

ANSBACHER LAW

CONDOMINIUMS • HOMEOWNER ASSOCIATIONS
REAL ESTATE • CONSTRUCTION • PERSONAL INJURY

Binger Meets the New Rules

Binger

Florida's Seminal Case on Discovery Violations & Remedies

Binger – The Facts

[Binger v. King Pest Control, 401 So. 2d 1310 \(Fla. 1981\)](#)

- In 1976 Bingers (and insurance company) sue King Pest Control (Defendant) for injuries arising out of an car crash.
- Pre-trial order requires exchange of witness lists 20 days prior to trial.
- Parties comply with order.
- Over a month prior to trial Plaintiffs amend disclosure to add an engineer as a new witness on accident reconstruction.
- 4 Days prior to trial Defendant deposes new witness.
- Defendant present accident reconstruction expert as to speed and distances.
- Plaintiffs present late disclosed engineer in rebuttal who testifies that defense expert lacked sufficient data for his opinions.
- Defendant objects due to late disclosure and not properly a rebuttal witness.

Binger – The Legal Arguments

Plaintiffs: There an exemption to disclosure for impeachment witnesses.

Defendants: The exemption applies only where the need for an impeachment witness is not foreseeable by pleadings or discovery prior to trial.

Binger – The Court's Approach ^{1/2}

- *The amendments created a framework for the active case management of civil cases with a focus on adhering to deadlines established early based on the complexity of the case while providing room for customization by judicial circuit.*

Binger – The Court's Approach 2/2

In order to resolve the dispute in this case and provide reasonable guidance to the bench and bar in future cases, it is not essential that we plow new ground in the field of civil practice. Existing Rule 1.200 of the Florida Rules of Civil Procedure provides an adequate framework, when supplemented by a faithful adherence to the notions of discovery which underpin civil trial practice and the good judgment of Florida's trial judges.

Rule 1.200 Fla.R.Civ.P. as of Binger

- Generally after the action is at issue the court may or on motion by party shall require a pre-trial conference.
- Court shall issue a pretrial order following the conference.
- The order shall control the subsequent course of the action **unless modified to prevent injustice.**
- ...and the **1984 amendment** “merely emphasizes the court's authority and arranges an orderly method for the exercise of that authority.”

Binger – Goals of Discovery Rules

- The goals of these procedural rules are "to eliminate surprise, to encourage settlement, and to assist in arriving at the truth."
- A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics.

Binger Factors – It's all about surprise.

- 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.
- **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.

Binger – Other Factors.

- Objecting party's **ability** cure prejudice.
- **Independent knowledge** of the witness by the objecting party.
- Calling party's possible **intentional, or bad faith, noncompliance** with the pretrial order

Binger – Conclusion

After consideration of Binger Factors:

If 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.

...therefore in instant case

- Since Defendant's expert witness and anticipated testimony was known **4 days before trial**.
- Plaintiffs knew or should have know they would call their own expert in rebuttal.
- Plaintiff's nondisclosure was **intentional surprise tactic**.
- No ability to cure so **NEW TRIAL**.

Rules of Civil Procedure

Current Florida and Federal Rules on Expert Disclosure

In Re: Amendments to Florida Rules of Civil Procedure

(December 5, 2024) [SC2023-0962](#)

- *The amendments are effective January 1, 2025, at 12:01 a.m.*
- *Case management orders already in effect on January 1, 2025, continue to govern pending actions; however, **any extensions of deadlines specified in those existing case management orders are governed by amended rule 1.200 or amended rule 1.201.***
- *Finally, the Court rewrites rule 1.460 entirely to provide that “[m]otions to continue trial are disfavored and should rarely be granted and then only upon good cause shown.”*

New Rule 1.200 Fla.R.Civ.P.

- Assignment of Case Track; Complex, Streamlined, or General.
- Case Management Order with deadlines for:
 - Completion of Fact Discovery.
 - Completion of Expert Discovery.
 - Motions for Summary Judgement.
 - Filing and Resolution of **All** Pretrial Motions.
- CMO Required within 120 Days after Commencement of Action.
- Pretrial conference must address witnesses expected to testify.

Is there a new standard?

Strict Enforcement of Deadlines. The case management order must indicate that the **deadlines** established in the order will be **strictly enforced** unless changed by court order.

Rule 1.200(d)(3)

How strict?

Rule 1.200(e) Extensions of Time; Modification of Deadlines

- Deadlines in CMO must be strictly enforced unless changed by court order.
- Parties may submit agreed orders to extend deadlines if extension does not affect remaining CMO dates; otherwise must seek amended CMO.
- Duty to meet trial period deadlines under Rule 1.460
- Motions to extend must include both (i) basis for extension and (ii) when the basis for extension became known to the defendant. Must also include specific actions and ability to meet proposed new deadline such as expert witness availability.

