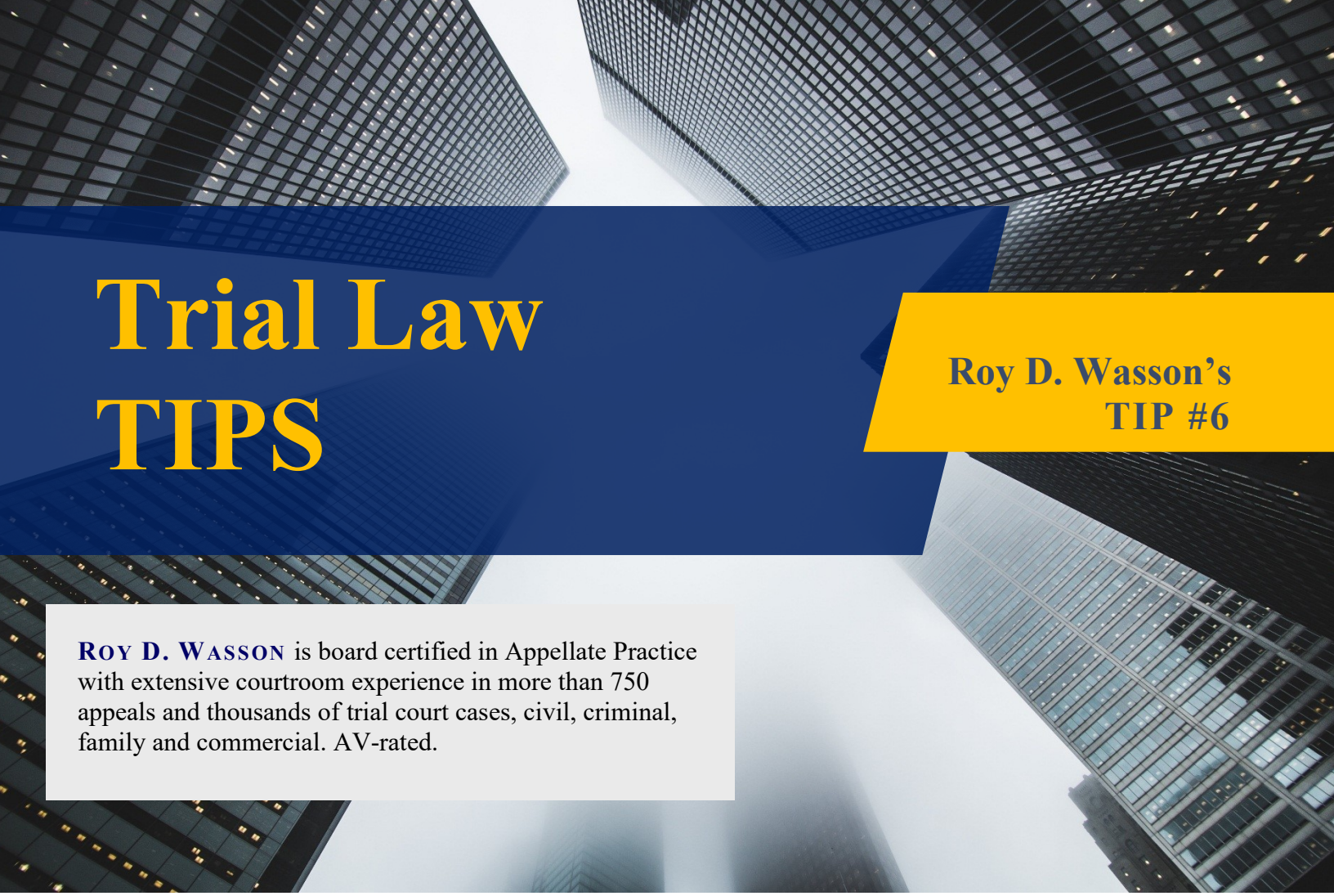

# Trial Law TIPS

**Roy D. Wasson's TIP #6**

**Roy D. Wasson** is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

## The Problem of Late-Listed Witnesses—Prejudice is the Key

### Introduction

In the scramble to prepare for trial, lawyers for both the plaintiff and the defense frequently miss deadlines for listing of witnesses and other deadlines, such as those pertaining to filing of motions and the completion of discovery. In most cases, counsel for both sides are in the same boat when it comes to meeting such deadlines, and generally agree to be flexible about them and cooperate in providing each other with pertinent information to permit adequate pretrial preparation. Problems sometimes occur, however, when your adversary holds back on a witness in a deliberate attempt to blindside you through non-disclosure until it is too late to allow you adequate time to prepare. Another form of problem occurs when you innocently miss a deadline by a few days, and the defense attorney—rather than attempting to accommodate your scheduling difficulties with professionalism—moves to strike

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your witness in an effort to force a cheap settlement or continuance of trial.

