IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Case No. SC17-2058

DCA Case No. 2D13-6051 Consolidated With DCA Case No. 2D14-86

L.T. Case No. 06-CA-5366 Consolidated With L.T. Case No. 13-CA-5139

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

ON DISCRETIONARY REVIEW OF
A QUESTION CERTIFIED TO BE OF GREAT PUBLIC
IMPORTANCE BY THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

June 8, 2018

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I. PRELIMINARY STATEMENT

Petitioner, Trial Practices, Inc., shall be referred to as "TPI." Jack J. Antaramian shall be referred to as "Antaramian." Substitute party for Antaramian and Respondent, Hahn Loeser & Parks LLP, shall be referred to as "Hahn Loeser."

Citations to the Appendix to this Answer Brief on the Merits will be cited to with the abbreviation "App.", followed by the Appendix document number and the Appendix page number(s), as appropriate (*e.g.*, App. A, pg. 5). The trial court transmitted a portion of its case file for L.T. Case Number 06-CA-5366 to the Second District on June 18, 2014, as the Original Record on appeal in Case Nos. 2D13-6051 and 2D14-86, which consists of 13,473 numbered pages. The Original Record transmitted by the trial court to the Second District will be cited to with the abbreviation "R" followed by the Original Record page number (*e.g.*, R89). The Second District has provided its Records to this Court for Case Numbers 2D13-6051 and 2D14-86 respectively. Citations to the Record of the Second District shall to be to the Record in the main Second District case, Case No. 2D13-6051, which consists of 1,657 PDF pages. The Second District's Record for Case No. 2D13-6051 will be cited to with the abbreviation "DCA R" followed by the Second District's PDF Record page number (*e.g.*, DCA R1247).

To the extent that a document is included in the Appendix to this Answer Brief and included in the Original Record or the Second District's Record, the document

will be cited to with both the Appendix reference and the Record reference (*e.g.*, App. B/R107 - 318 or App. G/DCA R1247 - 1293).

The transcripts of the ten-day jury trial in the trial court case are included in the Original Record at R7021 - 9532, and will be cited to with the abbreviation "Trial Tr." followed by the transcript page number, line numbers, and then the abbreviation "R", and the Record page numbers (*e.g.*, Trial Tr., pg. ____, lines ____, R7021). The transcripts of the two-day evidentiary attorneys' fees and costs hearing on May 15, 2013, and July 17, 2013, respectively, are included in the Original Record at R9762 – 9856, and R9867 - 9968, and will be cited to with the abbreviation "Hrg. Tr." followed by the transcript page number, line numbers, and then the abbreviation "R", and the Record page numbers (*e.g.*, Hrg. Tr., pg. ____, lines ____, R9762).

Citations to Petitioner's Initial Brief on the Merits will be cited to with the abbreviation "IB", followed by the Initial Brief page number and paragraph number, as appropriate. Citations to the Amended Appendix to Petitioner's Initial Brief on the Merits will be cited to with the abbreviation "TPI Appx.", followed by the Appendix document number and the Appendix page number(s), as appropriate (*e.g.*, TPI Appx. 1, pg. 4).

II. STATEMENT OF THE CASE AND FACTS

A. Introduction

This Case is before this Court on the question of great public importance certified by the Second District Court of Appeal as follows:

> 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?

(App. A, pg. 17/DCA R1581).

This Court did not accept jurisdiction over an alleged express and direct conflict with *Florida Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003) and *Florida Bar v. Jackson*, 490 So. 2d 935 (Fla. 1986), as requested by TPI. *See* order on jurisdiction of April 3, 2018, at pg. 2, ¶1.

The version of Rule 4-3.4(b), Rules Regulating The Florida Bar, in effect at the time of: (i) the jury consulting contingent fee contract between TPI and Antaramian dated September, 2005 (R5909-5914); (ii) TPI's lawsuit against Antaramian for breach of the contingent fee contract of June 21, 2006 (App. C, pgs. 239 - 242/R57 – 63); (iii) the jury trial in the trial court case, from March 21, 2011, through April 1, 2011, resulting in a jury verdict in favor of Antaramian (R4080); and (iv) the trial court's Order Awarding Attorneys' Fees and Costs in Favor of Antaramian of November 20, 2013 (R13276 - 13289) and the Judgment Awarding Attorneys' Fees, Costs and Pre-Judgment Interest to Antaramian of December 19,

2013 (R13312 – 13313), is as follows:

> A lawyer shall not:
>
> * * *
>
> (b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except 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.

See The Florida Bar re Amendments to Rules Regulating The Florida Bar, 644 So. 2d 282, 313 (Fla. 1994); and *In re Amendments to the Rules Regulating The Florida Bar*, 916 So. 2d 655, 700 (Fla. 2005).

Rule 4-3.4(b) was amended on May 29, 2014, with an effective date of June 1, 2014. The current version of Rule 4-3.4(b) is as follows:

> A lawyer shall not:
>
> * * *
>
> (b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except 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 a witness for time spent preparing for, attending, or testifying at proceedings.

See In re Amendments to the Rules Regulating The Florida Bar, 140 So. 3d 541, 567

(Fla. 2014).

The American Bar Association had a promulgated ethics opinion in effect at the relevant time (dated August 2, 1996), titled "Propriety of Payments to Occurrence Witnesses," which provides, in relevant part, as follows:

> A lawyer, acting on her client's behalf, may compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction.
>
> * * *
>
> The Committee also sees no reason to draw a distinction between (a) compensating a witness for time spent in actually attending a deposition or a trial and (b) compensating the witness for time spent in pretrial interviews with the lawyer in preparation for testifying, as long as the lawyer makes it clear to the witness that the payment is not being made for the substance (or efficacy) of the witness's testimony or as an inducement to "tell the truth." . . . The Committee is further of the view that the witness may also be compensated for time spent in reviewing and researching records that are germane to his or her testimony, provided, of course, that such compensation is not barred by local law.

(ABA Formal Opinion 96-402, ¶1, ¶5). The Florida Bar also had a promulgated ethics opinion in effect at the relevant time (dated December 11, 1997), which provides, in part, as follows:

> The inquiring attorney's firm would like to be compensated for time spent by the firm in reviewing the files concerning the investigation and/or testifying either

> at deposition or at the arbitration proceeding. Although the attorneys will not be testifying as experts, Rule 4-3.4(b) does not prohibit fact witnesses from being reimbursed for the "loss of compensation incurred by reason of preparing for and testify at the proceedings."

(Florida Bar Staff Opinion 20542, pg. 3, ¶2).

There is a pending Judgment Awarding Attorneys' Fees, Costs and Pre-Judgment Interest to Antaramian, and against TPI (R13312 - 13313). The relevance of the Second District's certified question to the Judgment is how much, if any, Antaramian is entitled to have in the Judgment for attorneys' fees and certified public accountant fees as a cost component to the Judgment. TPI objects to being responsible for certain fees and expenses charged by a certified public accountant, Frances Nolan, and Howard D. Medwed, Esq., Mark Manning, Esq., Robert Weinstein, Esq., Joseph D. Stewart, Esq., Theodore Tripp, Esq., and Lawrence Farese, Esq. Antaramian sought assistance with case and discovery preparation from each of these skilled and professional witnesses.

None of the skilled professional witnesses called into question by TPI are located within 100 miles of the trial court.[1] Further, the Record demonstrates that the billings from the professional witnesses were for the professionals' normal hourly rates for their work and actual expenses incurred, and were not contingent on

[1] Rule 1.330(a)(3)(B), Florida Rules of Civil Procedure, recognizes that a witness is considered unavailable to testify at trial or a hearing if the witness is at a greater distance than 100 miles from the location of the trial or hearing.

the content or outcome of the testimony.

At the trial, there was no secret that the witnesses were employed professionals. For example: (i) Ms. Nolan testified that she prepares Antaramian's tax returns (*see* testimony of Ms. Nolan at Trial Tr., pg. 1437, line 8 – pg. 1438, line 4, R8689 - 8690); (ii) Mr. Weinstein testified that he was the trustee for Antaramian's family trust (a paid position) (*see* testimony of Mr. Weinstein at Trial Tr., pg. 1273, line 19 – pg. 1274, line 13, R8509 - 8510); and (iii) Mr. Medwed testified that he is an attorney representing Antaramian (*see* testimony of Mr. Medwed at Trial Tr., pg. 1014, line 19 – pg. 1015, line 23, R8196 - 8197). A holding that such paid professionals can no longer work as paid professionals for Antaramian because Antaramian was sued would put an enormous and undue hardship on defendants in complex commercial cases where the defendant needs professional help in responding to attacks by a plaintiff. Antaramian's tax returns were attacked by TPI, and Antaramian should be permitted to hire his tax preparer and tax lawyer to assist him in responding to the attacks. Antaramian's Settlement Agreement with his ex-partner was attacked by TPI as allegedly having provided gross recovery to Antaramian for which TPI claimed a five percent contingent fee. Antaramian should be permitted to hire his paid professionals to respond to discovery requests and defend the attacks by TPI.

