnesses for their attendance at trial. Therefore, a contract to pay the witness more is illegal, contrary to public policy and void.).

These cases warn of the dangers in paying fact witnesses more than reasonable compensation for time lost by the witness in testifying or preparing to testify. Hiring and paying a fact witness for case assistance is fraught with danger, leaning toward the procurement of perjury and the perversion of justice.

d. The certified question does not limit payments to "reasonable" compensation to "reimburse for loss of compensation" as Rule 4-3.4(b) required in 2011 and should be answered in the negative for that reason also.

At the time of the TPI trial in 2011, Rule 4-3.4(b) limited payment to a witness to "reasonable" compensation to "reimburse a witness for loss of compensation." The fact witness payments at issue here were not subjected to any test of reasonableness and were not limited to reimburse[ment] for loss of compensation." The district court held that such a limitation was not required because the amendment to the rule in 2014 removed this language. 228 So. 3d at 1191.

The removal of the reimbursement language from Rule 4-3.4(b) — years after Antaramian's fact witnesses were paid for preparing his case and for their trial testimony — only emphasizes that the rule in effect in 2011 meant what it said: that witness compensation was limited to "reimbursement of compensation lost" because of preparing for, appearing and testifying at a proceeding. Otherwise, there would have been no reason to remove that language from the rule in 2014.

This is an important limitation in this case because five of the fact witnesses who Antaramian paid or promised to pay testified in connection with the fee hearing they did not lose compensation by reason of testifying and preparing to testify at the TPI trial. Statement of Facts, pp. 14-15, *supra*. Antaramian, in any event, did not

present evidence that his payments to these witnesses were reimbursement for "loss of compensation."

Paying a witness to assist the party with case preparation and discovery is fundamentally different from reimbursing a witness who has lost compensation because the witness had to spend time preparing for, attending and testifying at a proceeding. In the first instance, the witness is proactively providing a service to the hiring party for a fee. In the latter case, the witness has lost compensation because of fulfilling the civic duty to appear and testify to facts known to the witness. Interpreting Rule 4-3.4(b) to permit the hiring and payment of fact witnesses as case preparation and discovery consultants would materially change the rule and the role served by fact witnesses in litigation.

If the Court permitted attorney-fact witnesses to become paid advocates for a party hired to provide case preparation assistance, then the attorney would be serving a dual role of advocate and fact witness in the same proceeding. Lawyers are prohibited by Rule 4-3.7(a) of the Rules Regulating the Florida Bar from acting in those dual capacities, with limited exceptions that do not apply here. The paid lawyer-witnesses here acted as advocates for Antaramian at the trial. Their invoices, both before and during the trial, billed Antaramian for "professional services" rendered, showing that these lawyer witnesses were retained advocates, hired to defend Antaramian in the lawsuit. (R.12352; 12463; 12340-12345; 12229).

Moreover, their invoices describe the services of retained advocates, not fact witnesses preparing to testify for trial. Statement of Facts, pp. 9-11, *supra*. Antaramian's defense lawyers did not take off their advocate hats when they stepped into the witness box.[5] They continued advocating for their client, testifying that there was no "gross recovery," in violation of Rule 4-3.7(a).

II. Antaramian's payment to fact witnesses also violated the Florida Statutes governing payments to witnesses.

The circuit court found, and the appellate court agreed, that Antaramian violated Section 92.142(1), Florida Statutes by paying his fact witnesses more than $5 per day to testify. (R 13301). Permitting a party to hire and pay fact witnesses hundreds of thousands of dollars, as occurred in this case, to assist the party with case and discovery preparation, would nullify the $5 per day limitation on payments to fact witnesses for attending trials by allowing parties to circumvent the limitation with large, pre-trial consulting fees.