Rule 1.380

Failure to Make Discovery; Sanctions.

- If a party fails to make initial disclosure under Rule 1.280(a), other party may move to compel **and for appropriate sanctions**.
- If a party fails to provide information or identify a witness as required by rule 1.280(a) or (g), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.
- Alternative or additional available sanctions:
 - Payment of expense and fees,
 - Inform jury of party's failure, or
 - Impose other sanctions (e.g. striking pleadings, dismissing action, judicially establishing facts).

What about the Feds?

Rule 26 - Duty to Disclose; General Provisions Governing Discovery

- A party must to disclose the identify of **any witness** it may use at trial to **present evidence**. 26(a)(2)(A)
- Retained experts must sign a written report accompanying disclosure. 26(a)(2)(B)
- Anticipated testimony and supporting facts of other witnesses must be disclosed. 26(a)(2)(C)
- Timing of Disclosures:
 - At the times and in the sequence court orders. OR
 - 90 days prior to trial date
 - Rebuttal witnesses – 30 days after opponent's disclosure.

Supplementing Disclosures

Rule 26(e) Supplementing Disclosures and Responses

- Disclosures must be supplemented or corrected if incomplete or incorrect unless otherwise made known to other parties in discovery or in writing.
- Must disclose additions or changes to (i) expert reports, or (ii) deposition testimony.
 - Disclosure due by the time pretrial disclosures under Rule 26(a)(3) due.
 - Rule 26(a)(3): Due 30 days before trial.

Sanctions Under Federal Rules

Rule 37(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

- If a party fails to identify a witness or provide the required information or information required under Rule 26, the party is not allowed to use the information or witness to supply evidence unless the failure is substantially justified or is harmless.
- Alternative or additional available sanctions:
 - Payment of expenses, including reasonable attorney's fees,
 - Informing the court of the failure, or
 - Other sanctions (e.g. striking pleadings, dismissing action, precluding the party from establishing facts).

Florida Rule 1.380 Nearly Identical

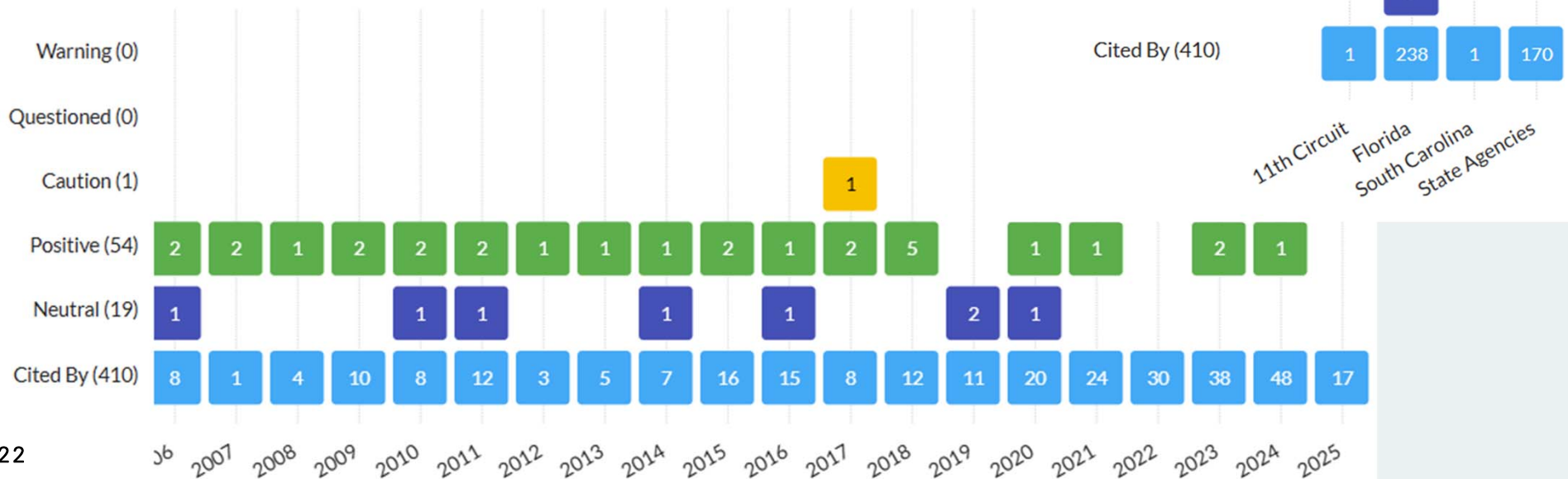
Case Law After Binger

Florida and Federal Cases

Binger – 1981 through 2025

Shepard's® Citing Decisions Analysis

Shepard's® Citing Decisions Analysis



Florida Case Law

Miller v. Conney, No. 1D2023-1919, 2025 Fla. App. LEXIS 4659 (1st DCA June 18, 2025)