B. TPI's Request for the Court to go Beyond the Certified Question

TPI requests this Court (implicitly) to go beyond the certified question, and essentially set aside Antaramian's status as prevailing party. Antaramian's status as prevailing party is confirmed by a final Per Curium Affirmance by the Second District in Case Number 2D11-5673[2] (*see* R9554; and Mandate at R9535 – 9536) in TPI's appeal of the jury verdict in favor of Antaramian and the final judgment thereon. The Second District also awarded Antaramian attorneys' fees in Case Number 2D11-5673 (*see* Order at R9555; and Opinion at App. A, pg.7, ¶1 and footnote 1/DCA R1571).

The jury verdict was rendered on April 1, 2011 (R4080). Antaramian's motion for attorneys' fees and costs was filed on April 19, 2011 (R4094 – 4105). A final judgment in favor of Antaramian, based on the jury verdict, was entered on October 13, 2011 (R4510). TPI appealed the jury verdict final judgment on November 10, 2011 (R7018 – 7020) (Case Number 2D11-5673). Supporting affidavits for Antaramian's request for attorneys' fees and costs were provided to TPI on November 11, 2011. (*See* TPI's Post-Hearing Memorandum at R13207, ¶ 2; App. G, pg. 272/DCA R1254 and App. G., pgs. 293 - 297/DCA R1275 - 1279; and *see generally* Hahn Loeser's Motion to Supplement the Appellate Record, along

[2] *Trial Practices, Inc. v. Antaramian*, 97 So. 3d 228 (Fla. 2nd DCA 2012) (table decision).

with the Appendix thereto, at App. G/DCA R1247 - 1293.) TPI served its Initial Brief in Case Number 2D11-5673 on March 9, 2012. The Second District entered its Per Curium Affirmance in Case Number 2D11-5673 on September 12, 2012 (*see* R9554; and Mandate at R9535 – 9536).

If TPI were going to make an argument collaterally attacking the jury verdict predicated on alleged fraud or the payment of witnesses, TPI would have been required to bring such a claim, pursuant to Rule 1.540(b), Florida Rules of Civil Procedure, within one year from the date of the jury verdict final judgment,[3] which was entered on October 13, 2011. Antaramian's status as the prevailing party was not contested in Case Number 2D11-5673. TPI made no effort to have a written opinion issued, or to seek the review of this Court of the Second District's Per Curium Affirmance in Case Number 2D11-5673.

The underlying Second District appeal, which the certified question arises out of, solely relates to the trial court's ruling on the amount of attorneys' fees and costs

[3] Alleged fraud involving the testimony of witnesses in the proceeding would constitute intrinsic fraud, which must be brought within one year of a final judgment. *See NAFH Natl. Bank v. Aristizabal*, 117 So. 3d 900, 902 (Fla. 4th DCA 2013) (explaining the difference between extrinsic fraud that can constitute fraud on the court, and intrinsic fraud, which is barred as a matter of law as a basis for an independent claim under Rule 1.540). *See also Parker v. Parker*, 950 So. 2d 388, 391 (Fla. 2007) (providing that "Intrinsic fraud . . . applies to fraudulent conduct that arises within a proceeding and pertains to issues in the case that have been tried or could have been tried. This Court has expressly held that false testimony given in a proceeding is intrinsic fraud.")

to be recovered by Antaramian. The certified question to this Court is limited solely to the amount of costs associated with skilled witnesses assisting with case and discovery preparation. In *Murray v. Regier*, 872 So. 2d 217 (Fla. 2002), this Court held as follows:

> Once this Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, we have jurisdiction over all issues. *See Savoie v. State*, 422 So. 2d 308 (Fla. 1982). Our authority to consider issues other than those upon which jurisdiction is based is discretionary and is exercised only when these other issues have been properly briefed and argued and are dispositive of the case. *See Savona v. Prudential Ins. Co. of America*, 648 So. 2d 705, 707 (Fla. 1995). We consider Murray's constitutional claim under this authority.

Murray at footnote 5.

This Case is before this Court on a certified question of great public importance, and not conflict. Further, the issues argued and addressed by TPI outside of the certified question cannot be "dispositive of the case" because the issue of prevailing party has already been settled by the Second District's affirmance of the jury verdict final judgment and of prevailing party status. Further, the issue of whether TPI should have asked skilled witnesses, during the trial, how much they were being paid, or otherwise elicited bias testimony,[4] and any impact that may or

[4] Whether any witnesses were being compensated for their time or testimony was an issue that could have easily been discovered by cross-examination of those witnesses during the trial. *See Platypus Wear, Inc. v. Horizonte Fabricacao Distribuicao Importacao Exportacao Ltda, et al.*, Case No. 08-20738-CIV, 2010

may not have had on the jury verdict is a question of fact that was not developed by TPI during the jury trial or during the two-day evidentiary hearing on attorneys' fees and costs, and therefore, there is no record upon which this Court could make a factual finding that any witness was tainted or gave false testimony. On the contrary, all indications and evidence demonstrate that the skilled witnesses testified truthfully, and sent invoices for their normal hourly rates and for their actual expenses.

C. TPI's Contingent Fee Contract with Antaramian and the Underlying Trial

TPI entered into a contingent fee contract with Antaramian in September of 2005 (R5909 - 5914), to provide jury consulting services in a case by and between Antaramian and Diane Nassif as Executor of the Estate of David E. Nassif (Antaramian's former business partner) ("*Nassif* case"). In the underlying *Nassif* case, Antaramian had retained Theodore L. Tripp, Esq., as his primary counsel and Lawrence A. Farese, Esq., as co-counsel. The attorneys for Nassif in the *Nassif* case were Joseph D. Stewart, Esq., and George H. Knott, Esq.

The jury trial in the *Nassif* case ended in a mistrial, and Antaramian and Nassif decided to walk away from their dispute, and not proceed with litigation (*e.g.*, *see*

WL 625356 (S.D. Fla. 2010) at *5 (declining to sanction party for payments to witnesses not falling within clear prohibition or exemption of Rule 4-3.4(b) and finding that credibility of witnesses based on those payments could be addressed with vigorous cross-examination and argument at trial).

Hrg. Tr., pg. 9, line 1 – pg. 10, line 17, R9766). Antaramian and Nassif each had their respective lawyers and accountants prepare a walk-away agreement to separate their business interests (*e.g., see* trial testimony of Mr. Medwed at Trial Tr., pg. 1048, lines 15 – 20, R8230), titled "Settlement Agreement" and dated May, 2006 (App. B/R107 - 318). After the Settlement Agreement, TPI demanded millions of dollars from Antaramian, claiming that the Settlement Agreement was not a walk-away but constituted a "gross recovery" to Antaramian, for which TPI was entitled to a five percent contingent fee. (*E.g., see* Hrg. Tr. Pg. 10, lines 18 – 22, R9766.) TPI filed suit against Antaramian (L.T. Case No. 06-CA-5366) to recover its contingent fee (*see* TPI's Complaint at App. C/R57 – 63).

TPI's counsel's opening statement at the jury trial in the trial court case is demonstrative of how much TPI was alleging Antaramian obtained as "gross recovery" from the Settlement Agreement. Relevant portions of Mr. Winkles' opening statement are as follows: "That through Trial Practices' efforts, Mr. Antaramian prevailed and made a huge recovery in a settlement of the lawsuit, as much as $120-million" (Trial Tr., pg. 49, lines 1 - 4, R7070).

When TPI initially sued Antaramian, Antaramian retained Edward K. Cheffy, Esq., as his attorney. Early on in the litigation, TPI's president, Dr. Harvey A. Moore ("Moore"), claimed that Mr. Cheffy had made promises to induce Moore into the jury consulting contingent fee contract for the *Nassif* case (*e.g., see* excerpt from

Moore's Affidavit of November 6, 2006, at R337, ¶5 – 7). Moore's allegation made Mr. Cheffy feel that he may be a material witness at the trial and also could not be an advocate at the trial, so he referred Antaramian to Thomas J. Roehn, Esq., and the law firm of Carlton Fields, P.A. (*See* Mr. Roehn's Notice of Appearance at R492 – 493; Mr. Cheffy's Motion to Withdraw at R1689; Hrg. Tr., pg. 12, lines 8 – 25, R9766; and trial testimony of Mr. Cheffy at Trial Tr., pg. 1358, line 11 – pg. 1359, line 7, R8610 – 8611.) Ultimately, Antaramian was not able to meet his financial obligations to Carlton Fields, and provide a requested trial retainer. Therefore, Carlton Fields withdrew, and Antaramian hired Edmond E. Koester, Esq., and the law firm of Coleman, Yovanovich & Koester, P.A (*e.g., see* order of withdrawal of Carlton Fields at R1580 – 1851; Notice of Appearance of Mr. Koester at R1595; and hearing testimony of Mr. Koester at Hrg. Tr., pg. 147, lines 4 – 24, R9819). Mr. Tripp was still an attorney of Antaramian, representing him in other matters, and was still assisting in TPI's lawsuit against Antaramian, although not as counsel of record. Mr. Cheffy remained a lawyer of Antaramian, and was still assisting in TPI's lawsuit against Antaramian, although not as trial counsel. Joseph Varner, Esq., was TPI's initial attorney in the trial court case, and then Frank Winkles, Esq., was TPI's attorney, including for the jury trial. (*See* Hrg. Tr., pg. 11, line 22 – pg. 12, line 7, R9766.)