The only exception to these limitations on payments to witnesses is for an "expert or skilled witness," who the Legislature provided "shall be allowed a witness

[5] *Scott v. State*, 717 So. 2d 908, 910 (Fla. 1998) ("While Rule Regulating the Florida Bar 4-3.7 prohibits a lawyer from acting as an advocate and witness in the same trial, a purpose of the rule is to prevent the evils that arise when a lawyer dons the hats of both an advocate and witness for his or her own client. Such a dual role can prejudice the opposing side or create a conflict of interest.")

fee . . .". Section 92.231(2) Florida Statutes. This Court, in *Moakley v. Smallwood*, considered these statutory limitations on payments to witnesses in the context of compensation paid to an attorney (Smallwood) subpoenaed in bad faith to testify at a hearing. 826 So. 2d at 223, F.N. 1. The trial court ordered the party who subpoenaed Smallwood to pay $1,125 to Smallwood as a sanction. The sanctioned party argued there was no legal authority for paying Smallwood. Smallwood argued on appeal that the amount awarded to her was proper under section 92.231. Florida Statutes (1997). The Court rejected that argument because Smallwood was not offered as an expert or permitted to qualify and testify as an expert. *Id.* Smallwood also argued that the amount of the award was proper under section 92.151, Florida Statutes (1997) as "witness compensation." *Id.* The Court rejected that argument as well because section 92.142, Florida Statutes limits witness payments to "$5 per each day of actual attendance." *Id.*

The Legislature dealt with the issue of compensating fact witnesses in Chapter 92, Florida Statutes. Permitting payments to fact witnesses for pre-trial consulting services would enable parties to circumvent the $5 per day limitation in sections 92.142 and 92.151 by paying the witnesses significantly more in the guise of a pre-trial consulting service fee. The statute permits such payments only to an "expert or skilled witness," not to fact witnesses. §92.231, Florida Statutes. As the court stated in *Wright v. Somers, supra*, when applying the Illinois statute on payments to fact

witnesses, "[t]his is all the witness is entitled to receive. To demand more is forbidden by the policy and the spirit of this statute." *Hamilton*, 490 F. 2d at 228, citing *Wright* 125 Ill. App. at 257-258.

III. The violations of Rule 4-3.4(b) and Sections 92.142(1), Florida Statutes should not be rewarded by awarding nearly two million dollars in prevailing party attorney's fees and costs against TPI.

Antaramian prevailed in the litigation on the critical issue of whether there was a "gross recovery." He accomplished this through undisclosed, lucrative payments to all seven fact witnesses who testified on "gross recovery," in violation of the Florida Statutes and Rule 4-3.4(b). As the trial court said, it was not reasonably foreseeable when Antaramian and TPI entered the Consulting Agreement that Antaramian would prevail through payments to witnesses at a rate higher than the rate to which they were entitled to be compensated. (R.13301 at ¶18)

The circuit court addressed Antaramian's violation by capping the taxation of fees against TPI for Antaramian's payments to fact witnesses for their trial testimony at the statutorily mandated $5 per day. (R.13301 at ¶17). In a subsequent paragraph, he said that Antaramian is "only entitled to recover a reasonable fee for fact witness testimony," though he did not say what amount was reasonable. (R.13301 at ¶18) The circuit court and district court should have gone further and sanctioned Antaramian.

A litigant and his counsel should not be permitted to violate the Florida Statutes and Bar rules with impunity, hide the misconduct and then receive a mere slap on the wrist. This Court's pronouncement in *Wohl* that it "condemn[s] the practice of compensating fact witnesses in violation of Rule 4-3.4(b)" shows that such conduct must be treated much more severely than was done here below. 842 So. 2d at 816. In *Wohl*, the Court penalized misconduct in violation of Rule 4-3.4(b) with greater severity, rejecting a referee's proposed discipline of "admonishment" in favor of the more severe punishment of "suspension." *Id.*

Courts that have considered unlawful payments to fact witnesses outside the context of Bar disciplinary proceedings have entered orders preventing the offending party from benefitting from its unlawful conduct and preventing prejudice to the opposing party. In *Golden Door* and *Roucheux*, the courts excluded the paid fact witnesses from testifying at trial. 865 F. Supp. at 1526-1527; 2009 WL 3246837 at *4. In *Cinergy*, the court granted a motion for a new trial once the fact witness consulting contract was discovered. 2008 WL 7679914 at *14.

Here, at this stage of the proceedings, the Court should refuse to enforce the prevailing party fee-shifting provision against TPI, thereby preventing Antaramian and Hahn Loeser from further profit by their wrongdoing and protecting TPI from further prejudice from their misdeeds. Indeed, it is Hahn Loeser — whose attorney, Tripp, was among the improperly paid "fact" witnesses — that is now benefitting

from the assignment from Antaramian to address the six million dollars he owed Hahn Loeser.

