>> WE WILL NOW MOVE TO THE
SECOND CASE ON TODAY'S DOCKET,
TRIAL PRACTICES, INC. V. HAHN
LOESER & PARK, LLP, ETC..
>> MAY IT PLEASE THE COURT, MY
NAME IS G. DONOVAN CONWELL AND I
REPRESENT TRIAL PRACTICES INC..
THIS IS ABOUT A PARTY WHO
PREVAILED IN THE TRIAL WITH THE
TESTIMONY OF WITNESSES.
THAT PARTY FALSELY PORTRAYED AS
FACT WITNESSES, BUT SECRETLY
PAYING THOSE WITNESSES FOR
TESTIFYING AND ACTIVELY
REPRESENTING THE PARTY TRYING TO
WIN THE CASE.
FROM THIS, THAT PARTY OBTAINED A
DEFENSE VERDICT AND OVER $2
MILLION THE PREVAILING PARTY,
FEES AND COSTS.
THE ISSUE FOR THE COURT TODAY IS
WHETHER OR NOT THE CONDUCT FOR
FLORIDA STATUTES AND BAR IS
PROHIBITING OFFERING AN
INDUCEMENT TO A WITNESS AND

PROHIBITING PAYING A FEE TO A
FACT WITNESS AND IF SO, WHETHER
THAT MISCONDUCT SHOULD BE
REWARDED WITH THE PREVAILING
PARTY, FEE AND COST, WITH THE
COURT'S PERMISSION, I WOULD LIKE
TO ADDRESS VIOLATIONS AND --
>> YOU ARE TRYING TO
COLLATERALLY ATTACK THE
JUDGMENT.
HERE WE ARE PROCEDURALLY,
WHETHER THOSE FEES GET REWARDED
FOR THINGS ALLOWED BY THE POOL.
AND IT ALLOWS THE FEES TO BE
REWARDED.
YOU ARE ASKING FOR MORE THAN
THAT, I DON'T SEE A LEGAL
THEORY.
>> THIS GOES TO AN ISSUE OF A
REMEDY, WE DIDN'T DISCOVER THIS
UNTIL LONG AFTER THE TIME THAT
PASSED FROM MOVING FOR A NEW
TRIAL.
IT WAS TWO YEARS AFTER THE TRIAL
BEFORE WE DISCOVERED THIS.

WE DISCOVERED IT IN THE CONTEXT
OF THE OTHER SIDE FILING THE
MOTION OF FEES AND COSTS AND
WHEN IT GOT THE DETAIL OF THOSE
INVOICES, THE EFFECT THEY DID
WAS TOOK THESE FACT WITNESSES
AND HIRED THEM AS TO WIN THE
CASE.
>> WOULDN'T THAT BE TO ATTACK
THE JUDGMENT BASED ON FRAUD ON
THE COURT OR WHATEVER SERIES YOU
HAD?
WE HAVE A PROCESS AND RULES FOR
THAT.
THAT DOES NOT APPEAR.
THERE IS A DIFFERENT PROCESS FOR
THAT THAN RAISING AN APPEAL OVER
THE ATTORNEYS FEES THAT ARE AT
ISSUE.
>> THERE IS A 1-YEAR PERIOD IN
WHICH YOU CAN FILE A MOTION FOR
RELIEF, JUDGMENT UNDER 1.540.
THEY DID NOT MAKE THE DISCLOSURE
AFTER THAT IMPASSE.
THEY LEFT WITHOUT A REMEDY SO

THE QUESTION FOR THE COURT IS
WHAT DO YOU DO WITH A SITUATION
LIKE THIS WHERE IT IS NOT
DISCLOSED UNTIL AFTER THAT
PERIOD OF TIME?
WE WOULD BE LEFT WITH NO REMEDY
SO THE ISSUE IS WHAT CAN THE
COURT DO WHEN WE KNOW THEY
PREVAILED BY HIRING FACULTY?
THIS IS TO HELP THEM WIN THEIR
CASE.
NOWHERE IN THE RULES DOES IT
PERMIT THAT.
THERE ARE THREE EXCEPTIONS OF
THE RULE.
>> 1.40 DOES NOT PROVIDE REAL
RELIEF IN THE TIME DEADLINE THAT
WE SHOULD MAKE SOMETHING UP.
IN THIS CASE.
>> I THINK THERE ARE THREE LEGAL
BASES FOR PREVENTING THEM FROM
BEING REWARDED.
THE PREVAILING PARTY FEES AND
COSTS.
NUMBER ONE IS TO ENFORCE THE

CONTRACT PROVISION AND GIVEN
PREVAILING FEES AND COSTS,
GIVING TO VIOLATION OF PUBLIC
POLICY.
THIS IS A PUBLIC POLICY ISSUE.
THE PUBLIC POLICY IS BOUGHT OR
SOLD, YOU SHALL NOT PAY A FEE TO
A FACT WITNESS AND HIRE SOMEONE
WHO IS AN ADVOCATE FOR YOU IN
YOUR CASE.
THAT IS A CLEAR VIOLATION OF THE
STATUTES.
YOU SHOULD NOT REWARD THAT WITH
THAT CONTACT PROVISION.
THE LOSSES THE COURTS SHOULD NOT
AFFECT THE CONTRACT WITH THE
RESULT OF THAT BEING TO FURTHER
A VIOLATION OF PUBLIC POLICY
WHICH IS WHAT HAPPENED HERE.
THERE IS -- THEY PRESENTED THESE
AS FACT WITNESSES IN THE LOWER
COURT.
THEY ARGUED THAT TO THE TRIAL
JUDGE, ARGUED THAT TO THE JURY.
IT WAS CLEAR AND THE FEE HEARING

JUDGE WHO WAS A DIFFERENT JUDGE
MADE THE SAME THING.
THEY ARE ALL FACT WITNESSES SO
THEY ARE TAKING A CONTRARY
POSITION AND SAYING IT WAS OKAY
FOR US TO PAY THEM BECAUSE THEY
WERE EXPERT WITNESSES, THEY
CHANGED THEIR POSITION 180 ∞ AND
NOW THEY ARE SAYING THESE FEES
WERE LAWFUL BECAUSE THEY WERE
EXPERT WITNESSES.
THAT SHOULD BE STOPPED FROM
RECOVERING THE PREVAILING PARTY
FEE AND COST AWARD IN THESE
CIRCUMSTANCES WHERE THEY TAKE
THESE INCONSISTENT POSITIONS.
>> ARE YOU FAMILIAR WITH
SUBSECTION B5, RULE 1.540?
>> I DON'T RECALL.
>> I UNDERSTAND YOU GOT SOME
TIME LIMITATIONS BUT THERE ARE
SOME PROVISIONS THAT ARE NOT
SUBJECT TO THE 1-YEAR TIME
LIMITATION.
ISN'T THAT CORRECT?

>> THAT IS CORRECT.

>> THERE IS A PROVISION THAT PROVIDES IT IS NO LONGER EQUITABLE THE JUDGMENT WOULD HAVE RESPECTIVE APPLICATION.

BUT WHAT YOU ARE ASKING US TO DO IS SOMETHING HERE WHICH, WHAT PRECEDENT DO YOU HAVE?

>> I DON'T HAVE PRESIDENT OTHER THAN I CAN SAY THERE HAS NEVER BEEN A CASE LIKE THIS.

ALL THE CASES I HAVE SEEN, A VIOLATION, ONE WITNESS OR TWO WITNESSES WHO ARE UNLAWFULLY PAID IN VIOLATION OF THE RULE.

IT UNDERMINE THE ENTIRE TRIAL.

>> WE ARE HERE ON A CERTIFIED QUESTION AND I SUGGEST YOU FOCUS ON THAT.

>> THAT IS WHERE I WANTED TO HEAD.

THE STARTING POINT WAS COMMON-LAW CITED IN THE POOL AND IT SAYS THE COMMON-LAW RULE, TO PAY A FEE ON A WITNESS, FACT

WITNESS.

THE FLORIDA LEGISLATURE CREATED TWO EXCEPTIONS UNDER 92.421, YOU CAN PAY $5 AND GIVE MILEAGE REIMBURSEMENT.