Antaramian offered TPI over $100,000 for its time and expenses, and TPI

refused and proceeded with taking its case to trial. (*See* trial testimony of Antaramian at Trial Tr., pg. 1726, line 10 – pg. 1727, line 13, R9028 – 9029; and Antaramian's Proposal for Settlement at R7012 – 7014.) In the pretrial process, TPI accused Antaramian of tax fraud and sought voluminous discovery into Antaramian's finances, taxes, and the numerous business dealings between Antaramian and Nassif. (*E.g.*, see Hrg. Tr., pg. 11, lines 7 – 19, and pg. 11, line 25 – pg. 12, line 7, R9766; and trial testimony of Mr. Cheffy at Trial Tr., pg. 1359, line 8 – pg. 1360, line 19, R8611 – 8612.)

Antaramian had for a long time used a tax attorney by the name of Howard D. Medwed, Esq., of Burns & Levinson LLP (and other attorneys from the firm), and also utilized a certified public accountant, Frances Nolan, to prepare his tax returns. (*See* testimony of Antaramian at Trial Tr., pg. 1720, line 15 – pg. 1721, line 4, R9022 – 9023.) TPI's allegations against Antaramian related to tax fraud, its asking for his financial information, asking for all information about the underlying *Nassif* case, and how the Settlement Agreement was drafted and what it meant, resulted in Antaramian asking his retained professionals to assist him with discovery responses and his defense of the claim (*e.g., see* Hrg. Tr., pg. 10, line 11 – pg. 14, line 14, R9766 - 9767).

The skilled professionals utilized in assisting with case and discovery preparation were a necessary and natural fit to Antaramian being able to defend

himself. They were the ones that prepared the underlying documents and already had the knowledge regarding the Settlement Agreement and the underlying *Nassif* case. Starting anew, with all new professionals, is neither legally required, nor would it further Antaramian's desire for the most efficient and cogent defense possible. In fact, if Antaramian would have retained new professionals to assist with case and discovery preparation that did not have the knowledge of the skilled witnesses utilized, the amount of the cost award against TPI would have been even higher, as the new professionals would have had to familiarize themselves with the issues, review numerous documents, *et cetera*.

One example of the professional witnesses being skilled witnesses, is that the trial court permitted Mr. Medwed to provide a tax opinion at trial. (*See* argument of Antaramian's trial counsel and the trial judge's ruling at Trial Tr., pg. 1078, line 14 – pg. 1079, line 12, R8283 – 8284.)

TPI improperly conflates the concept of expert disclosure requirements and payment of witnesses. Antaramian contended, at trial, that all of the skilled witnesses were like treating physicians and had every right to provide skilled testimony, as that is the only capacity in which they were ever known to be testifying, and that is the only capacity in which they actually testified. TPI tried to take the position that the skilled witnesses were not able to give any skilled testimony because they should have been explicitly designated as "expert" witnesses.

Argument ensued at the trial because of this, and as indicated above, the trial court permitted the testimony. Neither TPI nor Antaramian's witness lists specified the capacity in which the witnesses would be called. (*See* TPI's witness lists at App. D/R13183 – 13190; and Antaramian's witness lists at App. E/R13174 - 13182.)

One (of many) examples of TPI's conduct in the trial court case and the nature of the voluminous discovery sought by TPI is reflected in the testimony of Mr. Roehn at the attorneys' fees and costs hearing. Mr. Roehn testified, in part, as follows:

> Q Tell me how the litigation was from the day-to-day perspective?
> A When Mr. Varner was in it, it was what you would expect from Mr. Varner and Mr. Cheffy, professional businesslike and pleasant. Mr. Moore got new counsel, and the theory of the case appeared to change to be one that everybody on Mr. Antaramian's side of the transaction was a crook, was actually a thief and a liar.
> That was everybody including Mr. Cheffy. It became very adversarial.
> Q Were there a lot of depositions?
> A Yes.
> Q A lot of document discovery?
> A Tons of documents.
> Q Tell us about the deposition, the discovery, the motions, the types of things that were happening on a day-to-day basis.
> A Most of the depositions that we attended were depositions scheduled by Trial Practices, Inc. by Mr. Winkles. The depositions were all geared towards drilling down into the underlying tax issues and real estate issues about the transactions that led up to and then were split in the settlement agreement in the

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underlying case.

Mr. Moore and -- I don't know who on his behalf, but they had gone through these millions of documents that had been produced, that they had found key documents that, in their opinions, supported that Mr. Antaramian was a tax cheat, a liar, and a fraud.

These documents, in their opinion, would go to establish that in these depositions. They were very unusual depositions, not the types of depositions I was used to in a business case because issues that I thought we would address were not addressed at all.

It was going into what I considered to be on character assassinations on all of these people or underlying transactions of the documents. It became quite complex.

Q Were some of the depositions out of state?

A Yes. Mr. Winkles took several depositions of the lawyers in Boston, all of them being accused of being cheats and liars, and with the depositions of Mr. Antaramian's longtime bookkeeper, his accountant, who was accused of being tax cheats and liars, and Mr. Jaroch, who was Mr. Nassif's in-house counsel who, I think, also Mr. Winkles and Mr. Moore accused of being a liar.

(Hrg. Tr., pg. 100, line 2 – pg. 101, line 24, R9788 – 9789).

One example of the voluminous documents sought by TPI through discovery, and produced to TPI, is reflected in the trial testimony of Mr. Cheffy, which provides, in part, as follows:

Q. In the case that we're here at this trial on, did you assist and agree in waiving mediation and certain attorney-client privileges to produce documents to Trial Practices?

A. I did.

Q. What did you do?

A. We were -- after Mr. Moore filed his suit, and his attorney at the time was --

MR. WINKLES: Your Honor, objection, cumulative and irrelevant.

THE COURT: Overruled.

A. His attorney at the time was Joe Varner and Mr. Varner was asking for many documents, and as I was trying to assemble those documents, we discovered they were just massive. And Ted Tripp, the primary attorney who had represented Mr. Antaramian in the Nassif trial, had a hard drive which I believe had over a hundred thousand documents on it, hundreds of thousands of

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documents, and as Mr. Tripp and I considered going through and figuring out what would be privileged, what wouldn't be and the time and expense, the suggestion was made, let's just waive the privilege and give them everything. Let them have full access to this and understand everything.

So we talked to Mr. Antaramian, Mr. Antaramian liked that idea, signed the letter waiving the attorney-client privilege.

In having further discussions with Mr. Varner, he asked me about the mediation privilege which is a different privilege. And to get to waive the mediation privilege, we would have to get the consent of everybody involved in the mediation. Mr. Antaramian agreed to waive that privilege and then authorized us to go to Mr. Knott, one of the attorneys who had represented Mr. Nassif to see if he would agree to waive that privilege also so that we could give those documents to Trial Practices.

(Trial Tr., pg. 1359, line 8 – pg. 1360, line 19, R8611 – 8612).

TPI's attorney's opening statement at the jury trial is also demonstrative of the voluminous discovery involved, and the allegations being made by TPI. Relevant portions of Mr. Winkles' opening statement are as follows:

The difficulty in the case comes because of the parties actions, especially Mr. Antaramian's actions, because you're going to see that many, many of the corporations' books and records were altered or changed.

That Mr. Antaramian stole from these companies, used company monies to build part of

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his house, pay the captain of his yacht, pay his children's nanny, things of that nature, that he hid matters from his partner, David Nassif. That he took company loans to hide his salary and other benefits, and all of these matters were hidden in the settlement agreement, that he got huge tax benefits which he recovered in the settlement agreement, by manipulating the books and records.

One slick, neat innocuous phrase in the settlement agreement, $60-million, over $60-million in debt, period. It was either forgiven, or debt assigned to Mr. Antaramian, and I'll talk to you about that in a minute. The same as if he took that money that he owed and put it in his pocket.

(Trial Tr., pg. 50, line 19 – pg. 51, line 16, R7071 - 7072).