Florida law supports denying a further reward. First, as a matter of contract law, courts should not enforce a contract provision when doing so would reward a party's violation of public policy. Second, Antaramian and Hahn Loeser should be equitably estopped by their misconduct from benefitting from the fee-shifting provision of the Consulting Agreement against TPI. And third, the Court has the inherent authority to sanction such misconduct where, as here, it was calculated to interfere with the jury's impartial adjudication of the case.

a. Antaramian and Hahn Loeser should not benefit from their violations of public policy.

As things now stand, Antaramian and the assignee law firm (whose lawyer testified for payment at the TPI trial) will receive a judgment of nearly two million dollars against TPI.

Antaramian's payments and agreements to pay his fact witnesses for case preparation and discovery assistance and to pay expert witness rates for trial testimony violate public policy, as shown above, and therefore, are illegal and unenforceable. *Vacation Beach, Inc. v. Charles Boyd Construction, Inc.*, 906 So. 2d 374, 377 (Fla. 5th DCA 2005) (Agreements that transgress public policy, "are considered to be illegal and will not generally be enforced by the courts.") Courts

have "an 'affirmative duty' to avoid allowing a party who violates public policy to receive *any substantial benefits from his or her wrongdoing*." *Title & Trust Co. of Fla. v. Parker*, 468 So. 2d 520, 523 (Fla. 1st DCA 1985) (emphasis added).

Courts should not give their "stamp of approval" to conduct that violates public policy or the law. *Id.* at 523; s*ee also Gonzalez v. Trujillo*, 179 So. 2d 896, 897-98 (Fla. 3d DCA 1965) ("Indeed, there rests upon the courts the affirmative duty of refusing to sustain that which by the valid laws of the state, statutory or organic, has been declared repugnant to public policy. To do otherwise would be for the law to aid in its own undoing."); *Schaal v. Race*, 135 So. 2d 252, 256 (Fla. 2d DCA 1961) ("[W]hen a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice."); *Local No. 234, etc. v. Henley & Beckwith, In*c., 66 So. 2d 818, 823 (Fla.1953) ("a contract against public policy may not be made the basis of any action either in law or in equity.").

Permitting Hahn Loeser to enjoy the substantial financial benefit of a prevailing party under the Consulting Agreement, when Antaramian prevailed at trial through the tainted, purchased testimony of his fact witnesses, would give this Court's stamp of approval to the serious misconduct of Antaramian and his paid fact witnesses. TPI respectfully requests this Court disapprove the unlawful payments to Antaramian's fact witnesses for their trial testimony and case preparation, and that

it not reward Antaramian (and his assignee and its lawyer who was paid to testify as a "fact witness") by awarding them fees and costs pursuant to the prevailing party provision in the Consulting Agreement. The unlawful acts occurred in the very case that gives rise to the prevailing party fee claim.

b. Antaramian and Hahn Loeser should be estopped from further benefitting from their violations of Florida Statutes and Rule 4-3.4(b).

Antaramian should be equitably estopped to enforce the prevailing party fee and cost shifting provision in these circumstances, where Antaramian led TPI, the court, and the jury to believe that these witnesses were unpaid fact witnesses when Antaramian secretly paid them high, forbidden, hourly rates as if they were paid experts. "Equitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position[.]" *Florida Dept. of Health & Rehabilitative Services v. S.A.P*, 835 So. 2d 1091, 1096-97 (Fla. 2002).

Antaramian promised to pay his "fact" witnesses much more than the "fact" witnesses were paid in *In re Depuy Orthopaedics, Inc.*, 2018 WL 1954759 (5th Cir. 2018). There, a substantial verdict was reversed when it was revealed the prevailing party's counsel made a $10,000 donation to two "non-retained experts' " charity of their choosing, who also received $65,000 in post-trial payments. *14. The Fifth Circuit held the verdict could not stand. *29. It stated: "the central question is not

whether the non-disclosure [of the payments to the fact witnesses] was outcome-determinative but, instead, whether disclosure would have opened up potentially promising impeachment tactics on cross-examination, which it patently did." *29 at n 82.