THE LEGISLATURE PROVIDED A FEE TO AN EXPERT WITNESS BUT ONLY TO EXPERT WITNESS.

THE RULE SAYS YOU ARE PROHIBITED FROM OFFERING AN INDUCEMENT, AND THOSE EXCEPTIONS, YOU CAN REIMBURSE THEM AT A LOSS FOR EXPENSES, BUT THE SECOND ONE AFTER THAT, WE COULD REIMBURSE THEM FOR LOSS OF COMPENSATION BY REASON OF PREPARING FOR TESTIFYING IN THE ONLY EXCEPTION FOR PAYING A FEE IS THE SECOND ONE AND YOU CAN PAY A FEE TO AN EXPERT WITNESS.

THAT IS THE ONLY EXCEPTION THAT ALLOWS PAYMENT OF A FEE BUT WHAT THE COURT OF APPEALS SAID WAS YOU COULD PAY A FEE TO A FACT WITNESS TO HIRE THAT WITNESS TO

HELP YOU WIN YOUR CASE.
THAT COMPLETELY CHANGES THE
RULE.
IT IS NOT IN THE EXCEPTIONS BUT
IT IS CONTRARY TO THE INTENT AND
PURPOSE OF THE RULE, THE INTENT
AND PURPOSE OF THE RULE IS NOT
TO OFFER A FINANCIAL INDUCEMENT
BUT AS SOON AS YOU HIRE A FACT
WITNESS AND OFFER THEM A FEE YOU
HAVE MADE THEM INTO AN ADVOCATE.
>> I WANT TO UNDERSTAND THE CORE
ARGUMENT.
IF I UNDERSTAND THIS CORRECTLY
IT IS QUITE SIMPLE.
YOU ARE CLAIMING, TELL ME IF I'M
WRONG, THAT ASSISTANCE WITH CASE
AND DISCOVERY PREPARATION DOES
NOT FALL WITHIN THE SCOPE OF
TESTIFYING AT PROCEEDINGS.
>> THAT IS EXACTLY RIGHT AND
THAT PROVISION IS ABOUT
PREPARING THE WITNESS FOR GIVING
TESTIMONY AND I AM FOR HIRING A
FACT WITNESS TO HELP PREPARE THE

PARTY'S CASE FOR TRIAL.
IT CHANGES THE ROLE OF THE FACT
WITNESS TO AN ADVOCATE.
AND COMPLETELY FLIPS THE RULE ON
ITS HEAD.
YOU MIGHT AS WELL THROW OUT THE
IF THE LAW IN FLORIDA NOW IS ANY
FACT WITNESS CAN BE HIRED BY A
PARTY, PAY THE FEE TO HELP THE
PARTY PREPARE THEIR CASE FOR
TRIAL, BASICALLY TO WIN THE
CASE.
IT IS NOT IN ANY OF THE
EXCEPTIONS.
THE QUESTION CLEARLY HAS TO BE
ANSWERED IN A NEGATIVE THAT YOU
ARE NOT PERMITTED TO DO THAT AND
TO DO SO, TO ALLOW THIS WOULD
VIOLATE THE PUBLIC POLICY OF
THIS COURT AND THIS STATE WHICH
IS IDENTIFIED IN MANY CASES, THE
CORE PRINCIPLE HERE.
>> THE ATTORNEYS, MOSTLY
ATTORNEYS, WERE INVOLVED IN THE
ORIGINAL DEAL THAT RESULTED IN A

SETTLEMENT.

IS THAT CORRECT?

>> YES.

>> PREPARING FOR THE ISSUE, PREPARING FOR TRIAL, THEY WERE USING THESE WITNESSES AS FACT WITNESSES BUT TAKING AWAY FROM THEIR TIME AS ATTORNEYS.

BUT FOR THE RULE WHICH MAY ENVISION PAYING THEM FOR THE TESTIMONY, IF YOU ARE ASKING AN ATTORNEY WHO PREVIOUSLY WORKED AND YOU PAID MONEY TO SPEND, RECONSTRUCTING WHAT HAPPENED.

AND IF OUR CONCERN IS YOU DON'T PAY A FACT WITNESS FOR THEIR TESTIMONY.

I AM NOT AS OUTRAGED OR CONCERNED ABOUT IT IN THIS CONTEXT.

EXPLAIN TO ME IF YOU THINK THE RULE INTENDED TO BAR THAT FROM HAPPENING AS YOUR BIG ISSUE THAT SHOULD HAVE BEEN DISCLOSED, WHICH YOU CAN GO BACK TO.

>> I DON'T KNOW HOW MUCH, I
MEAN, WE'RE TALKING ABOUT
HUNDREDS-- A LOT OF MONEY,
HUNDREDS OF THOUSANDS OF
DOLLARS-- IN PREPARING WHAT
THEY SAID AT TRIAL.
SO CAN YOU HELP ME WITH THAT.
>> RIGHT.
WELL--
>> I MEAN, ONE IS WITH THE
PRACTICALITIES.
YOU'RE ASKING A BUSY ATTORNEY TO
SPEND TIME WITH YOU NOW TO
PREPARE YOUR CASE.
>> RIGHT.
THIS GOES FAR BEYOND THAT.
AND THAT'S WHAT THE COURT OF
APPEALS WAS SAYING.
IT'S LIKE IN ADDITION TO TIME
YOU SPEND ACTUALLY TESTIFYING
AND PREPARING FOR YOUR
TESTIMONY, YOU ALSO CAN PAY THE
WITNESS FOR OTHER SERVICES,
BASICALLY HIRING THEM AS YOUR
ADVOCATE AND HELPING YOU WIN THE

CASE, HELPING YOU PREPARE YOUR
CASE--
>> LET ME ASK THIS QUESTION.
I MEAN, ALL OF THESE-- IS THE
TESTIMONY OF RECORD EXACTLY
EVERYTHING THAT ALL THESE
WITNESSES DID, NUMBER ONE.
>> YES, I THINK--
>> EVERYTHING IS THERE, OKAY.
>> IT IS, YES.
>> HOW ABOUT IN CASES, FOR
EXAMPLE, THAT THERE'S VOLUMINOUS
DOCUMENTATION OF SOMETHING LIKE
A CONSTRUCTION DISPUTE.
HIGH-RISE CONSTRUCTION DOWN IN
SOUTH FLORIDA, AND IT'S JUST--
TRACTOR-TRAILER LOADS OF
DOCUMENTS.
AND AN EXPERT ENGINEER, GO TO
ENGINEERING, ONE, TO ASK FACTS
ABOUT I DON'T REMEMBER THAT.
I DON'T REMEMBER THAT.
CAN YOU PAY THAT PERSON HIS TIME
OR HER TIME TO GO I THROUGH THE
RECORDS TO COME UP WITH FACT,

WHATEVER THE FACTS ARE IN THAT,

IN THOSE TRACTOR-TRAILER LOADS

OF DOCUMENTS?

>> YES.

THE BAR RULE THAT GOVERNS OUR

CASE SAYS THAT YOU CAN REIMBURSE

THEM FOR COMPENSATION LOST BY

REASON OF PREPARING FOR,

ATTENDING AND TESTIFYING IN A

PROCEEDING.

>> OKAY, SO YOU CAN.

YOU CAN THEN PAY A WITNESS WHO

WOULD PREPARE THE FACTS.

>> AND THAT'S CORRECT.

>> OKAY.

NOW, HOW ARE THESE DIFFERENT

QUALITATIVELY?

>> WELL--

>> THAN THOSE KINDS OF

CIRCUMSTANCES?