At the jury trial, TPI attempted to distort information and misstate the truth about facts it had learned about Antaramian in connection with its work for Antaramian in the *Nassif* case, in an effort to persuade the jury to dislike Antaramian. By way of example, Moore:

(i) After testifying to his own experience "dealing with defectors and deserters" (Trial Tr., pg. 639, line 16, R7765), Moore went on to state that Antaramian "had cut his enlistment short for some reason," in an attempt to portray

Antaramian as a military deserter (Trial Tr., pg. 791, lines 8 – 13, R7917), while Moore knew that Antaramian had, in fact, been granted leave from the military to tend to a family medical emergency (Antaramian had received an early discharge to take care of his young child, who had suffered a concussion) (*see* cross-examination of Moore at Trial. Tr., pg. 812, line 18 – pg. 813, line 6, R7968 – 7969);

(ii) Falsely testified that Antaramian conspired and avoided payment of alimony to his ex-wife (while TPI's own Mock Trial Results Report in the *Nassif* case showed that Antaramian had paid his wife $7.5 million in alimony, which was above and beyond what he was required to pay). *Compare* Moore's testimony at Trial Tr., pg. 704, lines 3 – 21, R7830, with cross-examination of Moore at Trial Tr., pg. 811, line 8 – pg. 812, line 7, R7967 – 7968; and *see also* excerpt from TPI's Mock Trial Results report in the *Nassif* case at App. H, pg. 313, ¶5;

(iii) Erroneously testified that Antaramian had employed, and had a long-standing friendship with, a "murderer." (*See* testimony of Moore at Trial Tr., pg. 716, lines 14 – 23, R7842; and cross-examination of Moore at Trial Tr., pg. 813, line 12 – pg. 814, line 25, R7969 – 7970); and

(iv) Rejected the notion that he owed Antaramian any ethical obligation to refrain from exploiting the personal information Antaramian provided to him in connection with TPI's work in the *Nassif* case, and derided Antaramian for producing privileged documents to TPI regarding the *Nassif* case, which was done

in an effort to show TPI that Antaramian achieved no recovery from the Settlement Agreement. (*See* testimony of Moore at Trial Tr. pg. 866, line 24 – pg. 868, line 18, R8022 - 8024.)

Eerily, TPI even displayed a blow-up of Antaramian's house, and asked Antaramian to show the jury where his and his children's bedrooms were located. (*See* trial testimony of Antaramian at Trial Tr., pg. 1732, line 6 – pg. 1733, line 20, R9034 - 9035.) Inexplicably, TPI's Mock Trial Results Report in the *Nassif* case even advised Antaramian to "Strike . . . Blacks and Hispanics" from the jury (*see* Trial Tr., pg. 862, lines 4 - 8, R8018; and excerpt from TPI's Mock Trial Results report in the *Nassif* case at App. H, pg. 314).

TPI purports to provide services that are in the nature of the practice of law and charges the client directly a five percent contingent fee. For example, TPI purports to: draft opening statements for lawyers for trial (*see* trial testimony of non-attorney TPI employee, Ann McDermott, at Trial Tr., pg. 153, lines 16 – 18, R7196; and trial testimony of Moore at Trial Tr., pg. 660, lines 1 – 5, R7786), provide proposed voir dire questions for use at trial (*see* trial testimony of Moore at Trial Tr., pg. 660, lines 13 – 18, R7786), and provide witness preparation and strategy advice (*see* trial testimony of Moore at Trial Tr., pg. 674, lines 22 – 24, R7800).

D. The Professional Witnesses' Assistance with Case and Discovery Preparation, and Their Trial Testimony, Were Necessary to Defend Against TPI's Lawsuit

Antaramian had for a long time utilized tax and business attorneys, Burns & Levinson LLP, and tax accountants to handle his affairs and to prepare his tax returns. (*See* testimony of Antaramian at Trial Tr., pg. 1720, line 15 – pg. 1721, line 4, R9022 – 9023.) Burns & Levinson LLP was key in designing, preparing, and effectuating the division of Antaramian's interests with Nassif by way of the Settlement Agreement (App. B/ R107 - 318).

During the lawsuit and at trial, TPI contended that Antaramian committed tax evasion, received tax benefits, or otherwise received a windfall from the Settlement Agreement, which constituted a "gross recovery." Antaramian obviously needed to consult with his accountant, Frances Nolan, CPA (located in Naples, Florida), who prepared his tax returns (ironically, TPI claimed at the trial that Antaramian's tax returns were false), and Antaramian's business and tax attorneys, including Howard Medwed, Esq., Mark Manning, Esq., and Robert Weinstein, Esq. (of Burns & Levinson LLP, located in Boston, Massachusetts).

The other witnesses TPI attacks as having been improperly paid or promised to be paid (*see* IB, pgs. 5 – 7) are as follows:

(i) Joseph D. Stewart, Esq., of Joseph D. Stewart, P.A., located in Naples, Florida. Mr. Stewart represented Nassif in the *Nassif* case;

(ii) Theodore L. Tripp, Esq., of Hahn Loeser & Parks LLP, located in Fort Myers, Florida. Mr. Tripp represented Antaramian in the *Nassif* case; and

(iii) Lawrence Farese, Esq., of Robins, Kaplan, Miller & Ciresi, L.L.P., located in Naples, Florida. Mr. Farese represented Antaramian in the *Nassif* case.[5]

The skilled Professional Witnesses' assistance and testimony in the trial court case was directly predicated on the allegations made by TPI. Throughout the course of discovery and throughout the litigation in the trial court case, TPI was well aware of the Professional Witnesses' respective roles as skilled professionals regarding the underlying *Nassif* case (*e.g., see* Antaramian's Answer to TPI's Interrogatory Number 7 of October 3, 2006, at R4388 – 4389; and Affidavit of Howard D. Medwed in Opposition to Plaintiff's Motion for Summary Judgment of December 29, 2006, at R475 - 479).

TPI's *ad hominem* attacks and conspiracy theory driven prosecution of the case necessitated having various witnesses testify in the case and at trial, and to respond to voluminous and onerous discovery from TPI. (*E.g., see* Hrg. Tr., pg. 11, line 9 – pg. 14, line 22, R9766 - 9767; Hrg. Tr., pg. 17, lines 15 – 23, R9768; hearing testimony of Mr. Roehn at Hrg. Tr., pg. 100, line 2 – pg. 101, line 24, R9788 – 9789; and Antaramian's Answers to TPI's Interrogatories at R4380 – 4389.)

[5] Mr. Medwed, Mr. Manning, Mr. Weinstein, Ms. Nolan, Mr. Stewart, Mr. Tripp, and Mr. Farese shall be referred to as the "Professional Witnesses."

Thousands and thousands of documents from various sources, including many of the Professional Witnesses, were sought by, and produced to, TPI (*e.g.*, *see* TPI's Second Request for Production at R5865 – 5868; and trial testimony of Mr. Cheffy at Trial Tr., pg. 1359, line 8 – pg. 1360, line 19, R8611 – 8612).

The concept TPI asserts, through its Initial Brief, that it is somehow unlawful or wrong for Antaramian to have gone to his business and tax attorneys to obtain responses to TPI's discovery requests defies common sense.

i. Burns & Levinson, LLP

Howard Medwed, Esq., Mark Manning, Esq., and Robert Weinstein, Esq., of Burns & Levinson, LLP (Boston, MA), were not attorneys of record for Antaramian in the trial court case. They assisted with responding to voluminous discovery from TPI, having depositions taken, travelling to Tampa, Florida to testify at trial, and otherwise explaining how the complex unraveling of Antaramian and Nassif's numerous business interests worked. Burns & Levinson's assistance and testimony was necessary to refute TPI's unfounded allegations that Antaramian received a gross recovery through the underlying *Nassif* case. (*E.g.*, *see* testimony of Mr. Koester at Hrg. Tr., pg. 175, line 22 – pg. 176, line 17, R9826.)

At the jury trial in the trial court case, Mr. Medwed testified that he structured and directed the drafting of the Settlement Agreement to unwind the complex business relationships between Antaramian and Nassif, with input from Nassif's

team, and that Mr. Manning and Mr. Weinstein assisted him (*see* Trial Tr., pg. 1022, lines 6 – pg. 1023, line 21, R8204 - 8205; and Trial Tr., pg. 1048, lines 10 – 20, R8230), and that the Settlement Agreement was designed to be a walk-away between Antaramian and Nassif with no "gross recovery" to Antaramian (*see* Trial Tr., pg. 1023, line 22 – pg. 1025, line 2, R8205 – 8207).

TPI claimed that the Antaramian Family Trust and Antaramian entities should be treated as one in the same with Antaramian for purposes of determining Antaramian's recovery assets and his liability, and claimed that Antaramian obtained a recovery from a transaction involving the Antaramian Family Trust. Mr. Weinstein was the trustee of the Antaramian Family Trust at the relevant time. Mr. Weinstein's assistance with the case was necessary. (*See* testimony of Mr. Koester, Hrg. Tr., pg. 175, line 22 – pg. 176, line 4, R9826; and testimony of Mr. Cheffy at Hrg. Tr., pg. 42, line 15 – pg. 43, line 3, R9774.) Mr. Weinstein testified at the trial to confirm that the Antaramian Family Trust was a party to the Settlement Agreement for the limited purpose of selling its interest in one of the entities, which was a transaction that would have occurred independent of any settlement (*see* Trial Tr., pg. 1278, line 24 – pg. 1279, line 4, R8514 - 8515).

Antaramian had to fly Mr. Manning to the trial to testify because TPI essentially claimed that Mr. Medwed was untruthful in his claiming to be the architect of the Settlement Agreement. (*See* testimony of Mr. Koester, Hrg. Tr., pg.

176, lines 8 – 17, R9826.) Mr. Manning testified that he took direction from Mr. Medwed in assisting with drafting the Settlement Agreement, and that the purpose of the Settlement Agreement was to divide the assets of Antaramian and Nassif equally. (*See* Trial Tr., pg. 1367, line 23 – pg. 1372, line 7, R8619 - 8624.)

