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**PRETRIAL DISCLOSURE
by Ted Babbitt**

The Supreme Court of Florida set the standard for the requirements of pretrial disclosure in Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981). There the Court gave the trial court an arsenal to deal with faulty pretrial disclosure. The essence of Binger was distilled by the Fourth District in Florida Marine Enterprises v. Bailey, 632 So. 2d 649 (Fla. 4th DCA 1994). In that case, the Fourth District approved the trial court's striking of four witnesses for blatant violations of the trial court's pretrial order. In discussing the limits of tolerance in Binger, the Fourth District in Florida Marine Enterprises at Page 652, stated:

“In exercising its discretion to strike witnesses not properly disclosed upon pretrial order, the trial court may consider such factors as: whether use of the undisclosed witness will prejudice the objecting party; the objecting party's ability to cure the prejudice or its independent knowledge of the witnesses' existence; the calling party's possible intentional noncompliance with the pretrial order; and the possible disruption of the orderly and efficient trial of the case.

Compliance with pretrial orders directing proper disclosure of witnesses eliminates surprise and prevents trial by 'ambush.' *Binger*, 401 So. 2d at 1314. Counsel who disobey a trial court order entered months earlier should not be rewarded for their conduct. *Pipkin v. Hamer*, 501 So. 2d 1365, 1370 (Fla. 4th DCA 1987).”

Trial by ambush has been discouraged since the 1954 adoption of our modern rules of procedure. Office Depot, Inc. v. Miller, 584 So. 2d 587, 590 (Fla.

4th DCA 1991) (“a party can hardly prepare for an opinion that it doesn’t know about, much less one that is a complete reversal of the opinion it has been provided”).

With the well settled law that gives a trial judge discretion to react to “sandbagging” extant, along came Wax v. Tenet Health System Hospitals, Inc., 31 Fla. L. Weekly D1385 (Fla. 4th DCA, May 17, 2006). That was a medical malpractice wrongful death case in which the trial court refused to permit two expert witnesses to testify because of her perception that the witnesses’ testimony was not properly disclosed pretrial and that on rebuttal, the testimony was cumulative. In reversing the Fourth District at Page D1386 opined:

“We do not think that these designations of the substance of testimony in pretrial notices of experts should be subjected to literalistic, mechanical or crabbed readings. If a disclosed witness’s trial testimony is even arguably within the designation, exclusion of the testimony by the witness should not be employed.”

Read out of context, that statement seems to eviscerate Binger and all its progeny. An isolated reading of this quote would lead one to believe that the trial court is powerless to enforce its pretrial rulings. Read in context, the Wax opinion says nothing of the sort.

In Wax, plaintiff’s theory of the case was that the defendant doctors were negligent in the manner in which they attempted resuscitation of the plaintiff’s decedent who had an anesthetic accident during a hernia operation. The defendants introduced the theory that plaintiff’s decedent’s need for resuscitation

arose out of the inadvertent stimulation of the vagus nerve during the operation. Plaintiff's expert disclosure was consistent with plaintiff's theory of negligence in the resuscitative efforts but failed to specifically refer to defendant's theory of the case. The trial court refused to allow the disclosed witness to testify because of the absence of mention of the vagus nerve issue.

The procedure for disclosure of experts varies from trial judge to trial judge. Some require simultaneous disclosure by plaintiffs and defendants with an opportunity for rebuttal, while others require the plaintiffs to go first with the defendants being required to disclose only after some designated period of time. (The purpose behind this delayed disclosure has always alluded this writer.) No trial judge requires the defense to go first. Thus, it is not surprising that plaintiff's initial disclosure would not mention a theory that had not been disclosed by the defense prior to plaintiff's required disclosure of its expert's opinions.

The excluded expert was deposed but defense counsel chose not to inquire about that witness' opinions concerning the defendant's core defense. Whether that was done by design in the hopes of trapping the plaintiffs (as it turns out successfully) by having the trial court eliminate that expert's testimony cannot be divined from this opinion. Surely defendants knew about their own defense when they took the deposition of this expert.

Given those circumstances, the Wax court held that the trial judge's exclusion of the witness was error. The Court relied, in part, on Klose v. Coastal Emergency Services of Ft. Lauderdale, 673 So. 2d 81, 83 (Fla. 4th DCA 1996) which held it to be error to exclude a party's only expert in a particular specialty

absent prejudice to the opposing party when the witness had been questioned about that subject matter on deposition. In Wax, as in Klose, the witness in question was the only expert in that particular specialty and the Court found that the exclusion of the testimony was especially prejudicial because of that unique expertise.

“Klose holds that in the absence - as here - of any misconduct or impropriety by the party seeking to admit the testimony, this kind of prejudice impels the trial judge first to exhaust other measures less drastic than outright exclusion. A brief adjournment for a deposition of the witness on the vagus nerve issue was clearly the first remedy if the trial judge thought the designation insufficient to apprise defendant of the vagus nerve issue.”
Wax, supra, at Page D1386.

In Wax, a second witness was excluded by the Court on rebuttal because the Court found that his testimony was cumulative. The Court reversed on that issue as well, relying upon Griever v. DiPietro, 708 So.2d 666 (Fla. 4th DCA 1998).

“[a] trial court clearly may exercise its discretion in imposing sanctions. In this case, however, the trial court, by excluding the foregoing testimony, engaged in judicial overkill... A trial court should only exclude witnesses under the most compelling of circumstances. This is particularly so when the exclusion would be of a party’s most important witness.

* * *

‘Although a trial court has broad discretion regarding the admissibility of rebuttal testimony, it abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense.’ 708 So. 2d at 672; see also Castillo v. Bush, 902 So. 2d 317,

324 (Fla. 5th DCA 2005).” Griefer, supra, at Page 671.

So where does all this leave a trial judge with respect to the parameters of the Court’s ability to enforce pretrial orders? The answer lies in the admonitions of Binger. The Court must ask whether the nondisclosure prejudices the objecting party, whether there is a means of curing any prejudice either by virtue of the prior knowledge of the objecting party or by some means short of the ultimate sanction of not allowing the witness to testify. These questions must be answered in the context of the extent of culpability of the party accused of noncompliance and the effect of that noncompliance on the orderly trial of the case. There is no bright line rule to guide a trial judge. Application of the principals in Binger combined with a healthy helping of common sense allows a trial judge to insist upon compliance with pretrial orders while at the same time avoiding prejudice to either side.

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