>> WELL, THE BILLS THAT THEY

SUBMITTED WERE HELPING TO

PREPARE A MOTION FOR SUMMARY

JUDGMENT, HELPING TO--

>> IS THAT WHAT EVERYTHING WAS,

WAS ACTING AS AN ATTORNEY FOR
THE PARTY, EVERYTHING?
>> RIGHT.
THEY'RE NOW ADVOCATING FOR THE
PARTY.
>> WELL, NOT-- SOME OF WHAT
THEY DID, AM I NOT CORRECT, DID
FALL WITHIN THE SCOPE OF
PREPARING FOR, ATTENDING OR
TESTIFYING IN A PROCEEDING.
>> YES.
>> THERE'S PART OF IT WAS THAT
WAS THAT.
BUT THERE ARE THESE OTHER
THINGS.
AND SO THE QUESTION IS WHAT
FALLS WITHIN THE SCOPE OF THIS
AS THESE OTHER THINGS WHICH THE
DISTRICT COURT REFERS TO AS CASE
AND DISCOVERY, ASSISTANCE WITH
CASE AND DISCOVERY PREPARATION.
THE DISTRICT COURT SAID THAT,
THAT REALLY FALLS WITHIN THIS
LANGUAGE, AND YOU'RE SAYING, NO.
AND I'M HAVING TROUBLE SEEING

HOW THAT FALLS WITHIN THIS
LANGUAGE.
>> WELL, ASSISTING SOMEBODY AND
PREPARING THEIR CASE FOR TRIAL
AND ASSISTING SOMEBODY AND
WINNING THEIR CASE IS FAR
DIFFERENT FROM ASSISTING
YOURSELF IN PREPARING TO GIVE
TESTIMONY.
>> WELL, WERE THERE INSTANCES
WHERE THEY ACTUALLY HELPED IN
ANSWERING INTERROGATORIES--
>> YES.
>>-- AND ALL KINDS OF THINGS
THAT WERE NOT SPECIFICALLY
PREPARING FOR THE TESTIMONY THAT
THEY WERE GOING TO GET.
>> YES.
THEY HELPED ANSWER
INTERROGATORIES NOT TO THEM, BUT
TO THE PARTY.
THEY PREPARED DEPOSITION
SUMMARIES.
THEY PREPARED MOTIONS IN LIMINE.
THEY WORKED ON MOTIONS TO AMEND.

THEY WORKED ON ALL SORTS OF--

>> BUT YOU WERE REALLY

FUNCTIONING, WHAT YOU'RE SAYING,

AS ATTORNEYS.

AND THEN YOU, I MEAN, I

UNDERSTAND, BUT YOU AT TRIAL ARE

HAVING TO CROSS-EXAMINE THESE

ATTORNEYS WHO YOU HAD NO IDEA

HAD DONE ALL THIS WORK.

>> THEY'RE BEING PRESENTED TO

US, TO THE JUDGE, TO JURY AS

MERE--

>> I DON'T MEAN TO BRING YOU

BACK TO THAT, BUT THERE DOES

SEEM, TO ME, SOMETHING.

>> THEY'RE BEING PRESENTED AS

MERE FACTS, BUT THEY'RE MUCH,

MUCH MORE THAN THAT.

>> BUT I QUESTION THAT ASSERTION

IN THE WAY WE USE THE TERM FACT

WITNESS.

WE USE TO THAT DETERMINE BETWEEN

EXPERTS THAT ARE ALLOWED TO GIVE

TESTIMONY AT TRIAL.

YOU CAN'T NOT LIST SOMEONE AS AN

EXPERT AND THEN ELICIT AN
OPINION FROM THEM, CORRECT?
>> CORRECT.
>> SO THEY, THEY WERE, IN FACT,
FACT WITNESSES.
NO ONE ATTEMPTED TO ELICIT
OPINIONS FROM THEM, CORRECT?
>> WELL, ACTUALLY, MR. KOESTER,
WHO WAS THEIR COUNSEL, DID TRY
TO LIST, AND THE JUDGE SUSTAINED
THE--
>> BECAUSE THEY WERE FACT
WITNESSES.
>> BECAUSE THEY WERE FACT
WITNESSES.
>> THEY HAD NOT BEEN LISTED AS
EXPERTS.
>> THAT'S CORRECT, YES.
>> OKAY.
YOU KNEW THESE WERE ATTORNEYS
WHO HAD DONE WORK FOR THIS, THE
OPPOSING SIDE, CORRECT?
>> YES.
>> OKAY.
AND I WOULD THINK THAT YOU KNEW

IT WAS A POSSIBILITY THAT THEY
COULD STILL BE DOING WORK FOR
THE OPPOSING SIDE, CORRECT?
>> I SUPPOSE I WAS NOT TRIAL
COUNSEL, BUT I WOULD THINK THAT
THAT COULD BE A POSSIBILITY,
YES.
BUT THEY WERE NOT DISCLOSED AS
EXPERTS AT ANY TIME.
>> DO YOU THINK THAT IF THE WORK
THAT THEY HAD DONE AS ATTORNEYS
FOR THE OPPOSING SIDE HAD BEEN
IN DIFFERENT MATTERS, THAT THAT
WOULD HAVE BEEN PERMISSIBLE FOR
THEM TO BE PAID FOR--
>> YES, I DO.
I THINK, I THINK THE VIOLATION
IS HIRING THEM IN THIS CASE.
THEY WERE FACT WITNESSES IN THIS
CASE.
IN THE FIRST CASE, ACTUALLY,
THEY WERE ACTING AS LAWYERS TO
WRITE A SETTLEMENT AGREEMENT.
BUT IN THIS CASE THEY'RE FACT
WITNESSES AS TO WHAT HAPPENED

THERE.

AND THERE'S NO RULE THAT PERMITS

YOU TO HIRE THEM NOW AND TO PAY

THEM A FEE.

THE RULE, IN FACT, IS TO

CONTRARY.

IT SAYS YOU CANNOT OFFER THEM AN

INDUCEMENT.

THE ONLY TIME YOU CAN DO THAT

FOR A FEE IS AN EXPERT, AND

EXPERT'S GOT TO BE DISCLOSED.

>> IN TERMS OF THE FAILURE TO

DISCLOSE ARGUMENT, DID YOU ASK

IN DISCOVERY IF THESE ATTORNEYS

WERE STILL DOING WORK FOR THEIR

FORMER-- WHAT YOU KNEW TO BE

THEIR FORMER CLIENT?

>> THAT IS NOT IN THE RECORD,

AND I DIDN'T DO IT, SO I CAN'T

ANSWER THAT.

>> LET ME-- LET ME SEE IF I CAN

ASK YOU A QUESTION.

OVER HERE.

>> OKAY.

>> I'VE BEEN THE QUIET ONE.

>> YES, SIR.

>> YOU MENTIONED EARLIER THAT THE ONLY FEE THESE FACT WITNESSES ARE ENTITLED TO RECEIVE A FEE, BASICALLY, IS TO BE REIMBURSED FOR WHATEVER TIME THEY DEVOTED OUT OF THEIR JOB--

>> FOR LOST COMPENSATION.

AND THEY ALL SAID-- NONE OF THEM WHO WERE ASKED SAID THEY LOST COMPENSATION, THEY ALL SAID THEY DID NOT.

>> RIGHT.

SO MY QUESTION IS IF THE SO-CALLED FACT WITNESS HAPPENED TO BE SOMEONE WHO IS RETIRED, NOT WORKING, IS LIVING OFF HIS RETIREMENT AND IS ASKED, LIKE JUSTICE LEWIS MENTIONED, TO REVIEW A TRUCKLOAD OF DOCUMENTS AND ASSIST COUNSEL IN PREPARING FOR DEPOSITION OR WHATEVER, UNDER THAT SCENARIO, THAT FIRST ONE WOULD NOT BE ENTITLED TO BE PAID ANYTHING.

>> THAT IS CORRECT.
THAT IS WHAT THE RULE THAT
GOVERNED DURING OUR CASE SAID.
THERE'S NOT AN EXCEPTION FOR
THAT.
>> WHO WOULD DO THAT?
>> I'M SORRY?
>> WHO WOULD DO THAT?
>> WELL, THE WAY WE'VE ALWAYS
DONE IT IS YOU SUBPOENA THEM,
AND YOU ASK THEM THE QUESTIONS.
IN FACT, THEY DID THAT WITH ONE
OF THEIR FACT WITNESSES.
HE WAS THE LEAD ATTORNEY IN THE
UNDERLYING CASE, AND--
>> YOU CAN GET, YOU CAN GET
ANYBODY TO HELP YOU WITH
DOCUMENTS.
THE ISSUE IS TO ME, I MEAN, DO
YOU GET TO TAX THE OTHER SIDE
FOR IT.
SO IT'S NOT LIKE YOU'RE BARRED
FROM HAVING LAWYERS OR WHOEVER
ASSIST IN DOCUMENT REVIEW.
ARE WE-- IS THAT ONE OF THE

ISSUES HERE?

