

ITEM 1.04 | EXCLUSION OF EXPERT WITNESSES AND/OR THEIR OPINIONS

A recurring problem in trial practice is late disclosure of expert witnesses and/or their opinions. These issues should be anticipated by counsel or by the court and specifically addressed at pretrial conference and in case management and pretrial orders. An orderly trial is most likely to occur when the judge enforces discovery and pretrial orders strictly and requires each party to make full and proper disclosure before trial. The Fourth District Court of Appeal in *Central Square Tarragon LLC v. Great Divide Insurance Company*,²² reiterated the need to “strictly enforce” provisions of pretrial stipulations. This prevents last minute gamesmanship, and makes disruption of the trial and error on appeal less likely.

Generally, last-minute additions of witnesses and substantial changes to testimony should not be admissible at trial. Failure to exclude such testimony prejudices the opposing party and constitutes reversible error.²³ A party who fails to disclose a substantial reversal in an expert’s opinion does so at his peril.²⁴

A claimed violation of the pre-trial order or other discovery violation regarding any witness, including experts, is subject to the *Binger v King Pest Control*²⁵ test before a trial court can consider exclusion or other remedy.

The trial court should scrutinize a claim of newly discovered evidence with some suspicion to determine if it is just a pretext for an ambush on the other party. Otherwise, the trial becomes a free-for-all, and the discovery and pretrial deadlines become meaningless. As the Fourth district said in *Office Depot*, “[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.”²⁶

As with other discovery violations, the sanction must fit the offense. Striking the entire testimony of an expert witness is the most drastic remedy available.²⁷

Under many circumstances, barring the expert from testifying will be too harsh.²⁸ In cases where an expert claims to have a new opinion, for example, it is probably best to bar the new opinion rather than the expert’s entire testimony.²⁹

When an expert is the only witness a party has to establish a key element in the case, courts should be particularly hesitant to strike the expert’s testimony.³⁰ The same rule applies to an expert



who could offer key rebuttal evidence.³¹ Finally, where a plaintiff's expert has already testified to new opinions, it is proper to allow the defense expert to give new opinions in order to respond.³²

Discovery disputes can sometimes arise over the role of experts retained by a party. In *Carrero v. Engle Homes, Inc.*,³³ a trial court ordered disclosure of the names of experts a party had consulted for trial. The Fourth District Court of Appeal reversed. In doing so, it followed the well-settled rule that the names of consulting experts need not be disclosed.³⁴ The court held, however, that a trial court has "ample authority" to strike experts if a party unreasonably delays disclosing the names of trial (as opposed to consulting) experts.³⁵

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Footnotes

²² 82 So. 3d 911, 914 (Fla. 4th DCA 2011), rev. denied (Fla. 2012) (admonishing defense counsel for engaging in "gamesmanship" by failing to honor the pretrial stipulation).

²³ *Belmont v. North Broward Hospital District*, 727 So. 2d 992, 994 (Fla. 4th DCA 1999); *Garcia v. Emerson Electric Co.*, 677 So. 2d 20 (Fla. 3d DCA 1996); *Auto Owners Insurance Co. v. Clark*, 676 So. 2d 3 (Fla. 4th DCA 1996); *Keller Industries v. Volk*, 657 So. 2d 1200 (Fla. 4th DCA 1995); *Grau v. Branham*, 626 So. 2d 1059 (Fla. 4th DCA 1993); *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981); *Office Depot v. Miller*, 584 So. 2d 587 (Fla. 4th DCA 1991); *Florida Marine Enterprises v. Bailey*, 632 So. 2d 649 (Fla. 4th DCA 1994).

²⁴ *Gouveia v. F. Leigh Phillips, M.D.*, 823 So. 2d 215, 222 (Fla. 4th DCA 2002).

²⁵ 401 So. 2d 1310 (Fla. 1981).

²⁶ *Office Depot*, at 590

²⁷ *Lobue v. Travelers Insurance Company*, 388 So. 2d 1349, 1351 (Fla. 4th DCA 1980).

²⁸ *Id.*; see also *Jean v. Theodorsen*, 736 So. 2d 1240 (Fla. 4th DCA 1999); *Kaye v. State Farm Mut. Auto Ins. Co.*, 985 So. 2d 675 (Fla. 4th DCA 2008) (striking a witness for violation of discovery orders is a drastic remedy which should be utilized only under the most compelling circumstances).

²⁹ *Keller Industries*, *supra*, at 1203.

³⁰ *Keller Industries*; *Lobue*.

³¹ *Griefer v. DiPietro*, 708 So. 2d 666, 672 (Fla. 4th DCA 1998).



³² *Gonzalez v. Largen*, 790 So. 2d 497, 500 (Fla 5th DCA 2001). See also *Midtown Enterprises, Inc. v. Local Contractors, Inc.*, 785 So. 2d 578 (Fla. 3d DCA 2001) (same ruling where lay rather than expert testimony involved).

³³ 667 So. 2d 1011 (Fla. 4th DCA 1996)..

³⁴ *Carrero* at 1012.

³⁵ *Id.*

