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Beneficial Or Not: Adoption of Federal Rule 26 into Florida Rules of Civil Procedure

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BENEFICIAL OR NOT? ADOPTION OF FEDERAL RULE 26 INTO FLORIDA RULES OF CIVIL PROCEDURE

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I. INTRODUCTION

The *Federal Rules of Civil Procedure*, from the beginning, tried to deal with the belief that the old issue pleading system, where discovery did not exist, was inefficient in the delivery of justice.¹ It was believed, therefore, that liberal permissive discovery “would inform the parties of the relevant facts, eliminate surprise, help limit the issues, and provide a basis for either intelligent settlement or an efficient trial.”² Rule 26, as amended in 1993, intended to cure, the burden placed on the parties to seek the right information through discovery.³ However, an important proviso in the initial required disclosures

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¹ See Paul W. Green, *Reassessment of the Lawyers' Discovery Responsibilities: The Early Disclosure Provisions of the Proposed Amendments to Rule 26, Federal Rules of Civil Procedure*, ALA. LAW., July 1992, at 278.

² See *id.* at 279 (emphasis added). Magistrate Green argued that discovery abuses by adversarial attorneys caused much of the delay and expense of trial perceived by lawyers, judges and the public. He claimed that “the non-adversarial approach to discovery is intended to simplify and expedite the resolution of litigation” in support of the initial disclosure requirement of rule 26. See *id.* at 278.

³ See FED. R. CIV. P. 26 advisory committee notes (1993) (amended 2000) (“This subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information . . .”).

was an “opt out” clause allowing the federal district courts to not mandate these disclosures.⁴ This led many federal district courts, including the southern district of Florida, to take this opt out provision by local rule.⁵ On the other hand, many federal district courts, including the northern district of Florida, have adopted this initial disclosure requirement.⁶ This disparity, therefore, is evident within the state of Florida. The southern district of Florida without any discussion as to its reasons for choosing the opt-out provision, simply stated, “[t]he disclosure requirements imposed by Rule 26(a)(1)-(4) . . . , shall *not* apply to civil proceedings in this court,”⁷ The northern district of Florida, in contrast, explicitly adopted the initial disclosure requirements of Rule 26(a)(1), stating that, “[i]t is the court’s intention to implement these early disclosures, which appear to be cost effective and which should reduce much of the delay in the discovery process,”⁸

The inconsistency with which the federal district courts adopted the initial disclosure requirements led to a proposed amendment to Rule 26 which took effect December 1, 2000.⁹ The amended Rule 26 (hereinafter the “2000 amendment”) therefore makes it mandatory to comply with these initial disclosure requirements, thereby eliminating the “opt out” provision by local rule.¹⁰ The advisory committee acknowledged widespread support for a national uniform disclosure rule.¹¹ However, there continues to be resistance to the new procedure in some districts, where some early studies

⁴ See FED. R. CIV. P. 26(a)(1) (1993) (amended 2000) (“Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties: . . .”).

⁵ See, e.g., AL R USDCTMD, Optional FRCP Amendments; AR R USDCTED, Order 42 re FRCP Amendments; CAR USDCTSD CIVLR 26.1; CTR USDCTL CIV.R. 37; FLR USDCTSD, Gen. R. 26.1; IAR USDCT LR 26.1.

⁶ See, e.g., ILR USDCTSD 26.1; DC R USDCT LCvR 26.2; AKR RCP 26; C.R.C.P. 26; FL R USDCTND, Expense and Delay Reduction.

⁷ See FLR USDCTSD, Gen. R. 26.1 (emphasis added).

⁸ See FLR USDCTND, Expense and Delay Reduction.

⁹ See FED. R. CIV. P. 26(a)(1) (amended 2000). The advisory committee notes make it clear that “[t]he Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice.” *Id.*

¹⁰ The 2000 Amendment states: “Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:” FED. R. CIV. P. 26(a)(1)(A) (amended 2000).