>> NO.

WHAT YOU'RE BARRED FROM DOING IS

PAYING THEM.

THAT'S THE ISSUE.

>> IF THEY'RE A WITNESS.

IF THEY'RE A FACT WITNESS.

>> IF I'M--

>> THEY CAN'T BE ONE OF THESE

TWO-- THE ISSUE HERE IS THEY

CAN'T BE WEARING TWO DIFFERENT

HATS.

>> YES, I AGREE.

>> THEY CAN'T BE A FACT WITNESS

DOING THE THINGS LEGITIMATE FOR

A FACT WITNESS TO DO AND ALSO,

YOU KNOW, HELPING YOU WORK UP

YOUR CASE AND BEING PAID FOR

THAT.

IT'S LIKE, HMM, BECAUSE THAT

DOESN'T-- I MEAN, THE THEORY

WOULD BE THAT'S AN INDUCEMENT IF

PAYING FOR THAT, IT'S AN

INDUCEMENT THAT'S INCONSISTENT

WITH THEIR ROLE OF BEING A

PROPER FACT WITNESS, CORRECT?

>> YES, I AGREE.

>> WE'VE TAKEN MORE THAN ALL OF YOUR TIME.

I'LL GIVE YOU TWO MINUTES FOR REBUTTAL, NONETHELESS.

>> THANK YOU.

>> MAY IT PLEASE THE COURT, ED KOESTER FOR HAHN LOESER.

I WOULD LIKE TO BEGIN WITH THE RULE AS WE GET TO CERTIFIED QUESTION.

THE RULE, 4-3.4, FAIRNESS TO OPPOSING COUNSEL, OPPOSING PARTY AND COUNSEL, SPECIFICALLY AUTHORIZES THE PAYMENT AND REIMBURSEMENT OF REASONABLE EXPENSES INCURRED BY THE WITNESS IN ATTENDING AND TESTIFYING AT THE PROCEEDINGS.

AND FURTHER, ALLOWS REASONABLE COMPENSATION TO REIMBURSE A WITNESS FOR THE LOSS OF COMPENSATION INCURRED BY REASON OF PREPARING FOR, ATTENDING AND

TESTIFYING AT THE PROCEEDINGS.
THE WITNESSES THAT WE ARE
TALKING ABOUT TODAY ARE, FIRST,
FRAN NOLAN, A CERTIFIED PUBLIC
ACCOUNTANT WHO PREPARED JACK
ANTARAMIAN'S TAXES.
SHE UNEQUIVOCALLY TESTIFIED SHE
HAD NO PRIOR AGREEMENT TO BE
PAID FOR HER TESTIMONY.
SHE ASSUMED SHE WOULD BE PAID
SOMEDAY, BUT THE REAL ESTATE
MARKET WAS BAD, AND SHE DIDN'T
KNOW, AND HER ASSUMPTION MIGHT
BE WRONG.
SHE TESTIFIED SHE BILLED AT HER
TAX HOURLY RATE, DID NOT BILL
FOR A HIGHER EXPERT WITNESS
RATE.
SHE TESTIFIED THAT WHEN SHE WAS
IN TRIAL, THERE WAS A SUGGESTION
BY OPPOSING COUNSEL THAT
MR. ANTARAMIAN DID NOT INCLUDE
INCOME ON HIS TAX RETURN.
SHE SAYS AS THE TAX PREPARER,
SHE CRUSHED IT.

SHOWED THEM RIGHT WHERE THE--

>> HOW MANY HOURS DID SHE SAY ON THE STAND THAT SHE SPENT IN PREPARING FOR TRIAL?

>> SHE BILLED APPROXIMATELY TWO DAYS FOR THE TRIAL AND ONE DAY FOR THE DEPOSITION FOR A TOTAL OF $11,000.

>> OKAY.

NOW, WHAT IS BEING SOUGHT IN THAT WITNESS POST-TRIAL--

>> POST-TRIAL HER ENTIRE INVOICE SUBMITTED TO CHIEF FINANCIAL OFFICER FOR MR. ANTARAMIAN, OUR CONTENTION IS IT'S QUITE CLEAR FROM HER INVOICE IT'S ALL FOR PREPARING, ATTENDING AND TESTIFYING AT THE PROCEEDINGS.

>> SO IT WAS ONLY $11,000?

>> CORRECT.

THAT'S FRAN NOLAN, THE FIRST ONE.

AND SHE'S A CERTIFIED PUBLIC ACCOUNTANT.

>> BEFORE YOU GO ON TO GOING

THROUGH ALL THESE FACTS, LET'S
GO BACK TO THE CERTIFIED
QUESTION.
>> HOW SHOULD WE ANSWER THE
CERTIFIED QUESTION?
>> YOU SHOULD ANSWER THE
CERTIFIED QUESTION IN THE
AFFIRMATIVE, AND THE REASON YOU
SHOULD ANSWER IN THE AFFIRMATIVE
IS IN OUR PARTICULAR CONTEXT
WHAT YOU'LL SEE AS WE GO THROUGH
THE RECORD, WE'RE ONLY GOING TO
END UP TALKING ABOUT LAWYERS WHO
GAVE LEGAL ADVICE BEFORE AND
AFTER THE TRIAL, BEFORE AND
AFTER THE LAWSUIT.
AND MOST OF THEIR BILLING IS FOR
PREPARATION, ATTENDING AND
TESTIFYING--
>> AND THIS BEFORE AND AFTER,
HOW IS THAT CASE PREPARATION AND
DISCOVERY?
I DON'T UNDERSTAND THAT.
IF YOU'RE SAYING THAT'S A
CATEGORY AND I'M ASKING YOU

ABOUT THE CERTIFIED QUESTION,

THAT PUZZLES ME.

>> HOWARD EDWARD, FOR EXAMPLE,

WITH THE LAW FIRM OF BURNS AND

LEVINSON--

>> YOU'RE GOING BACK TO THESE

FACTS.

I'M KIND OF HERE ON THE

CONCEPTUAL LEVEL, AND YOU'RE

TALKING ABOUT-- I'M NOT, I'M

NOT FOLLOWING--

[AUDIO DIFFICULTY]

>>-- GET SUED, YOU GET SUED AND

YOU CALL THAT PROFESSIONAL, AND

YOU SAY TO THAT PROFESSIONAL I

NEED HELP ABOUT WHAT HAPPENED, I

NEED TO RESPOND TO THIS GUY, I

NEED TO RESPOND TO THIS LAWSUIT,

AND I NEED YOUR TESTIMONY TO

HELP ME, THAT PERSON HAS TO

EDUCATE TRIAL LAWYERS, FOR

EXAMPLE.

MY PREDECESSOR--

>> THEY'RE BEING PAID FOR

WHAT-- OKAY, BUT THEY'RE BEING

PAID FOR SOMETHING THAT HAPPENS
AFTER THE CASE STARTS.
I THOUGHT YOU WERE SAYING THEY
WERE BEING PAID FOR THINGS THAT
HAPPENED BEFORE THE CASE AND
AFTER THE CASE.
AND NOW YOU'RE SAYING, WELL,
AFTER THE CASE THEY'VE GOT TO
HELP YOU BECAUSE OF THINGS THEY
DID BEFORE THE CASE.
RIGHT?
>> THEY'RE--
>> IS IT GOING ON DURING THE
CASE?
>> LAWSUIT'S FILED IN 2006.
TAX PLANNER, HOWARD MEDWOOD, AND
HIS LAW FIRM WITH MARK MANNING
ARE SPECIFICALLY ASKED BY
MR. ANTARAMIAN'S EARLIER
ATTORNEY, WOW, THIS GUY'S
CLAIMING WE COMMITTED TAX FRAUD.
BURNS AND LEVINSON, THEIR
TIMEKEEPERS, MARK MANNING AND
WEINSTEIN, WRITE DOWN THEIR
TIME, AND THE LAW FIRM SENDS AN