Some relevant excerpts from Mr. Medwed's testimony at the attorneys' fees and costs evidentiary hearing regarding Burns & Levinson's assistance with, and testimony in, the trial court case is as follows:

> A As the case was litigated, it was not simple at all. The case involved numerous issues that were raised by the plaintiff. These included issues such as whether or not the transaction which would have formed the basis of recovery was fraudulent, essentially it tried to attack the character of the defendant and his representatives by taking the position that a transaction which was carefully thought out in terms of legitimacy, tax practice, and procedure was done in a way that was open or above board and proper and got at the central issue of the case which was whether or not there was a gross recovery which would form a basis for a recovery by Trial Practices.
>
> Q What were the complicating factors when it came to analyzing the claims filing of Trial Practices?
>
> A There were a host of complicating factors. The history of the case in a way goes back to at least 1999 when there was a development of repayment agreement that dealt with the payment of debt. It included a complex transaction which was called corolla which occurred around 1999, 2000 as well. And ultimately there was litigation which actually did not revolve around the tax
>
> (Pg. 46)
>
> issues, but it revolved around the conduct of partners towards each other in the course of the litigation. And that was the litigation issue that was settled by an

> 4 agreement that neither party had a right to recover
> 5 anything on account of the claims issue. . . .

(Hrg. Tr., pg. 45, line 4 – pg. 46, line 5, R9880). (*See* also hearing testimony of Mr. Medwed at Hrg. Tr., pg. 51, line 15 – pg. 52, line 2, R9881; and Hrg. Tr., pg. 52, line 11 – pg. 54, line 3, R9881 - 9882.)

Successor counsel to Mr. Cheffy in the trial court case, Mr. Roehn, testified at the attorneys' fees and costs hearing that working with Burns & Levinson was necessary to refute TPI's claims, and that TPI sought the depositions of Burns & Levinson in Boston. (*See* Hrg. Tr., pg. 102, lines 9 – pg. 103, line 4, R9789; and Hrg. Tr., pg. 141, lines 2 – 5, R9817.) Antaramian testified at the attorneys' fees and costs hearing that it was necessary for Burns & Levinson to be involved in the case to refute TPI's allegations of tax fraud and wrongdoing against him (*see* Hrg. Tr., pg. 7, line 19 – pg. 8, line 4, R9870). TPI's attorneys' fees expert, Mr. Waggoner, testified at the attorneys' fees and costs hearing that it was not improper for Antaramian to utilize Burns & Levinson in responding to TPI's discovery (*see* Hrg. Tr., pg. 219, lines 1 - 10, R9954).

ii. Frances Nolan, CPA

Ms. Nolan (of Naples, FL) testified more than once in depositions in the trial court case and traveled to Tampa, Florida to testify at trial. At the trial, TPI claimed that Antaramian's tax returns were false and constituted some sort of tax evasion (*e.g., see* testimony of TPI's expert, Paul Hawkins, at Trial Tr., pg. 425, line 22 –

pg. 426, line 6, R7498 - 7499; and *see also* Trial Tr., pg. 1443, lines 14 – 22, R8695). Ms. Nolan testified at trial that she prepared the relevant tax returns for Antaramin, and that, in her opinion, the tax returns were true and accurate (*see* Trial Tr., pg. 1444, line 7 – pg. 1451, line 19, R8696 - 8703).

Ms. Nolan did not have a contingent fee agreement with Antaramian, as alleged by TPI (*see* IB, pg. 27). The undisputed evidence is actually clear that she had no fee agreement whatsoever with Antaramian for her testimony. When Antaramian moved for prevailing party attorneys' fees and costs post-trial, Antaramian's controller, Mr. Frazitta, began reaching out to the professionals involved, to make sure he had all of their bills to include as costs (*e.g.*, *see* post-trial deposition testimony of Ms. Nolan at Tr., pg. 33, lines 11 – 18, R11296). In response to Mr. Frazitta's call, Ms. Nolan provided an invoice dated April 28, 2011, for fifty hours of work at $225 per hour, in the amount of $11,250 (R12336). Ms. Nolan's invoice unequivocally demonstrates that her capacity in assisting in the trial court case was always as a skilled witness. For example, the first entry on Ms. Nolan's invoice is as follows: "Review of expert opinion letters Paul Hawkins dtd 7-31-09, WH Simon & Co. dtd 8-3-09" (R12336).

During Ms. Nolan's post-trial deposition on July 12, 2013, in advance of the attorneys' fees and costs hearing, Ms. Nolan clearly testified that she did not have any agreement in place with Antaramian as to whether or how she would even be

compensated (*see* Tr., pg. 29, line 9 – pg. 33, line 18, R11295 – 11296). More significantly, Ms. Nolan commented that at trial, TPI was trying to make it look like Antaramian was hiding income, when in fact the income was included on his tax return, and in her skilled capacity as a certified public accountant, she clearly demonstrated that for the jury. Relevant excerpts from Ms. Nolan's post-trial deposition testimony are as follows:

> Q And who told you that?
> A Ed Koester, Jack Antaramian, but only through – he wasn't actually in the courtroom, but from what he had been told by Ed. And I kind of knew it, because while I was up there, I really kind of creamed Mr. Winkle. He tried to make me look like I was complicit in having Jack hide income, but, in fact, it was there on the return, and he just didn't know where it was and didn't see it. And I was like, "It's right there."

(Tr., pg. 32, lines 13 – 22, R11295).

iii. Joseph D. Stewart, P.A.

Joseph D. Stewart, Esq., of Joseph D. Stewart, P.A. (Naples, FL), represented Antaramian's adversary, Nassif, in the underlying *Nassif* case. Mr. Stewart, who was not an attorney of record in the trial court case, testified at trial that the *Nassif* case was ultimately settled after a mistrial was declared, that Antaramian and Nassif decided to go their own ways, and that neither Antarmian nor Nassif obtained a recovery from the *Nassif* case. (*See* trial testimony of Mr. Stewart at Trial Tr., pg.

1083, line 21 – pg. 1084, line 1, R8288 - 8289; Trial Tr., pg. 1086, line 20 – pg. 1087, line 2, R8291 - 8292; and Trial Tr., pg. 1087, lines 16 – 18, R8292.)

Subsequent to the trial, in connection with Antaramian's request for attorneys' fees and costs, TPI sought to depose Mr. Stewart. Mr. Stewart requested that TPI compensate him for his time in attending the deposition, as he is a professional and testified in his capacity as a professional when testifying in the trial court case. TPI's counsel refused to compensate Mr. Stewart, and indicated to Mr. Stewart that Mr. Stewart "should be paid by Mr. Antarmian" (R9860, ¶1). (*See* Mr. Stewart's Motion for Protective Order at R9859-9861.)

iv. Hahn Loeser & Parks LLP

Theodore L. Tripp, Jr., Esq., of Hahn Loeser & Parks LLP (Fort Myers, FL), represented Antaramian in the underlying *Nassif* case. Mr. Tripp's assistance was necessary to address the allegations being made by TPI in the trial court case related to the underlying *Nassif* case. Neither Mr. Tripp nor Hahn Loeser & Parks LLP were attorneys of record for Antaramian in the trial court case. Mr. Tripp travelled to Tampa, Florida to testify at trial. Mr. Tripp testified, in part, regarding the underlying litigation in the *Nassif* case, and that Antaramian and Nassif walked away from their claims in the lawsuit against each other, with neither party getting the better of the other. (*See* Trial Tr., pg. 231, lines 4 – 15, R7274.)

v. Robins, Kaplan, Miller & Ciresi, L.L.P.

Lawrence Farese, Esq., of Robins, Kaplan, Miller & Ciresi, L.L.P. (Naples, FL), was co-counsel for Antaramian in the *Nassif* case. (*See* trial testimony of Mr. Tripp at Trial Tr., pg. 174, lines 16 – 20, R7217; and trial testimony of Mr. Farese at Trial Tr., pg. 1343, line 24 – pg. 1344, line 1, R8595 - 8596.) Mr. Farese, who was not an attorney of record for Antaramian in the trial court case, testified regarding the underlying litigation in the *Nassif* case, and that Antaramian did not prevail in, and did not obtain a recovery from, the *Nassif* case. (*See* Trial Tr., pg. 1345, line 24 – pg. 1346, line 6, R8597 - 8598.)