Whether you represent the party seeking to call a late-listed witness or the party opposing such an effort, the mere fact of untimeliness alone will not warrant exclusion of the witness. The key to striking such a witness (or preventing your opponent from striking your witness) in such a case is prejudice. Should you wish to strike the other side's untimely witness, you must be prepared to show how you will be unfairly prejudiced if the witness is allowed to testify. If you are the one trying to call a witness who was not listed in a timely fashion, you should be prepared to demonstrate how the opposing party will ***not*** suffer prejudice if the witness is allowed to testify.

## The *Binger* Doctrine

The lead case on this subject is the Florida Supreme Court's decision of more than twenty-five years ago in *Binger v. King Pest Control,* 401 So. 2d 1310 (Fla. 1981). That case came up in the context of a late-listed impeachment witness, which resulted from the fact that many trial judges and lawyers in those days believed that impeachment witnesses did not have to be listed at all, or at least not listed under the same time deadlines as substantive witnesses. The Binger Court held that impeachment witnesses were no different from other witnesses when it came to the duty to list them in a timely fashion, and then established parameters for enforcing or excusing deadlines for listing of all witnesses.

The Supreme Court in *Binger* held that a trial court's discretion to strike a late-listed witness "should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party." *Id.* at 1314. "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." *Id.* A party cannot be surprised, for example, if you call an expert who was on a different party's witness list, but not your own. *See State Paving Corp. v. Zebrowski*, 544 So. 2d 279 (Fla. 4th DCA 1989).

In addition to considering the paramount issue of prejudice, the court in *Binger* held: "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, non-compliance with the pre-trial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases)." *Id.*

If your adversary tries to call a late-listed witness, establish that you are prejudiced or that the opponent is a dirty trickster. Otherwise, you may succeed in striking the witness, but then lose a good verdict on appeal. *See, e.g., Greifer v.* DePietro, 708 So. 2d 666 (Fla. 4th DCA 1998)(exclusion of expert error where objecting party aware of substance of expected testimony); *Lugo v. Fla. East Coast R. Co.*, 487 So. 2d 321 (Fla. 3d DCA 1986)(reversing ruling striking undisclosed witness where there was no real surprise, no bad faith, and plenty of time to correct any prejudice); *Clarke v. Sanders*, 363 So. 2d 843 (Fla. 4th DCA 1978)(no prejudice).

## Changes and Supplements to Existing Witness' Testimony

The *Binger* doctrine applies to the situation in which a timely-listed witness changes his or her expected testimony after being deposed but before trial. In such a case, once a witness has provided opinions or testimony about factual matters, a significant change in that testimony is tantamount to allowing an undisclosed witness to testify, so the same considerations govern permitting the new opinions to come into evidence. *See Suarez-Burges v. Morham,* 745 So. 2d 368, 370-71 (Fla. 4th DCA 1999)("Allowing the presentation of the changed opinion was tantamount to permitting an undisclosed witness to testify"). *Accord, e.g. Gouveia v. Phillips,* 823 So. 2d 215 (Fla. 4th DCA 2002); *Grau v. Branham*, 626 So. 2d 1059 (Fla. 4th DCA 1993); *Office Depot, Inc. v. Miller*, 584 So. 2d 587 (Fla. 4th DCA 1991).

On the other hand, a few courts have held that a change in opinion or new opinion will not support exclusion of the witness where there is no duty to update discovery responses, or where the

opposing party really made no effort to find out what the witness would say at trial. *See Ganey v. Goodings Million Dollar Midway, Inc.*, 360 So. 2d 62 (Fla. 1st DCA 1978)(question not asked at deposition); *Dos Santos v. Carlson*, 806 So. 2d 539 (Fla. 3d DCA 2002)(CPE report not available when requested). It might be a good idea to send out "change of opinion" interrogatories before trial to prevent the argument being made against you.

## Strategies to Ameliorate Opponent's Prejudice

If the party opposing the calling of a late-listed witness knows of the witness and his or her expected testimony, then there is no prejudice and the witness should be permitted to testify. "The courts generally agree that a party cannot claim surprise if it knows, or has the means available to it to know, what testimony will be introduced against it at trial." *Tetrault v. Fairchild,* 799 So. 2d 226, 240 (Fla. 5th DCA 2001). Thus, if you are on the side attempting to call a late-listed witness, the mere fact that you did not file a witness list with that person's name on it in timely compliance with a pre-trial order is not dispositive. If you have mailed letters to the defense attorney enclosing reports of your expert, used his or her affidavit to oppose a summary judgment, or provided answers to interrogatories identifying a witness and his or her expected testimony, the opposing party should not be heard to claim surprise. *See, e.g., Lugo v. Fla. East Coast R. Co.*, 487 So. 2d 321 (Fla. 3d DCA 1986)(expert had signed affidavit).