INVOICE.
AT THAT POINT THEY ARE STILL
MR. ANTARAMIAN'S LAWYER.
THEY'RE NOW, BY CONTENTION OF
MR. CONWELL THAT THEY ARE NOW
FACT WITNESSES.
MY TRIAL PRESENTATION WAS THAT
THEY'RE HYBRID WITNESSES.
THE COURT DID ACCEPT MY HYBRID
ANALYSIS AS A TREATING PHYSICIAN
AND DID ALLOW MR. MEDWOOD TO
EXPLAIN THE SETTLEMENT AGREEMENT
UNRAVELING THIS COMPLEX,
HUNDREDS OF MILLIONS OF DOLLAR
ESTATE BETWEEN TWO PARTIES.
AND WAS ALLOWED TO GIVE HIS TAX
ADVICE TO JURY.
I SAID HE WAS A TREATING
PHYSICIAN, THERE'S NOTHING HERE
THAT'S SURPRISING, HYBRID-STYLE
WITNESS.
THAT IS THE TYPE OF TESTIMONY HE
WAS SPECIFICALLY AUTHORIZED TO
GIVE.
FRAN NOLAN, FOR EXAMPLE, WAS

ALLOWED TO GIVE TESTIMONY--

>> I MEAN, WITH RESPECT TO THAT, IF YOU HAD LISTED ANY OF THESE PEOPLE AS EXPERTS, THESE WOULD NOT BE ISSUES AT ALL, CORRECT?

>> CORRECT.

>> BECAUSE YOU CAN BE A HYBRID. YOU CAN BE A FACT WITNESS AND, AS LONG AS YOU'RE DISCLOSED AS AN EXPERT, THOSE EXPERTS CAN CONSULT WITH THE CASE, THEY CAN HELP WITH THE CASE, THEY CAN ALSO GIVE OPINIONS, CORRECT?

>> CORRECT.

ONE SIGNIFICANT THING TO NOTE ABOUT THAT IS WHETHER THEY WERE DISCLOSED ON A PRETRIAL FORM AS EXPERTS OR NOT EXPERTS ISN'T OUTCOME-DETERMINATIVE AS TO WHEN THEY FALL WITHIN THE RULE OR WHETHER THEY WERE PROPERLY GIVEN LEGAL ADVICE.

THE COURT MAY HAVE CONCLUDED THAT THEY COULDN'T GIVE THE TESTIMONY THAT WE WANTED THEM TO

GIVE, BUT THE COURT
UNEQUIVOCALLY ALLOWED THEM TO
GIVE THE TESTIMONY AND TREAT IT
AS HYBRID AND FELT THAT HYBRID
WITNESSES DIDN'T NEED TO BE
DISCLOSED AS EXPERTS.
I LIKE THE TREATING PHYSICIAN
EXAMPLE BECAUSE IT'S CLEAR, AND
IT'S USED SO OFTEN.
IF MY DOCTOR PERFORMS A MEDICAL
PROCEDURE ON ME AND LATER I'M
INVOLVED IN A LAWSUIT AND
SOMEBODY SAYS, WELL, NOW YOUR
DOCTOR IS A FACT WITNESS, HE
CAN'T GIVE AN EXPERT OPINION
ANYMORE, AND HE WASN'T--
>> WE'RE NOT TALKING ABOUT THAT
SAME DOCTOR.
IF YOU COULD GET THAT DOCTOR TO
SAY, LISTEN, I NEED YOU TO SIT
DOWN, AND I NEED YOU TO GO
THROUGH AND TALK TO MY CLIENT
ABOUT ALL OF THESE
INTERROGATORIES AND HELP ME
PREPARE ANSWERS TO

INTERROGATORIES, AND THIS IS
WHAT NOW THEY'RE, THE
INDEPENDENT MEDICAL EXPERT IS
SAYING.
AND I WANT TO HAVE YOU HELP ME
WITH THAT.
AND YOU'RE STILL SAYING THIS IS
A FACT WITNESS.
THAT'S WHAT WE'RE TALKING ABOUT.
WE'RE NOT TALKING ABOUT WHETHER
YOU CAN'T PAY THE TREATING THERE
FOR THE TIME SPENT TO TESTIFY
AND WHETHER THEY'RE AN EXPERT.
SO I'M HAVING TROUBLE AGAIN, AND
GOING BACK TO JUSTICE CANADY'S
QUESTION, WE'RE PRESUMING IN THE
ANSWER THAT THEY'RE FACT
WITNESSES, NOT HYBRID WITNESSES
IN THE QUESTION, RIGHT?
CAN THEY PAY THEM FOR THEIR
ASSISTANCE WITH CASE AND
DISCOVERY PREPARATION, WHICH IS
NOT PREPARATION FOR THEIR
TESTIMONY, BUT TO DEVELOP THE
CASE, TO DEFEND THE CASE.

AND I DON'T UNDERSTAND WHAT
YOUR, WHAT YOU'RE TRYING TO SAY.
ARE YOU SAYING THE QUESTION
SHOULD NOT BE ANSWERED BECAUSE
IT DIDN'T HAPPEN IN THIS CASE?
>> TWO POINTS.
FIRST POINT, THE QUESTION SHOULD
BE ANSWERED IN THE AFFIRMATIVE
BECAUSE HAVING A LAWYER WHO'S A
TAX LAWYER GIVE YOU ADVICE IS
NOT PRECLUDED BY THE RULE.
AND AS THE SECOND DISTRICT COURT
OF APPEALS SAID--
>> OKAY.
SO NOW YOU'RE SAYING WHAT WAS
HAPPENING, YOU'VE GOT $176,000
FOR BURNS AND LEVINSON.
WERE THOSE THE TAX LAWYERS?
>> CORRECT.
>> OKAY.
AND SO IS THERE A DETAILED
ACCOUNTING OF WHAT THESE FACT
WITNESSES, WHAT THEY DID FOR THE
$176,559.35?
>> ABSOLUTELY.

AND THAT DETAILED ACCOUNTING IS
IN THE RECORD.
THE MOST OF THAT MONEY RELATES
THE THEIR DEPOSITION AND THEIR
TRIAL TESTIMONY.
THERE IS ALSO UNEQUIVOCAL TIME
ENTRIES FOR WHEN AN
INTERROGATORY COMES IN RELATED
TO--
>> BUT WE'RE ONLY ASKED TO SAY,
SO YOU WOULD-- MOST OF IT IS
LEGITIMATE FOR THEIR TRIAL
TESTIMONY PREPARATION, AND YOU
CAN-- THEN YOU'LL BE ABLE TO
SHOW BACK TO THE TRIAL COURT
WHAT PART IS WHAT.
BUT I THINK--
>> CORRECT.
>> BUT IT'S NOT-- SO IT MAY BE
A VERY SMALL AMOUNT THEN.
>> IT MAY BE.
IT'S NOT AS SUBSTANTIAL AS THIS
COURT HAS BEEN LED TO BELIEVE.
IT'S ACTUALLY QUITE
INSUBSTANTIAL IF I GO TRUE THE

WITNESSES.

>> BUT IT'S A STARTLING AMOUNT IN VARIOUS COSTS, FEES AND EXPENSES.

SO WE'RE NOT TALKING-- YOU'RE SAYING 10,000 HERE, WHATEVER.

THAT'S A STARTLING AMOUNT OF TAXABLE COSTS, FRANKLY, YOU KNOW?

NOT THAT I'VE EVER, YOU KNOW, THAT'S JUST-- WE'RE NOT IN THE REALM OF WHAT WE NORMALLY SEE AS JUDGES OR LAWYERS.

>> TWO POINTS.