E. The Professional Witnesses' Billings Were for Actual Time Spent, at Their Normal Hourly Rates, and for Actual Expenses Incurred, and Were Not Contingent

Note that all of the billings from the Professional Witnesses were for their normal hourly rates. Further, the invoices, on their face, demonstrate that the Professional Witnesses' billings were for actual time spent (at their customary professional hourly rates), and for actual expenses incurred. (*See* invoices from Mr. Farese's firm at R12228 – 12237; invoices from Mr. Stewart's firm at R12305 – 12306, R12310, R12312, R12314, R12316, R12318, R12340; invoices from Burns & Levinson at R12352 - 12464; invoices from Mr. Tripp's firm at R12341 – 12350; and the invoice from Ms. Nolan at R12336.) There is simply no evidence in the Record whatsoever to support TPI's contention that the Professional Witnesses'

charges were excessive or contingent. In fact, there is no evidence whatsoever that the Professional Witnesses had any fee agreements with Antaramian for their testimony. By way of example, relevant excerpts from correspondence from Antaramian's attorney to TPI's attorney, Mr. Conwell, regarding Antaramian's attorneys' fees and costs document production, are as follows:

> Responses to the inquiries contained in your correspondence of April 11, 2013, are as follows:
>
> Request 1: In response to request number 1, you produced two fee agreements to us; one for your firm and one for Carlton Fields. Are there any others or they being withheld?
>
> Response: Mr. Antaramian has produced all fee agreements with his attorneys for which reimbursement of his attorneys' fees and costs from Trial Practices, Inc., is being sought related to this matter, which are in his possession, custody and control. No fee agreements are being withheld.

(App. F, pg. 262/R11313).

F. There Was No Effort to Hide the Reasonable Compensation to the Professional Witnesses

Through its Initial Brief, TPI indicates that there was some effort by Antaramian to hide the billings from, and payments to, the Professional Witnesses until "twenty-two" months after the jury trial, and after the Second District's affirmance (in Case No. 2D11-5673) of the final judgment in favor of Antaramian, based on the jury verdict (R4510), and that Antaramian's Amended Motion for

Attorneys' Fees and Costs of November, 2011 (R7000 – 7017), was not supported by "affidavits or other evidence of attorneys' fees or costs paid" (*See* IB, pgs. 9 - 10).

TPI's contention is simply false and contradicted by TPI's own filings in the Record. TPI, through its Second Corrected Post Evidentiary Hearing Memorandum (related to Antaramian's request for attorneys' fees and costs), conceded that:

> On November 10, 2011, Antaramian amended his motion for attorneys' fees and costs, and submitted affidavits of Messrs. Cheffy, Roehn and Koester, Defendant's three lead attorneys in the case at various point in time, and of Robert Frazitta, Defendant's controller, claiming attorneys' fees and costs totaling over $2.48 million. . ..

(R13207, ¶ 2). The spreadsheet attached to Mr. Frazitta's Affidavit of November, 2011, clearly sets forth the billings from the Professional Witnesses (*see* R11848-11853). In fact, Antaramian's counsel provided Mr. Frazitta's Affidavit (including the spreadsheet attached thereto identifying the Professional Witnesses' firms and specifying the amounts billed and the timeframes for the billings from such firms) to TPI's counsel, Mr. Romano, by email on November 11, 2011 (less than one month following the entry of the jury verdict final judgment (R4510), four months prior to TPI's Initial Brief in Case No. 2D11-5673, and approximately 1.5 years prior to the evidentiary hearing on attorneys' fees and costs). (*See* App. G, pg. 272/DCA R1254 and App. G., pgs. 293 - 297/DCA R1275 - 1279; and *see generally* Hahn Loeser's

Motion to Supplement the Appellate Record, along with the Appendix thereto, at App. G/DCA R1247 - 1293.)

With respect to the production of the backup invoices from the Professional Witnesses in support of Mr. Frazitta's Affidavit, note that Antaramian filed his initial motion for attorneys' fees and costs (based on the jury verdict) on April 19, 2011 (R4094 - 4105). TPI could have promptly served discovery directed to Antaramian's fees or costs, but it did not. TPI did not serve any written discovery related to the Antaramian's attorneys' fees and costs until January 25, 2013, and Antaramian promptly responded and produced the Professional Witnesses' invoices and other backup documentation, prior to the deadline for Antaramian to respond to the discovery request (*see* R9635 – 9663; and App. F/R11311 – 11315).

G. The Trial Court's Award for a Portion of the Professional Witnesses' Billings

With respect to attorneys' fees and costs, the contingent fee contract, which TPI drafted, contains a broad, all-encompassing attorneys' fees and costs provision, which is as follows:

> The prevailing party in any action arising from or relating to this agreement will be entitled to recover all expenses of any nature incurred in any way in connection with the matter, whether incurred before litigation, during litigation, in an appeal, in a bankruptcy proceeding, or in connection with enforcement of a judgment, including, but not limited to, attorneys' and experts' fees.

(App. C, pg. 241, ¶4/R62).

The amounts charged by the Professional Witnesses are set forth in the Affidavit of Antaramian's controller, Robert Frazitta (R11848-11853), in support of Antaramian's request for prevailing party fees and costs. Mr. Frazitta's Affidavit provides, in relevant part, as follows:

> 3. Excluding Mr. Antaramian's payments to Coleman, Yovanovich & Koester, P.A., Carlton Fields, P.A., and Cheffy, Passidomo P.A., from December, 2006, through September, 30, 2011, Mr. Antaramian has expended, paid, or is indebted for, the sum of $715,467.61, as a direct result of his dispute with Trial Practices, Inc. . . .

(R11849).

A two-day evidentiary hearing on Antaramian's request for prevailing party attorneys' fees and costs took place in May and July of 2013 (the hearing transcripts are located in the Original Record at R9762 - 9856 and R9867 – 9968). At the hearing, TPI's attorneys' fees expert, Mr. Waggoner, testified that Antaramian was entitled to $1,255,497.50 in attorneys' fees for the lawsuit, and $50,135 in fees for the appeal related to the jury verdict final judgment (Case No. 2D11-5673). (*See* Hrg. Tr., pg. 184, lines 7 - 13, R9914.) Mr. Waggoner also testified that it was not improper for Antaramian to utilize Burns & Levinson in responding to TPI's discovery (*see* Hrg. Tr., pg. 219, lines 1 - 10, R9954). Mr. Waggoner offered no opinion related to costs. TPI's attorney, at the hearing, conceded that Antaramian was entitled to reasonable attorneys' fees (*see* Hrg. Tr., pg. 25, lines 11 - 13, R9770).

Antaramian's attorneys' fees and costs expert, Mr. Boyle, testified that the invoices of Burns & Levinson were reasonable and that having Burns & Levinson involved in the lawsuit to assist Antaramian was efficient and reasonable (*see* Hrg. Tr., pg. 133, line 13 – pg. 134, line 12, R9902; and Hrg. Tr., pg. 159, lines 3 – 11, R9908). Mr. Boyle also testified that the amount sought in the Affidavit of Mr. Frazitta was reasonable. (*See* Hrg. Tr., pg. 132, lines 20 – 25, R9901.)

Mr. Medwed testified at the attorneys' fees and costs hearing, and confirmed the accuracy and payment of his firm's invoices, the basis for the charges to Antaramian, and that it was reasonable to have Burns & Levinson assist Antaramian in the lawsuit by TPI. (*See* testimony of Mr. Medwed at Hrg. Tr., pg. 44, line 13 – pg. 49, line 20, R9879 - 9881; Hrg. Tr., pg. 51, line 15 – pg. 52, line 2, R9881; Hrg. Tr., pg. 52, line 11 – pg. 54, line 3, R9881 - 9882; Hrg. Tr., pg. 54, lines 5 – 24, R9882; and Hrg. Tr., pg. 70, lines 11-20, R9886.)

The trial court awarded a portion of the amount set forth in Mr. Frazitta's Affidavit as an element of Antaramian's costs and expenses (*see* order at R13288, ¶43), ruling, in part, that the all-encompassing attorneys' fees and costs provision in the contingent fee contract provided for a broad recovery of costs (*see* order at R13281, ¶28 – R13282, ¶33). Of the total $715,467.61 sought by Antaramian for the costs set forth in Mr. Frazitta's Affidavit, which included the billings from the Professional Witnesses, the trial court awarded $317,873.64 (*see* order at R13288,

¶43). The trial court recognized and relied on, in part, the specific and all-encompassing attorneys' fees and costs provision in the contingent fee contract (*see* Order, ¶ 22 – 35, R13280 - 13283).

TPI appealed the trial court's Order Awarding Attorneys' Fees and Costs in Favor of Antaramian (R13276-13289), and the resulting Judgment Awarding Attorneys' Fees, Costs and Pre-Judgment Interest to Antaramian (R13312 - 13313), which resulted in the Second District's Opinion (App. A/DCA R1569 - 1587). The Second District held that the payments to the Professional Witnesses were permissible (*see* App. A, pgs. 13 - 17/DCA R1577 - 1581), but remanded a portion of the cost award to the trial court for itemization (App. A, pg. 22, ¶2/DCA R1586). The Second District agreed with the trial court that the attorneys' fees and costs provision in the contingent fee agreement is all-encompassing (App. A, pg. 12, ¶3/DCA R1576).

III. SUMMARY OF ARGUMENT

Both the current and the previous version of Rule 4-3.4(b), Rules Regulating The Florida Bar, various ethics opinions, and Florida law, all taken together, uniformly permit reimbursing witnesses for reasonable compensation at reasonable hourly rates and for travel expenses for assistance with case and discovery preparation, and to the extent that this Court addresses the issue, trial testimony.

The Professional Witnesses were all skilled witnesses, all providing skilled

testimony, all providing assistance to Antaramian in his defense, all on a non-contingent basis. They did nothing wrong, nor did Antaramian in requesting their assistance and incurring the invoices addressed to Antaramian for the Professional Witnesses' normal hourly rates and customary and actual expenses.