Of course you should be willing to work over the weekend or at night to make a late-listed witness available for deposition to the other side, as a gesture of good faith and to cure any possible prejudice. Later in this report I offer you some authority for the notion that prejudice ***to you*** might not be curable by such a mid-trial deposition, but it surely is curable as far as the defense goes, right? *See Klose v. Coastal Emergency Services*, 673 So. 2d 81, 83 (Fla. 4th DCA 1996)(exclusion of late-listed expert "overly severe" where mid-trial deposition was available).

Be creative in dispelling the prejudice element when you want to call an unlisted witness. I have seen the argument successfully made (by a defense attorney in an asbestos case) that an unlisted expert witness should not be stricken because "the Plaintiff''s attorney and I have tried a half-dozen of these cases against each other and he knows that I always use Dr. [X] or Dr. [Y], and both of them say the same thing." Part of the reason for that ruling (and its affirmance on appeal) was that the Plaintiff''s attorney really had no good answer when the judge asked him: "What would you have done differently to prepare for this trial, if the expert had been listed six months ago?"

Is your late-listed expert a replacement for another witness in the same specialty whose testimony the opponent was already aware of? If so, there is no prejudice from merely calling another person to say the same thing. However, be aware that new opinions by the replacement will keep you from using that argument. And don't forget to put on the record that fact that such a witness is not really bringing anything new to the case, or a ruling striking his or her testimony will be affirmed. *See Alexandre v. Meyer*, 722 So. 2d 904 (Fla. 4th DCA 1998).

## Last Minute Discovery Not Always a Cure for Prejudice

Frequently a defendant who attempts to blindside the plaintiff with a late-listed witness will argue that any potential prejudice can be cured by the parties waiving the discovery deadlines and taking a deposition of that witness during or immediately before trial. However, the mere fact of being able to depose the new witness will not necessarily cure any prejudice. *See Metropolitan Dade County v. Sperling,* 599 So. 2d 209 (Fla. 3d DCA 1992); *Gustafson v. Jensen,* 515 So. 2d 1298, 1301 (Fla. 3d DCA 1987)("While a hastily schedule deposing of the . . . surprise expert may have been possible, the time frame for assimilation and analyzation of refuting testimony and documents was too highly compressed")(My win and my language, shamelessly plagiarized by Third DCA).

Just taking the new witness' deposition will not cure the prejudice, because you will need to marshal additional refuting evidence during the time you would otherwise be making your final pre-trial preparations. "It is not enough that the [party opposing use of the expert] simply knows what a witness may say before he testifies [at trial]. Prejudice also exists by the fact that [the opponent] is unable to counter the offered testimony." *Grau v. Branham*, 626 So. 2d 1059, 1061 (Fla. 4th DCA 1993).

Further, a last-minute (or mid-trial) deposition may unfairly distract you from your other preparations. "[O]nce the trial starts the parties'' attorneys should be allowed to concentrate on the presentation of the evidence at hand. Neither side should be required to engage in frantic discovery to avoid being prejudiced . . . ." *Id.* It may be better to participate in such a deposition if you can see that the judge is leaning toward allowing the defense witness to testify over your objection, but preserve the issue by stating on the record what (specific) other trial preparations will suffer while you depose the late witness.

## Continuance of Trial Is Another Form of Prejudice, Not Cure

Defendants who wish to avoid trial or to hamper plaintiffs in their preparation for trial sometimes list a witness late in an effort to force the plaintiff to choose between last-minute discovery and a continuance. However, courts have held that a continuance of the trial is not an automatic cure of the prejudice from listing a witness in an untimely fashion, but is just another form of prejudice which can be cured by striking the witness. For example, in Florida Marine Enterprises v. Bailey, 632 So. 2d 649, 652 (Fla. 4th DCA 1994), the court held as follows:

> Where, as here, a party without good cause improperly discloses witnesses, and by virtue of the improper disclosure gains an unfair advantage over the opposing party who is in compliance with the pre-trial order, *Binger* gives the trial court discretion to strike those witnesses ***to prevent the objecting party from being forced to choose between frantic last-minute discovery and an unjustified delayed of her trial***. This is not a fair manner in which to "cure the

> prejudice" caused by the defendants'' failure to timely prepare their case, and we hold that *Binger* does not require such a result here.

*Id.* at 652 (emphasis added).

It may be impossible to keep your trial date, get ready for the surprise witness, and still focus on the rest of the trial, so use your good judgment about what is most important in the case at hand. Then keep the issue in mind if you need to appeal a bad result.

## Conclusion

When dealing with the problem of late-listed witnesses on either side of the situation, don't overlook the policy of our court system which favors allowing relevant evidence to come in at trial, while having faith that the art of cross examination and the good sense of the jury will sort out the truth. "Excluding the testimony of a witness is a harsh remedy which should be invoked sparingly." *Tomlinson-McKenzie v. Prince*, 718 So. 2d 394, 396 (Fla. 4th DCA 1998). Some planning can greatly reduce the risk of that happening and make your trial a pleasure rather than a pain.

***Keep Tryin!***

***Roy***

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