ONE IS WHEN AN INTERROGATORY COMES IN TO A PERSON WHO'S BEING SUED FOR A GIGANTIC AMOUNT OF MONEY BY A JURY CONSULTANT WHO TOOK A CASE ON A CONTINGENCY IS FEE CLAIMING THAT HE NETTED HUNDREDS OF MILLIONS OF DOLLARS OR MORE THAN $100 MILLION OUT OF A COMPLICATED SETTLEMENT AGREEMENT AND THEY WANT THE KNOW HOW THE SETTLEMENT AGREEMENT

WORKED, WHAT PROPERTY IS WHICH,
WHICH ENTITIES ARE WHICH, TO
SUGGEST IT'S SOME SORT OF CRIME
OR ILLICIT OR SECRET TO GO TO
TAX LAWYER WHO DRAFTED IT WHO'S
YOUR LONGTIME TAX LAWYER AND SAY
HELP ME ANSWER THESE
INTERROGATORIES, HE WOULD HAVE
NO WAY TO ANSWER THOSE
INTERROGATORIES.
HE WOULD HAVE NO WAY TO EXPLAIN
THE TAX RAMIFICATIONS.
INTERESTINGLY, THE INTERROGATORY
ANSWERS WE'RE TALKING ABOUT FIT
DIRECTLY ARE WITHIN THE EXACT
TRIAL TESTIMONY GIVEN BY HOWARD
MEDWOOD, MARK MANNING AND--
>> SO THEN MAYBE THAT WOULD BE
WITHIN THE SCOPE OF PREPARING
FOR, ATTENDING OR TESTIFYING AT
THE PROCEEDING.
>> AND THAT'S MY POINT.
>> WELL, OKAY.
BUT THAT'S NOT THE WAY THIS
QUESTION IS FRAMED.

THE QUESTION IS FRAMED AS
ASSISTANCE WITH CASE AND
DISCOVERY PREPARATION.
AND I THINK THAT IN A WAY THAT
IS UNDERSTOOD TO BE BEYOND
THINGS THAT ARE DIRECTLY
PREPARING FOR, ATTENDING OR
TESTIFYING AT A PROCEEDING.
SO THAT'S THE WAY THIS IS TEED
UP FOR US.
AND THAT'S WHAT WE'VE GOT TO
DECIDE, IS THAT-- IT'S KIND OF
A BINARY CHOICE, YES OR NO.
AND BOTH OF YOU SEEM TO AGREE
THAT WE SHOULD ANSWER THAT
QUESTION.
IT'S JUST YOU THINK-- ONE
THINKS IT SHOULD BE ANSWERED ONE
WAY, AND ONE THINKS IT SHOULD BE
ANSWERED THE OTHER WAY, RIGHT?
>> CORRECT.
I WOULD ALSO LIKE TO ADD,
PLEASE, THAT RULE 4-3.7 OF THE
FLORIDA BAR RULES RELATES TO
CONFLICT.

AND IN THAT CONTEXT, IT SAYS A
LAWYER IS ONLY CONFLICTED OUT
FOR BEING AN ADVOCATE AT TRIAL
IF THE LAWYER'S GOING TO BE A
WITNESS.
AND I WOULD EXPLAIN AND ARGUE TO
COURT THAT IF YOU LOOK AT 4-3.4
AND 4-3.7, MR. CONWELL'S
ARGUMENT THAT THEY WERE SHOCKED
AND SURPRISED THAT
MR. ANTARAMIAN'S LONGTIME
LAWYERS WERE STILL GIVING HIM
LEGAL ADVICE AFTER THE LAWSUIT
WAS FILED EVEN THOUGH THEY WERE
GOING TO TESTIFY, TO ME, IS
DISINGENUOUS.
AND THE REASON IT'S DISINGENUOUS
IS HE KNEW THEY WERE INVOLVED.
HE KNEW THEY WERE GOING TO
DEPOSITIONS.
HE KNEW THEY WERE HIS LONGTIME
ATTORNEY.
HE KNEW THAT THEY WERE SIGNING
AFFIDAVITS IN RESPONSE TO
MOTIONS FOR SUMMARY JUDGMENT.

HE KNEW THEY WERE INVOLVED ALL ALONG.

AND GIVEN THAT THE RULE SPECIFICALLY CONTEMPLATES PAYMENT OF WITNESSES AND REIMBURSEMENT, BEGIN THERE WAS A VENUE PROVISION THAT FORCED THE CASE TO BE TRIED IN TAMPA, GIVEN THEY WERE ALLEGING COMPLEX TAX FRAUD, MAKING ARGUMENTS UP OF WHOLECLOTH RELATED TO A COMPLEX SETTLEMENT AGREEMENT, KNOWING THAT NOBODY LIVED IN TAMPA, KNOWING THAT THE BURNS AND LEVINSON LAW FIRM IS IN THE BOSTON, OTHER LAWYERS ARE IN NAPLES AND EVERYBODY WAS TRAVELING IN, EVEN THE ACCOUNTANT.

THEY COULD NOT POSSIBLY HAVE THOUGHT THEY WERE WALKING INTO A COURTROOM WHERE NOBODY IN THE AREA LIVED AND THAT ALL OF THESE PROFESSIONALS WERE COMING IN TO GIVE PROFESSIONAL OPINION AND

HELP FOR FREE.
THERE'S NO WAY THEY COULD HAVE
LEGITIMATELY BELIEVED IT.
AND IF THE COURT WERE TO ANSWER
THE CERTIFIED QUESTION IN THE
NEGATIVE AND SAY THAT A LAWYER
IS NO LONGER ALLOWED TO HELP
WITH CASE PREPARATION AND NO
LONGER ALLOWED TO PROVIDE LEGAL
TAX ADVICE BECAUSE HIS CLIENT
HAS BEEN SUED, THAT WOULD BE
DIRECTLY INCONSISTENT 4-3.7, AND
IT WOULD BE A DUE PROCESS
PROBLEM.
IF MY CLIENT'S PROFESSIONALS HAD
BEEN HIS LONG-TERM
PROFESSIONALS, THEY PREPARE HIS
TAX RETURNS, THEY HANDLE ALL OF
HIS COMPLEX LEGAL MATTERS, AND
IF HE GETS SUED BY A JURY
CONSULTANT, MR. CONWELL IS
REMARKING THIS COURT THAT HE
SHOULD BE ESTOPPED AND SHOULD NO
LONGER BE ABLE TO PAY ANY OF HIS
PROFESSIONALS AND NO LONGER BE

ABLE TO OBTAIN THEIR
PROFESSIONAL ADVICE AND THAT
THEY SHOULD HAVE TO WORK FOR
FREE.
AND THAT SIMPLY IS NOT A FAIR
STATEMENT OF THE LAW, AND IT
WOULD JEOPARDIZE--
>> DO YOU THINK THAT THE RULE
SHOULD BE DIFFERENT FOR A
NON-PROFESSIONAL FACT WITNESS?
>> THE ANSWER WOULD BE
DIFFERENT, IT COULD BE DIFFERENT
FOR A NON-PROFESSIONAL FACT
WITNESS.
>> AND SHOULD SOMEBODY CEASE AN
ACT IN WHICH YOUR CLIENT IS
INVOLVED, AND SHOULD YOUR FIRM
BE ABLE TO HIRE THEM TO DO SOME
PARALEGAL TYPE WORK UNRELATED TO
THEIR TESTIMONY IN CONNECTION
WITH THAT LAWSUIT OR SOMETHING
ELSE?
>> I THINK THAT WOULD BE
IMPROPER, AND I THINK THAT
HIGHLIGHTS THE DIFFERENCE

BETWEEN THESE PROFESSIONAL,
SKILLED WITNESSES WHO ARE
LONGTIME ADVISERS TO
MR. ANTARAMIAN AND AN OCCURRENCE
WITNESSES.
THESE ARE NOT OCCURRENCE
WITNESSES.
>> YOU RECOGNIZE THAT THE RULE
AS DRAFTED DOES NOT TREAT FACT
WITNESSES DIFFERENTLY BASED UPON
WHETHER THEY'RE PROFESSIONAL OR
NON-PROFESSIONAL.
>> MY ANSWER TO THAT IS THAT THE
RULE DOES NOT EXCLUDE CONSULTING
EXPERTS AND LAWYERS PROVIDING
ADVICE TO CLIENTS ON A CONTINUAL
BASIS, AND WE WOULD HAVE TO READ
ALL OF THE RULES TOGETHER.
AND THAT'S WHY I BRING UP 4-3.7.
BECAUSE A READING OF 4-3.4 THAT
SAYS YOUR TAX ATTORNEY IS NOW
DISQUALIFIED WOULD RUN AFOUL OF
4-3.7 AND WORK AN UNUSUAL
HARDSHIP ON A CLIENT ARE.
>> I SHOULD KNOW THE ANSWER TO

THIS QUESTION, AND I DON'T, I
JUST DON'T REMEMBER.
BUT DO YOU HAVE A DUTY TO
DISCLOSE IN DISCOVERY CONSULTING
EXPERTS OR ONLY TESTIFYING
EXPERTS?
>> YOU DO NOT HAVE SUCH AN
OBLIGATION.
EVERY ONE OF THESE WITNESSES
TESTIFIED IN THAT POSITION,
EVERY ONE OF THEM TESTIFIED AT
TRIAL, EVERY I ONE OF THEM
TESTIFIED TRUTHFULLY.
OPPOSING COUNSEL DID NOT ASK ANY
OF THEM, AND I DO WANT TO POINT
OUT THAT EVERY ONE OF THESE
WITNESSES THAT WE'RE TALKING
ABOUT WAS INTRODUCED TO JURY AS
TO WHO THEY ARE.
MR. MEDWOOD WAS INTRODUCED AS
I'M A LONGTIME TAX ATTORNEY AND
PRESENT TAX ATTORNEY FOR
MR. ANTARAMIAN.
FRAN NOLAN, I PREPARE HIS TAX
RETURNS, I'M HIS CPA.