Hahn Loeser, as the assignee of the Fee Judgment and the law firm of Theodore Tripp, who participated in the misconduct as Antaramian's lead, paid attorney-fact witness, should also be equitably estopped from enforcing the Fee Judgment. *See Radio South Dade, Inc. v. Marrero*, 572 So. 2d 3 (Fla. 3d DCA 1991) (judgment creditor's assignee can lose the right to execute on the assigned judgment upon a showing of fraud or equitable estoppel).

Antaramian's representations at trial that his material witnesses were fact witnesses, rather than paid expert witnesses, misled TPI, the court and the jury – who all were entitled to expect seven officers of the court to adhere to the ethical rules of the Florida Bar. TPI did not attempt to impeach the credibility of these witnesses at trial with evidence that they were being paid large fees for their testimony, as would be done routinely with an expert witness (and as was done with Antaramian's expert Hughes,), because Antaramian's counsel represented that they were fact, not expert, witnesses -- and it is well known and rightly assumed among lawyers and non-lawyers that paying expert witness fees to fact witnesses for their testimony violates the law (as Mr. Cheffy later observed and the circuit court later

found). Indeed, the Comment to rule 4-3.4(b) makes clear, "[t]he common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying…."

Antaramian presented Tripp, for example, as a fact witness to testify that there was "no recovery from the litigation." (R.7283). This was convincing testimony coming from Antaramian's lead counsel in the Nassif case, a point emphasized during Antaramian's counsel's closing argument. Yet Antaramian was secretly paying Tripp at expert witness rates for that testimony and other extensive work wholly unrelated to his testimony. If Antaramian had disclosed Tripp as a paid expert, TPI could have challenged his credibility with evidence of the fee-for-testimony arrangement or even moved to strike the witness. Allowing Antaramian and his assignee, Hahn Loeser (Tripp's law firm), to enjoy the benefits of being the "prevailing party" under these circumstances would be inequitable and they should be estopped from doing so. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001) ("Equitable estoppel . . . bars the wrongdoer from . . . profiting from his or her own misconduct.").

The hidden payments — coupled with Antaramian's emphasis that he presented *fact witnesses* — was also a species of fraud on the court. *Compare Robinson v. Weiland*, 988 So. 2d 1110 (Fla. 5th DCA 2008) (party committed fraud on the court by concealing the identity of a witness to hamper the presentation of the

opposing party's claim). *Robinson* succinctly states "fraud on the court occurs where: 'it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense.'" 988 So. 2d at n. 1. The testimony of *paid* fact witnesses – while not disclosing they were paid – was done to improperly influence the jury.

A party who commits a fraud on the court is subject to sanctions, including the most severe sanction of dismissal with prejudice. *Sky Development, Inc. v. Vistaview Development, Inc.*, 41 So. 3d 918 (Fla. 3d DCA 2010). The appellate court in *Sky Development* affirmed the dismissal of the corporate plaintiff's action based upon improper communications between a corporate official and witnesses – one during a deposition and one in trial. There was no claim that the testimony was not true. A note passed during a deposition said "Don't worry about pleasing him. Just say no." Then during trial, the company's sole shareholder sent the CFO two text messages while the CFO was on the stand about receipt of a document. The appellate court affirmed the dismissal with prejudice, saying this was a fraud on the court. *Id.*

Similarly, Antaramian and Hahn Loeser's conduct in making secret payments to fact witnesses — while portraying them as more believable than TPI's paid expert

witnesses — should receive the same treatment. It is too late to sanction them in the TPI trial, but not too late to deny them the further reward of the nearly two million dollars they seek.

CONCLUSION

Based on the foregoing, Petitioner TPI respectfully requests that the certified question be answered as follows: Rule 4-3.4(b) of the Rules Regulating the Florida Bar does *not* permit a party to pay a fact witness for the witness's assistance with case and discovery preparation.

Petitioner further requests that the Court deny prevailing party status to Antaramian under the fee provision of the Consulting Agreement, set aside the Fee Judgment in its entirety, and bar Hahn Loeser from enforcing the Fee Judgment. Florida law should condemn and punish, not reward, Antaramian's "extremely serious misconduct." *Wohl*, 842 So. 2d at 816.

Dated: May 7, 2018.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of May, 2018, 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:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing computer-generated brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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