The Second District, through its Opinion (App. A/DCA R1569 - 1587), has already affirmed attorneys' fees and costs to Antaramian. The only issue to be addressed by this Court is the amount of money, if any, that Antaramian should be entitled to receive for the costs incurred by him in retaining his professionals to provide assistance with case and discovery preparation.

This Court should not extend its jurisdiction outside the scope of the certified question from the Second District, or disturb Antaramian's prevailing party status affirmed the Second District in TPI's appeal of the jury verdict (Case No. 2D11-5673).

IV. ARGUMENT

A. The Limited Question Certified by the Second District Should be Answered in the Affirmative

i. Standard of Review

The limited question certified by the Second District is as follows:

> 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?

This Court's review of the limited certified question is *de novo* because it is solely a question of law.

ii. Rule 4-3.4(b) Permits Reasonable Compensation to Professional Witnesses for Assistance with Case and Discovery Preparation

The Second District, through its Opinion in this Case, held that there is nothing in the previous or the current version of Rule 4-3.4(b) that would make it unethical or illegal to pay a fact witness reasonable compensation for time spent preparing for, attending, or testifying at trial, and noted that both versions of Rule 4-3.4(b) acknowledge the value of a witness's time. (*See* Opinion at App. A, pg. 14/DCA R1578.) Although the Second District found that the language of Rule 4-3.4(b) is broad enough to encompass reasonable compensation to witnesses for case and discovery preparation, because the Rule does not expressly state as much, the Second District certified the limited question to this Court (*see* App. A, pg. 17/DCA R1581).

The current version of Rule 4-3.4(b), Rules Regulating The Florida Bar, provides, in part, as follows:

> . . . 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 a witness for time spent preparing for, attending, or testifying at proceedings.

R. Regulating Fla. Bar 4-3.4(b) (2014). The version of Rule 4-3.4(b) applicable at

the time of trial in the trial court case provided specifically, in part, as follows:

> . . . 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.

R. Regulating Fla. Bar 4-3.4(b) (2006).

In this Case, the Professional Witnesses were not fact witnesses that witnessed a car accident; they were skilled professional witnesses that were involved solely in their capacity as professionals, and their knowledge of the case was directly related to their professions and professional work. Their involvement was necessitated by the allegations being made by TPI. TPI's contention that the Professional Witnesses should have testified in depositions, produced documents, and responded to discovery with no compensation is illogical and unreasonable.

There is nothing in Rule 4-3.4(b) that would preclude a client from using the client's skilled professionals, as the client has done in the course of his ordinary business and in the filing of his tax returns, simply because litigation is now present. Indeed, there is no rule of procedure or statute that in any way attempts to limit a client's choice of a skilled professional or witness.

Various ethics opinions that predate the current version of Rule 4-3.4(b) provide that it is entirely reasonable and appropriate to compensate witnesses in

relation to preparing for, attending, or testifying at a deposition or at trial. *See, e.g.*, ABA Formal Opinion 96-402 (entitled "Propriety of Payments to Occurrence Witnesses") (stating that "[a] lawyer, acting on her client's behalf, may compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction" and that a there is "no reason to draw a distinction between (a) compensating a witness for time spent in actually attending a deposition or a trial and (b) compensating the witness for time spent in pretrial interviews with the lawyer in preparation for testifying . . .." and that a "witness may also be compensated for time spent in reviewing and researching records that are germane to his or her testimony . . .."). *See* also Florida Bar Staff Opinion 20542 ("Although the attorneys will not be testifying as experts, Rule 4-3.4(b) does not prohibit fact witnesses from being reimbursed for the 'loss of compensation incurred by reason of preparing for and testify at the proceedings'" especially where the circumstances necessitating the attorneys' testimonies are not simply "akin to that of a typical fact witness," but, rather, resemble a situation where the attorneys were "engaged … for the specific purpose, among others, of conducting the factual investigation about which [they] now have been asked to testify," thereby "equat[ing] … to that [situation] confronted by a private investigative firm or

accountant who later testifies concerning the results of his investigation or analysis" who "[s]urely no one would suggest … may not ethically be compensated for time expended by him or her in these circumstances"); and *see also* Florida Bar Staff Opinion 23940 ("Based on the out of state ethics opinions and the plain reading of the rule, the [party] may pay the reasonable expenses of a [former employee lay] witness, including the witness' attorney's fees…").

TPI attempts to claim that there is no evidence that the Professional Witnesses "lost compensation," and therefore, the version of Rule 4-3.4(b) in effect at the time of the trial somehow precludes an award to Antaramian for the Professional Witnesses' billings to him. (*See* IB, pg. 33.) Despite the obvious fact that any time the Professional Witnesses devoted to responding to TPI's voluminous discovery, preparing for, and testifying in the trial court case, was time that they could have been devoting to other matters for which they routinely bill for their work, the American Bar Association, prior to the enactment of the current version of Rule 4-3.4(b), clarified with respect to reasonable compensation to witnesses, that "a reasonable amount is relatively easy to determine in situations where the witness can demonstrate . . . loss of hourly wages or professional fees." ABA Formal Opinion 96-402, ¶8. The American Bar Association also provided examples of when a witness has not sustained a loss of income, such as "where the witness is retired or unemployed." ABA Formal Opinion 96-402, ¶8. The Record is clear that the

Professional Witnesses routinely billed for their time and expenses. Conversely, there is no indication anywhere in the Record that the Professional Witnesses, had they not billed Antaramian, would not have lost compensation. The Second District, through the Opinion, held that loss of compensation is not a determinative factor (*see* App. A, pg. 16, footnote 3/DCA R1580).

The Restatement (Third) of the Law Governing Lawyers § 117 (2000), titled "Compensating a Witness," provides that "A lawyer may not offer or pay to a witness any consideration: (1) in excess of the reasonable expenses of the witness incurred and the reasonable value of the witness's time spent in providing evidence . . .". *See also Charles v. 1170 Apartment Corp.*, Case No. BER-L-5521-04, 2006 WL 2730302 (N.J. Super Ct. App. Div. 2006) at *2 (The Superior Court of New Jersey, Appellate Division, emphasized the value of a witness's time, ruling that an attorney fact witness was entitled to compensation for his time spent at his deposition, finding that the term "loss of pay" encompasses "a professional's loss of billable time"). The United States District Court, in *Smith v. Pfizer, Inc.*, 714 F.Supp. 2d 845 (M.D. Tenn. 2010), held that it was not improper for the defendant to pay a professional fact witness, who was not a designated expert, but had knowledge of the events underlying the case, at her professional rate for time spent preparing for her deposition, testifying at her deposition, and preparing an affidavit. *Id.* at 852 - 853.

TPI's contention that "five of the fact witnesses who Antaramian paid or promised to pay testified in connection with the fee haring they did not lose compensation . . ." (IB., pg. 33) is simply incorrect. For example, Mr. Medwed, a partner of Burns & Levinson, testified that if Burns & Levinson (which includes Mr. Manning and Mr. Weinstein), would not have billed for their work related to the trial court case, it would have affected Burns & Levinson's profitability. (*See* testimony of Mr. Medwed at Hrg. Tr., pg. 70, line 21 – pg. 71, line 6, R9886.)

At the attorneys' fees and costs hearing, Antaramian's attorneys' fees and costs expert, Mr. Boyle, testified that the invoices of Burns & Levinson were reasonable and that having Burns & Levinson involved in the lawsuit to assist Antaramian was efficient and reasonable (*see* Hrg. Tr., pg. 133, line 13 – pg. 134, line 12, R9902; and Hrg. Tr., pg. 159, lines 3 – 11, R9908). TPI's attorneys' fees expert, Mr. Waggoner, testified that it was not improper for Antaramian to utilize Burns & Levinson in responding to TPI's discovery (*see* Hrg. Tr., pg. 219, lines 1 - 10, R9954). Mr. Boyle also testified that the amount sought in the Affidavit of Mr. Frazitta was reasonable (*see* Hrg. Tr., pg. 132, lines 20 – 25, R9901). TPI's expert, Mr. Waggoner, offered no opinion at the attorneys' fees and costs hearing related to costs, or related to the reasonableness of the amounts charged by the other Professional Witnesses.

iii. Reasonable Compensation to the Professional Witnesses is Lawful and Reasonable

There is no evidence in the Record whatsoever that Antaramian's payments to the Professional Witnesses of their normal hourly rates and actual expenses incurred in any way affected the veracity of their testimony in the trial court case. There is further no evidence in the Record whatsoever that the billings or the payments were contingent. In fact, there is no evidence that any of the Professional Witnesses had any fee agreements, let alone contingent fee agreements (*e.g.*, *see* correspondence regarding fees and costs production at App. F, pg. 262/R11313; and post-trial deposition testimony of Ns. Nolan at Tr. pg. 29, line 9 – pg. 33, line 18, R11295 – 11296).