¹¹ See FED. R. CIV. P. 26(a)(1)(A) (amended 2000) (“Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another.”); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 541 (1998) (“Since [1993 revisions to Rule 26], an increasing number of voices among both bench and bar have asserted that nonuniformity in the discovery rules — and in the disclosure rules in particular — is a serious problem and should be resolved.”).

suggested little savings in cost and time.¹² This resistance has been met with a try it, you'll like it, approach. Specifically, commentators suggest that although many attorneys "are opposed to mandatory disclosure in theory, they tend to be significantly more satisfied when they actually participate in early disclosure on their case."¹³

Additionally, Federal Rule 37(c) adds force to Rule 26(a) and (e) disclosure requirements by permitting a district court judge to exclude testimony by an undisclosed witness.¹⁴ Even though the requirements for disclosure of different types of witnesses, ie. expert versus fact witnesses are different under Rule 26(a),¹⁵ the punishment for failure to comply is uniformly applied under Rule 37(c).

It is well known that *Florida Rules of Civil Procedure* are "patterned after" the *Federal Rules of Civil Procedure*, and one continuing problem that both courts have been dealing with is the question of what and when is a witness a surprise witness. However, Florida has not adopted the initial disclosure requirement of Rule 26(a)(1). Instead, Florida relies on a combination of Rule 1.200, which establishes pretrial procedures, and the trial court judge's discretion to determine whether a witness is a surprise witness and should be excluded from testifying.¹⁶

This comment first examines Florida case law establishing the test for exclusion of witness testimony when an opposing party was "surprised", as well as the various interpretations of that test as applied by the trial courts and district courts of appeals. Next, this comment will examine Federal case law, establishing the test for exclusion of witness testimony prior to the 1993 amendment of Rule 26(a)(1). Third, this comment then examines the application of this test to violations of Rule 26(a) and its enforcement

¹² See David A. Churchill & Sada Manickam, *The Continuing Evolution of the Mandatory Disclosure Requirements of Federal Rule 26*, PROCUREMENT LAW., Winter 2000, at 3.

¹³ See *id.* (quoting James S. Kakalik, *Just, Speedy, and Inexpensive? Judicial Case Management Under the Civil Justice Reform Act*, JUDICATURE, Jan.-Feb. 1997); see also Willging et al., *supra* note 11, at 562 (finding that 80% of participants in national survey of two thousand civil attorneys responded that the initial disclosures in Rule 26 "decreased their client's overall litigation expenses, the time from filing to disposition, the amount of discovery, and the number of discovery disputes.").

¹⁴ See FED. R. CIV. P. 37(c). The rule states "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness ... not so disclosed." *Id.*

¹⁵ See FED. R. CIV. P. 26(a)(1)(A) (calling for disclosure of individuals that may have discoverable and relevant information); FED. R. CIV. P. 26(a)(2)(A), (calling for the disclosure of any person who at trial may present evidence under Rules 702, 703, or 705 of the *Federal Rules of Evidence*).

¹⁶ See *Binger v. King Pest Control*, 401 So. 2d 1310, 1312 (Fla. 1981) ("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.").

provision in Rule 37(c). Finally, this comment concludes with a discussion examining the possibility of Florida adopting the initial disclosure requirements of Rule 26(a)(1).

II. FLORIDA CASE LAW

A. *Binger v. King Pest Control*

In 1981, the Florida Supreme Court granted *certiorari* to decide which of four approaches taken by the Florida appellate courts should be used to resolve the problem of pretrial witness disclosure.¹⁷ In *King Pest Control v. Binger*,¹⁸ the trial court judge allowed the Bingers to present at trial the testimony of an impeachment witness who was not listed on their pretrial catalogue, in accordance with the pretrial order.¹⁹ King Pest Control objected to the introduction of the testimony because the pretrial order in that case required the parties to exchange witness lists at least twenty days before the trial began.²⁰ Additionally, the order required the listing of *all* witnesses on the pretrial catalog.²¹ The Fourth District Court of Appeals determined the requirement that all witnesses be listed included impeachment witnesses, reversing the trial court, and the Supreme Court of Florida granted *certiorari*.

In its opinion, the Florida Supreme Court surveyed the approaches taken by the district courts in resolving the problem of pretrial witness disclosure. First, some cases suggested that impeachment witnesses did not need to be disclosed.²² Second, “[a]t least one case appears to conclude that, . . . , a ‘rebuttal’ witness need not be disclosed prior to trial.”²³ Third, a witness who is responding to any new or surprise testimony brought out at trial need not be listed.²⁴ The Florida Supreme Court specifically rejected these first three

¹⁷ See *id.*

¹⁸ See *King Pest Control v. Binger*, 379 So. 2d 660 (Fla. 4th DCA 1980), *rev'd*, 401 So. 2d 1310 (Fla. 1981).