SO THERE IS NO QUESTION
WHATSOEVER THAT THESE PEOPLE AS
PRESENTED TO THE JURY WERE KNOWN
TO BE HIS PROFESSIONALS.
THE ONLY EXCEPTION WOULD BE
MR. STEWART WHO REPRESENTED
OPPOSING COUNSEL, OR OPPOSING
PARTY IN THE UNDERLYING
LITIGATION, AND MR. FARIS.
MR. STEWART BILLED ONLY FOR HIS
TIME PREPARING FOR, ATTENDING
AND TESTIFYING, SO HE'S NOT
SUBJECT TO QUESTION BEFORE US.
AND MR. FARIS BILLED FOR
PREPARING, ATTENDING AND
TESTIFYING WITH ONE EXCEPTION.
IN 2006 WHEN THE LAWSUIT WAS
FILED, SOMEBODY ASKED HIS FIRM,
ROBBINS KAPLAN, TO PROVIDE
DOCUMENT PRODUCTION, AND HE SENT
A COUPLE OF BILLS THAT TOTALED
ABOUT $1100 FOR THE COST IN
PRODUCING DOCUMENTS.
THERE ISN'T ANYTHING IN THE RULE
THAT WOULD PREVENT PAYING

SOMEBODY FOR DOCUMENT PRODUCTION
OR A PROFESSIONAL, AND IT WOULD
BE HARD FOR ME TO BELIEVE THAT
WE COULD BE HERE WITH TPA AND
AND MR. CONWELL CLAIMING THERE
WAS MASSIVE FRAUD AND ILLICIT
TESTIMONY BECAUSE A LAW FIRM WAS
ASKED TO PRODUCE DOCUMENTS EARLY
ON IN THE LAWSUIT.
>> WHERE DID THE BULK OF THE
MONEY GET PAID?
WHO GOT MOST OF THIS MONEY?
>> BURNS AND LEVINSON.
OF THE-- WELL, TO BREAK IT UP,
ABOUT $2 MILLION OF IT IS
ATTORNEYS' FEES.
IT BEGAN WITH MR. CHEFEE,
MR. ROAN AND THEN MY OFFICE
RIGHT BEFORE TRIAL.
SO WE'RE TALKING ABOUT THE
MAGNITUDE OF THE NUMBER, MOST OF
IT WENT TO ATTORNEYS' FEES, AND
THE CLIENT WAS BEING SUED AGAIN
FOR MANY, MANY, MANY, MANY
MILLIONS OF DOLLARS AND BEING

ACCUSED OF ALL KINDS OF
INTERESTING THINGS FROM THE
CONTINGENT FEE JURY CONSULTANT.
>> AND THE ATTORNEYS TESTIFIED
AT TRIAL AS FACT WITNESSES.
>> I THINK THEY TESTIFIED AS
HYBRID WITNESSES.
FOR EXAMPLE, THE JUDGE LET
MR. MEDWOOD GIVE HIS TAX
OPINION.
THEY ALLOWED MR. STEWART, WHO IS
ALSO A CPA, TO GIVE HIS OPINION
ON WHY HE THOUGHT WHEN THEY
ENTERED INTO THE LATE DOILY
SETTLEMENT AGREEMENT IT DID NOT
CREATE RECOVERY.
NOBODY TESTIFIED AS THOUGH THEY
SAW THE COLOR OF A LIGHT.
IT ALL RELATED TO REVIEWING
DOCUMENT, THEIR UNDERSTANDING OF
THEIR PROFESSIONAL ROLE--
>> WHAT WERE THEY LISTED AS--
>> WHAT THEY DID IN THE
PREPARATION OF THE TAX RETURN,
RIGHT?

I MEAN, WHAT THEY DID, WHAT WERE
THE FACTS OF WHAT OCCURRED OF
THE UNDERLYING PROBLEM OF THE
ISSUE AT TRIAL?
>> AND WHAT WAS THEIR OPINION
REGARDING--
>> RIGHT.
SO IF YOU'VE GOT--
[LAUGHTER]
DOESN'T THAT POINT OUT THE
NATURE OF THE PROBLEM AND THE
REASON FOR THE RULE?
IF YOU HAVE THOSE PEOPLE
TESTIFYING AND THERE'S THAT MUCH
MONEY AT STAKE THAT AROSE FROM
THE PREPARATION AT TRIAL,
DOESN'T THAT POINT OUT THE VERY
NATURE OF THE PROBLEM AND WHY
THAT'S A POTENTIAL ISSUE FOR THE
BAR RULE?
>> 4-3.4 SPECIFICALLY SAYS THAT
THE WITNESS CAN BE REIMBURSED
FOR THE TRAVEL EXPENSES AND
REASONABLE EXPENSES, AND THEY
CAN BE REIMBURSED FOR THEIR TIME

SPENT PREPARING FOR, ATTENDING
OR TESTIFYING AT THE PROCEEDING.
SO MR. STEWART, FOR EXAMPLE,
THERE ISN'T ANYTHING ABOUT ANY
OF HIS INVOICES THAT DON'T FALL
SQUARELY WITHIN THE RULE.
>> WHAT YOU DESCRIBED A FEW
MINUTES AGO WAS A LAWYER WHO
ESSENTIALLY, IT SOUNDED LIKE,
ALMOST ACTED LIKE LEAD COME FOR
THE LITIGATION BECAUSE OF THE
EXPERIENCE AND THE, ALL OF THE
EXPERTISE THAT THAT PARTICULAR
LAWYER HAD WITH THE CLIENT.
SO WHAT YOUR ARGUMENT WAS WHY
SHOULDN'T THAT PERSON BE PAID
AND REIMBURSED FOR ESSENTIALLY
BEING LEAD COUNSEL ON THE CASE?
BUT IT SEEMS LIKE THAT'S A
PROBLEM ACCORDING TO THE RULE,
ISN'T IT?
>> MR. STEWART WAS LEAD COUNSEL
FOR MR. NASSIF IN THE UNDERLYING
TRIAL.
IF YOU'RE TALKING ABOUT MY

DISCUSSIONS RELATED THE
MR. MEDWOOD, MR. MEDWOOD WAS
ALWAYS MR. ANTARAMIAN'S LEAD TAX
ATTORNEY AS FAR BACK AS I KNOW,
AND HE WAS HIS LEAD TAX ATTORNEY
BEFORE AND AFTER THE TRIAL.
IF THE RULE WERE TO BE READ THAT
MR. ANTARAMIAN COULD NO LEARNING
USE HIS LAWYER, FOR EXAMPLE,
WHEN HE PREPARED HIS TAX RETURNS
FOR THE NEXT YEAR WHEN HE
ASSISTED HIM WITH THE TAX
RELATED TO HIS TRUST, HE WOULD
ACTUALLY BE FORCED TO FIRE ALL
HIS PROFESSIONALS.
>> WELL, THAT'S NOT-- I MEAN, I
DON'T THINK THE SUGGESTION IS
THEY COULDN'T HAVE A
RELATIONSHIP THAT'S INDEPENDENT
OF THE CASE.
THE QUESTION HERE IS WHETHER
THEY'RE GOING TO BE, ARE GOING
TO RECEIVE A PAYMENT FOR
SERVICES IN CONNECTION WITH THE
CASE.