TPI made voluminous discovery requests, including interrogatories and for substantial amounts of documents, for which many of the Professional Witnesses assisted in responding to. When document requests are made to third-party witnesses, in cases involving voluminous discovery, courts routinely require that the requesting party compensate the party for professional time, energy, labor, staff, and resources expended in order to avoid imposing an undue hardship on the third-party witness. *See, e.g.*, *Schering Corp. v. Thornton*, 280 So. 2d 493 (Fla. 4th DCA 1973) (holding that if a non-party is likely to face significant hardship or incur "a substantial expenditure" in securing the documents requested, the requesting party must pay a reasonable fee for the non-party's time to find and prepare the

documents); *Parker v. James*, 997 So. 2d 1225 (Fla. 2nd DCA 2008) (characterizing it as reversible error, which would result in "irreparable harm" and "irreparable injury" to two non-party treating physician witnesses, for a trial court to force them to provide interrogatory responses); *Katzman v. Rediron Fabrication, Inc.*, 76 So. 3d 1060 (Fla. 4th DCA 2011) (holding that courts "should not allow discovery" requests directed at "hybrid witnesses [] to become a tactical litigation weapon to harass the witness, the party, or the law firms," and that Florida's Rules of Civil Procedure empower trial courts "to require the party seeking discovery from an expert to pay a fair part of the fees and expenses reasonably incurred by the expert"); and *Angell v. Shawmut Bank Conn. Nat. Ass'n*, 153 F.R.D. 585 (M.D.N.C. 1994) (observing that non-party witnesses are to "be protected from significant expenses of production" and observing that the "reasonable copying costs" recoverable for discovery requests directed at non-party witnesses "include the services of employees who must select the documents and perform the copying … [and] include work performed by attorneys," particularly when the "production would involve separating privileged or irrelevant material from responsive material").

iv. Public Interest

The public interest is best served by allowing for the reasonable compensation of witnesses to assist with case and discovery preparation. Holding otherwise would, among other things: (i) deprive defendants of their choice of counsel; (ii) deprive defendants of the most efficient professionals to assist them in responding to a lawsuit; (iii) impose financial hardships on witnesses to be pressured to work for free and suffer financial loss; and (iv) make the search for truth in the judicial process more difficult by creating a disincentive for skilled witnesses to assist with case and discovery preparation.

One need only imagine the position Antaramian would be in if all of his out-of-town professionals were prohibited by law from charging for their time spent assisting with case and discovery preparation. Under TPI's argument, Antaramian would have been precluded from maintaining his professional relationships with his accountant and his attorneys, and would have been required to seek an entirely new set of professionals to defend against TPI's attacks. The Rules Regulating The Florida Bar provide that an attorney is conflicted out only when the attorney feels he is a necessary fact witness on behalf of his client, and then only from being counsel at the trial. *See* Rule 4-3.7, Rules Regulating The Florida Bar. TPI seeks to expand Rule 4-3.7 to say that any professional who previously provided services to a

defendant related to the subject matter of a lawsuit is conflicted out from helping the defendant and charging the defendant for his professional services and expenses.

B. Issues Raised by TPI Outside the Scope of the Certified Question

i. Standard of Review

As to TPI's request that the attorneys' fees and costs Judgment be set aside, that prevailing party status to Antaramian be set aside, and all of the other issues raised in TPI's Initial Brief, which are outside the scope of the limited certified question from the Second District regarding Rule 4-3.4(b), Rules Regulating the Florida Bar, the standard of review is abuse of discretion, as they are factual in nature. TPI's entire Initial Brief appears to be an effort to re-argue the underlying factual and legal issues, which have already been lost by TPI, as opposed to directing its Initial Brief to the actual certified question.

TPI did not provide a standard of review in its Initial Brief. TPI expressly requests this Court to review the underlying trial and make findings of fact regarding the veracity of witnesses, the evidence presented, and who should have, or could have, won the jury trial. Even under an abuse of discretion standard, this Court should not reach back to the jury trial and weigh the testimony, questions, and rulings of the trial court judge in a case that was per curium affirmed by the Second District, and is not subject to this appeal. The Second District's decision (App. A/DCA R1569 – 1587), from which the certified question arises, is limited solely to how

much Antaramian was entitled to for costs and attorneys' fees that were awarded as an element of his costs. TPI did not (and could not have) proven its allegations at the trial, at any post-trial hearing, or even at the attorneys' fees and costs hearing, from which this appeal arises, because TPI's allegations are simply not accurate and correct. For example, if this Court were to find that Ms. Nolan had a contingent fee agreement for her testimony at the underlying trial, as alleged by TPI, this Court would have to make a finding of fact, where there is no evidence developed at a trial or evidentiary hearing to support the finding.

ii. TPI Cannot Collaterally Attack the Jury Verdict Judgment or the Attorneys' Fees and Costs Judgment

The Second District, in TPI's appeal of the jury verdict in favor of Antaramian (R4080) and the final judgment thereon (R4510), Case Number 2D11-5673, entered an order granting Antaramian his appellate attorneys' fees pursuant to a proposal for settlement (*see* Order at R9555; and Opinion at App. A, pg.7, ¶1 and footnote 1/DCA R1571). The underlying jury verdict final judgment was affirmed by the Second District on September 12, 2012 (*see* R9554; and Mandate at R9535 – 9536), and is not subject to this appeal. TPI cannot collaterally attack the Second District's order awarding Antaramian prevailing party attorneys' fees in Case Number 2D11-5673, and cannot collaterally attack the underlying jury verdict final judgment and the determination of Antaramian as the prevailing party. Any argument by TPI related to the testimony of the Professional Witnesses has been waived by TPI.

Further, the Second District, through its Opinion (App. A/DCA R1569 - 1587), has already affirmed attorneys' fees and costs to Antaramian and Antaramian's entitlement to attorneys' fees, costs, and expenses, under the broad, all-encompassing fees and costs provision in the contingent fee contract.

iii. Reasonable Compensation to the Witnesses for Their Trial Testimony did not Violate Florida Statutes

TPI alleges that there was somehow a violation of Section 92.142(1), Florida Statutes, because the Professional Witnesses were paid more than $5 per day for their trial testimony, and misrepresents that the trial court and the Second District found that Antaramian violated Section 92.142(1), Florida Statutes (*see* IB, pg. 35).

First, TPI's contention has nothing to do with skilled witnesses assisting with case and discovery preparation, which is the subject of the certified question. Second, Section 92.142(1), Florida Statutes, provides a minimum for witnesses subpoenaed to testify in court proceedings, and on its face, simply does not preclude reimbursing witnesses for their normal hourly rates to provide skilled testimony. Reimbursement of reasonable compensation to witnesses for their time spent testifying is permissible under the plain language of Rule 4-3.4(b). Further, none of the Professional Witnesses are located within 100 miles of the trial court. Rule 1.330(a)(3)(B), Florida Rules of Civil Procedure, recognizes that a witness is considered unavailable to testify at trial or a hearing if the witness is at a greater distance than 100 miles from the location of the trial or hearing.

TPI's implication that payment of reasonable compensation to the Professional Witnesses somehow violates 18 U.S.C. § 201 (IB, pg. 28, footnote 4) and constitutes bribery is wholly without merit and unsubstantiated. On its face, 18 U.S.C. § 201(d) expressly permits reimbursement to a witness for "the reasonable value of time lost in attendance at any such trial, hearing, or proceeding . . ..".

iv. Substitution of Hahn Loeser for Antaramian

TPI attempts to argue that Hahn Loeser being substituted for Antaramian in the trial court case and the Second District Case Numbers 2D13-6050 and 2D14-86 is somehow bad or negative (*see* IB, pgs. 16 – 17). Sadly, Antaramian fell on financial hardship, and in exchange for an obligation he owed to Hahn Loeser in an unrelated bankruptcy, he assigned the attorneys' fees and costs Judgment against TPI, and all the rights thereunder, including the contingent fee contract with TPI, to Hahn Loeser. (*See* TPI Appx. 2, pgs. 12 – 29.) The Assignment from Antaramian to Hahn Loeser is not part of this appeal, and is not addressed in the Second District's Opinion.

TPI's request to have this Court somehow weigh the facts and circumstances regarding how Antaramian came to file bankruptcy, how he came to assign the attorneys' fees Judgment to Hahn Loeser, and whether that was a "good" or a "bad" thing, is far off the field of this appeal.

V. CONCLUSION

For the reasons set forth above, this Court should answer the Second District's certified question in the affirmative. Further, this Court should not entertain Petitioner's requests that are outside the scope of the Second District's certified question. If this Court does entertain the additional relief requested by Petitioner, the Second District's Opinion should be affirmed, the attorneys' fees and costs Judgment should be upheld, and Respondent's status as prevailing party should be upheld.

WHEREFORE, RESPONDENT, HAHN LOESER & PARKS LLP, respectfully requests this Court to answer the Second District's certified question in the affirmative, deny Petitioner, Trial Practices, Inc., the relief it requests in this Case, award Hahn Loeser its attorneys' fees and costs incurred in this Case, and award Hahn Loeser any further relief the Court deems just and appropriate.

(Signature Block found on the following page.)

Dated this 8th day of June, 2018.

Respectfully submitted,

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

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