FACTS:

- January 3, 2023 trial on car crash. Disputed liability and damages.
- Pre-Trial Order required complete list of witnesses who are expected to testify at trial, together with...a concise description of the subject matter” and schedule of exhibits to be presented at trial.
- Order specifically provided for exclusion of undisclosed evidence.
- Plaintiff’s treating physician testified at depo that patient was candidate for ablation, but could not estimate the full cost of procedure.
- On January 4 (day two of trial) Plaintiff discloses receipt of ablation estimate by surgery center administrator dated and received January 3.
- Trial court allowed evidence because cost was not new opinion, and denied defense request for continuance.

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Miller v. Conney...

RULING:

- Abuse of Discretion Standard.
- Follows Binger and confirms Binger analysis equally applies to a disclosed expert's changed or new opinions which result in surprise.
- The cost estimate was a new opinion.
- Naked opinion without the supporting undisclosed estimate would not be admissible.
- Prejudice not curable by defense ability to challenge estimate given the timing of the disclosure.
- New Trial on the Future Medical Component of Damages only.
- **Concurring opinion** – Reverse future medical damages in lieu of new trial.

Federal Cases on Rule 26

- *Lamonica v. Hartford Ins. Co. of the Midwest*, 108 F.R.D. 682 (N.D. Fla. 2020).
- *Saveli v. United States*, No. 6:21-cv-36-PGB-EJK, 2022 WL2904870 (M.D. July 22, 2022).
- *Tran .v Tran*, No. 6:23-cv-1528-RBD-DCI2024, 2024 WL4710231 (M.D. Fla. Nov. 7, 2024).

LaMonica v. Hartford

FACTS:

- Plaintiff sues insurer for a property damage claim after Hurricane Michael.
- Parties proposed **July 24, 2020** expert disclosure deadline, adopted into scheduling order.
- Plaintiff serves Rule 26(a)(s) Expert Witness Disclosures over a month late on **August 28, 2020**. Names an engineer and a claims adjuster.
- Plaintiff argued that expert reports were provided in RFP response, and thus not untimely.
- Interrogatory response by Plaintiff as to experts objected as pre-mature.
- No trial date scheduled as of hearing on motion to strike experts.

LaMonica v. Hartford

Factors for court's exercise of discretion.

1. Extent of surprise.
2. Ability to cure surprise and its effects.
3. Disruption to trial.
4. Importance of evidence.
5. Explanation for untimely disclosure.
6. Negligence or Intentional Act to Obtain an Unfair Advantage.\

LaMonica v. Hartford

RULING:

- Production of expert reports provided “some notice.”
- Late disclosure did not add a new complex legal theory or substantially change the character of the case, rendering obsolete the other party’s trial preparation.
- Time to remedy through deposition within discovery deadline (and option to extend discovery deadline).
- No need to reschedule trial.
- No suggestion of intent, only negligence.
- Denies motion to strike.

Savell v. U.S.

FACTS:

- Plaintiff sues U.S. for injuries from a “slip and fall.”
- U.S. moves to strike Plaintiff’s expert witnesses.
- Court entered a CMO with deadlines.
- Plaintiff discloses experts 121 days after deadline, 64 days after discovery cut-off, and 7 days after mediation.
- No motion to extend deadlines or timely communication with defense.
- Plaintiff offered **no explanation** for the late disclosure.

Savell v. U.S.

RULING:

- Motion to Strike Granted.
- Court seems to focus on the lack of any explanation even citing a case referring to a party's "indolence".

Tran v. Tran

- November 2023 CMO set September 3, 2024 expert disclosure deadline. After 4 p.m. on September 3, 2023, Plaintiffs sought 45-day extension.
- Court denied original motion for noncompliance with local rules and failure to show good cause. Plaintiffs filed a new motion, which the court construed as an improperly filed motion for reconsideration.
- Plaintiffs failed to justify the late disclosure and argue only that the delay was harmless.
- Court weighs factors and finds that (1) prejudice and surprise, (2) inability to cure, and (3) disruption to trial are not outweighed by showing of (4) importance of evidence, or (5) explanation for delay.
- However, due to technical reasons defendants' motion to strike was also denied

So what is the current standard?

Binger Lives!

Thank
you

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