THAT'S, SO YOU'RE EXPANDING THIS
BEYOND WHAT IS AT STAKE IN THE
RULE, I THINK.
>> BURNS AND LEVINSON PROVIDED
LEGAL ADVICE, AND THEY PROVIDED
FOR PREPARING FOR, ATTENDING AND
TESTIFYING AT PROCEEDINGS.
LEGAL ADVICE, I BELIEVE, IS
APPROPRIATE UNDER 4-3.7, AND
THEIR PREPARING FOR, ATTENDING
AND TESTIFYING IS CLEARLY
APPROPRIATE UNDER 4-3.4, AND
NOBODY DID ANYTHING WRONG WITH
RESPECT TO MR. MEDWOOD.
ON THE WITNESS LIST, THEY WERE
NOT DISCLOSED IN ANY PARTICULAR
CAPACITY.
THEY WERE NOT HYBRID OR SOLELY
AS FACT.
>> BUT IF THEY'RE-- THIS
CONCEPT OF HYBRID IS THEY WERE
BOTH AN EXPERT AND A FACT
WITNESS.
THERE'S A DUTY TO DISCLOSE THAT.
IF YOU HAD DISCLOSED THEM AS

EXPERT WITNESSES, MAYBE WE
WOULDN'T QUITE BE HERE.
THE OTHER CONCERN I HAVE, AND
IT'S MAYBE BIGGER THAN YOUR,
THIS CASE, IS WE'VE GOT A LOT OF
LEGAL MALPRACTICE, MEDICAL
MALPRACTICE CASES OUT THERE.
AND THE ROLE OF PEOPLE THAT ARE
FACT WITNESSES TO WHAT HAPPENED
WHETHER AT THE END OF THE DAY
YOU'RE GOING TO USE THOSE SAME
PEOPLE TO PREPARE AND THEN GET
THE OTHER SIDES WHO HAVE TO PAY
IN THE FORM OF TAXABLE COST FOR
WHAT COULD BE HERE MILLIONS OF
DOLLARS OF PREPARATION TIME.
YOU KNOW, THERE'S JUST SOMETHING
ABOUT THAT, THAT DOESN'T THAT
STRIKE YOU AS NOT BEING EITHER
WITHIN THE INTENT OF THE TAXABLE
RULE, THE COST RULE AS WELL AS,
YOU KNOW, NOT ADDRESSED PROPERLY
IN THE BAR RULE.
>> BRIEFLY EXPLAIN, THEY BROUGHT
A LAWSUIT AGAINST MY CLIENT.

THEY ALLEGED MY CLIENT MADE
GROSS RECOVERY AS A RESULT OF A
VERY COMPLICATED SETTLEMENT
AGREEMENT.
THEY CLAIM THAT MY CLIENT
COMMITTED TAX FRAUD, AND THEY
SHOULD GET 5% OF THE TAX FRAUD.
THEY HAD A VERY BROAD FEE
PROVISION AND A VENUE PROVISION
IN TAMPA.
WHEN THEY BROUGHT THAT CLAIM AND
MADE THESE ALLEGATIONS, THEY
KNEW THESE TAX PROFESSIONALS
WOULD BE INVOLVED.
AND I WOULD ALSO THESE
PROFESSIONALS WERE DEPOSED WELL
BEFORE TRIAL.
THERE WAS NO COURT RULE OF ANY
KIND THAT SAID THEY WERE DEPOSED
AS HYBRID FACT WITNESSES.
THEIR TESTIMONY WAS ALL OVER
RECORD AND CRYSTAL CLEAR BEFORE
THE TRIAL--
>> IN RESPONSE TO THIS QUESTION
AND PART OF THE ANSWER THAT

YOU'RE NOT JUST TRAVELING UNDER
THE RULE WITH RESPECT TO
RECOVERY OF COST.
YOU'RE TRAVELING UNDER A
CONTRACTUAL PROVISION THAT YOU
BELIEVE THAT'S BROAD IN SCOPE
THAT WOULD COVER--
>> CORRECT.
>>-- THIS.
>> I SEE THAT I'M OUT OF TIME.
>> YOU ARE.
>> THANK YOU.
>> IT'S CLEAR THAT THE RULE
SIMPLY DOES NOT PROVIDE ANY
LEEWAY TO A PARTY TO HIRE AND
PAY A FEE TO A FACT WITNESS TO
HELP THAT FACT-- TO HELP THAT
PARTY WIN THEIR CASE, WHICH IS
WHAT HAPPENED HERE.
THEY WERE HIRED TO HELP THEM WIN
THE CASE.
IMAGINE IF HE APPLIED THAT,
YOU KNOW, TO CIRCUMSTANCES YOU
DESCRIBED.
ANY WITNESS THAT COMES IN SHOULD

NOT BE PAID A FEE TO HELP A
PARTY WIN A CASE.
THAT'S ALWAYS BEEN THE LAW.
AND WHEN THE OTHER SIDE
PRESENTED THEIR WITNESSES AS
MERE FACT WITNESSES, NOT AS
EXPERTS, NOT AS HYBRIDS AND NOT
AS PAID ADVOCATES WHICH IS WHAT
THEY WERE, THERE WAS A SERIOUS
LACK OF CANDOR WITH THE COURT.
>> WELL, AGAIN, NOW WE DON'T
HAVE THIS RECORD JUST ON THAT
LACK OF CANDOR.
WERE THE QUESTIONS ASKED IN
DEPOSITION WHAT'S BEEN YOUR
INVOLVEMENT IN THIS CASE?
>> THERE WAS A, THERE WAS A
REQUIREMENT IN THE LOCAL RULE
THAT REQUIRED THEM TO DISCLOSE
EXPERTS.
AND HE'S NOW TAKEN THE POSITION
THAT THEY WERE EXPERTS.
THEY DISCLOSED THEIR EXPERTS,
THEY DISCLOSED TWO OF THEM, AND
THEN THOSE EXPERT DEPOSITIONS

WERE TAKEN IN NOVEMBER AND
DECEMBER OF 2009.
THESE OTHER WITNESSES WERE NEVER
IDENTIFIED AS EXPERTS--
>> BUT THEIR DEPOSITIONS WAS
TAKEN.
>> THEIR DEPOSITIONS WERE TAKEN,
AND I DID NOT TAKE THE
DEPOSITIONS.
I DON'T KNOW-- THEY'RE NOT IN
THE RECORD.
I DON'T KNOW WHAT THEY SAY.
BUT I DO KNOW THAT THEY WERE NOT
DISCLOSED AS EXPERTS.
AND--
>> AM I CORRECT THAT IF THESE
WITNESSES HAD BEEN DISCLOSED AS
EXPERT WITNESSES, THAT THIS--
WE WOULDN'T, THERE WOULD BE NO
ISSUE?
BECAUSE A WITNESS CAN BE A FACT
WITNESS AND GET PAID TO HELP
WITH THE CASE AS LONG AS THEY
ARE DISCLOSED AS AN EXPERT
WITNESS, CORRECT?

>> THAT'S RIGHT.
AND SO LONG AS THEY ARE, IN
FACT, AN EXPERT WITNESSES.
WE'VE CITED CASES IN OUR BRIEF
THAT SAY YOU CAN'T HIRE A
WITNESS AS AN EXPERT WITNESS AND
JUST COME UP AND TESTIFY ABOUT
FACTS AND THEY'RE TRULY NOT AN
EXPERT.
LET ME JUST SAY IN CONCLUSION
THAT IT'S WRONG TO LET SOMEONE
PROFIT FROM THEIR WRONG DOING.
IN THIS CASE, IT WOULD BE LIKE
LETTING THE BANK ROBBER KEEP THE
MONEY.
THAT'S WHY WE BELIEVE THE
UNDERLYING JUDGMENT SHOULD BE
VACATED OR, JUSTICE CANADY, WE
SHOULD BE PERMITTED TO PURSUE
RELIEF FROM JUDGMENT.
THANK YOU.
>> WE THANK YOU BOTH FOR YOUR
ARGUMENTS.
THE COURT WILL NOW STAND IN
RECESS FOR ABOUT TEN MINUTES.

>> ALL RISE.