

Pre-trial Disclosure of Witnesses
Cynthia Stump Swanson
August 2010

The pretrial orders in general use in this circuit require the exchange of witness lists some number of days before the trial. Hopefully, enough days before trial to allow the other side to depose the listed witnesses, if desired, but not so far ahead of trial that all likely witnesses may not yet be known. There is no rule of family law or civil procedure which touches on this specifically, and instead trial courts are imbued with more of that discretionary power to run the trial. Generally speaking, a trial judge's discretion in determining whether an unlisted witness can testify should be guided primarily by whether prejudice would accrue to the objecting party. "Prejudice" in this connection is considered to mean that the objecting party might well have taken some action to protect himself had he timely notice of the witness and that there exist no other alternatives to alleviate the prejudice.

The leading Florida case on this issue is Binger v. King Pest Control, 401 So. 2d 1310 (Fla . 1981). In that case, when the parties exchanged witness lists, the plaintiffs listed their primary witnesses, and also including the usual catch-all, "any and all necessary impeachment or rebuttal witnesses." The defendants also listed a particular expert witness, and the plaintiffs took that expert's deposition. They then had an expert of their own review the deposition, but did not identify their expert to the defendants, relying on their "any impeachment or rebuttal witnesses" notification. The trial judge allowed the plaintiffs' expert to testify, over the defendant's objection.

The case made its way to the Florida Supreme Court to resolve a conflict between appellate districts. The Supreme Court characterized one view as saying that the law in Florida is well-settled to the effect that impeachment witnesses need not be disclosed prior to trial. The rule, suggest these proponents, was rooted in the belief that all witnesses, but especially expert witnesses, would be tempted to exaggerate or stray from the truth if they knew from looking at a witness list that their testimony was not going to be challenged.

Those on the other side argue that the rule permitting nondisclosure of impeachment witnesses is not so broad, but rather is limited to those situations in which the need for an impeachment witness is totally unforeseeable and arises from matters which come out for the first time during trial. They suggest that an impeachment witness who testifies on an issue disclosed by the pleadings or through discovery must be identified prior to trial, in order to prevent a party from secreting a witness and waiting to ambush his opponent's witnesses. They argue that trials in Florida are no longer sporting matches, and that full disclosure is the order of the day.

Resolving these differing points of view, the Florida Supreme Court held that a pretrial order directing the parties to exchange the names of witnesses requires a listing or notification of all witnesses that the parties reasonably foresee will be called to testify, whether for substantive, corroborative, impeachment or rebuttal purposes. Obviously, a general reference to "any and all necessary" impeachment or rebuttal witnesses, as was the case at trial in the Binger case, and as is a very common practice in this circuit, constitutes inadequate disclosure. The Court went on to

hold:

It follows, of course, that a trial court can properly exclude the testimony of a witness whose name has not been disclosed in accordance with a pretrial order. The discretion to do so must not be exercised blindly, however, and should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party. Prejudice in this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony. Other factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases). If, after considering these factors, and any others that are relevant, the trial court concludes that use of the undisclosed witness will not substantially endanger the fairness of the proceeding, the pretrial order mandating disclosure should be modified and the witness should be allowed to testify.

Clearly, the better practice is to disclose all your witnesses, so that there is no surprise, and who knows? Knowing who all the witnesses are and what they're going to say might even help promote settlement. In the Binger case, the Florida Supreme Court did rule that the plaintiffs should have disclosed their expert, that the defendants were actually surprised, and that they were unfairly prejudiced. A new trial was ordered. That's a lot of time and expense to the parties that is not necessary which planning and rule-following disclosure would avoid.