¹⁹ See *Binger*, 401 So. 2d at 1311. The impeachment witness in that case was an expert witness who was retained in order to impeach King Pest Control's expert witness. The issue in that case revolved around disclosure of impeachment witnesses and not disclosure of expert witnesses. See *id.* Therefore, this comment does not intend to reconcile the pre-trial disclosure of expert witnesses in Florida with Rule 26(a)(2) of the *Federal Rules of Civil Procedure*, but rather to focus on the test of exclusion once a rule has been violated.

²⁰ See *Binger*, 401 So. 2d at 1311.

²¹ See *id.*

²² See *id.* at 1312. This was the approach relied upon by the Bingers, arguing that impeachment witnesses did not need to be disclosed prior to trial. See *id.* at 1311-12.

²³ *Id.* at 1312.

²⁴ See *id.*

approaches,²⁵ opting instead to adopt the fourth approach suggested by the district court in that case. “That approach places all problems regarding the testimony of undisclosed witnesses within the broad discretion of the trial judge.”²⁶

The Florida Supreme Court went on to caution that the trial judge’s discretion should not be exercised blindly, but should be guided by four factors.²⁷ First, the trial judge should look to see if the “undisclosed witness will prejudice the objecting party.”²⁸ In this sense, prejudice, said the court, is defined by surprise in fact.²⁹ Second, the trial judge should look at the “objecting party’s ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness.”³⁰ Third, the “calling party’s possible intentional, or bad faith, noncompliance with the pretrial order.”³¹ Lastly, the trial judge should consider “the orderly and efficient trial of the case”³² The court concluded when applying these factors to the instant case, the Bingers should have listed their impeachment witness on the pretrial catalog and since they failed to do so, his testimony should have been excluded.³³

B. Courts of Appeals Cases

The *Binger* test has subsequently evolved into a two-part inquiry. The first question that needs to be decided is whether the witness has been sufficiently disclosed for the purposes of the pretrial order.³⁴ If the first question is answered in the negative, then the trial court must ask whether “use of the undisclosed witness will prejudice the objecting party.”³⁵

²⁵ See *id.* at 1313. The court stated, “[w]e expressly disapprove decisions in the first three categories of witness disclosure cases which hold or imply that certain types of witnesses are automatically exempt from the dictates of a pretrial disclosure.” *Id.*

²⁶ See *id.* at 1313.

²⁷ See *id.* at 1314.

²⁸ See *id.*

²⁹ See *id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See *id.* The court concluded that since the Bingers knew the expert’s name and the substance of his testimony prior to trial, the Bingers should have known that they would call their own expert witness and the only reason for not disclosing his name was to impeach King Pest Control’s expert by using surprise tactics. See *id.*

³⁴ See *HealthSouth Sports Med. and Rehab. Ctr. of Boca Raton, Inc. v. Roark*, 723 So. 2d 314, 317 (Fla. 4th DCA 1999).

³⁵ See *Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981).

1. WAS THE WITNESS DISCLOSED IN ACCORDANCE WITH THE PRETRIAL ORDER?

In *Casa de Alabanza v. Bus Service*,³⁶ the Third District Court of Appeals answered the first question in the affirmative. In that case, the plaintiff failed to list a witness' identity on its pretrial catalogue. Instead, the plaintiff "indicate[d] in its witness list that it would be calling '[a]ny and all parties to this lawsuit'."³⁷ The defendant objected to the calling of this witness and the trial court sustained the objection. On appeal, the appellate court reasoned that since the plaintiff was a church it should therefore be treated as a corporation.³⁸ The court added that since the excluded witness was a representative of the church, the representative therefore fell within the definition of "party" listed on plaintiff's witness list.³⁹ Consequently, since the appellate court answered the first question in the affirmative, that the witness was sufficiently disclosed, the court did not need to reach the second question.

However, in *HealthSouth Sports Medicine and Rehabilitation Center of Boca Raton, Inc. v. Roark*,⁴⁰ the Fourth District Court of Appeals disagreed with *Casa de Alabanza*, stating that the listing of a generic term does not sufficiently identify the person for the purposes of the pretrial catalog.⁴¹ In that case, the pretrial order required the parties to exchange the "names and addresses of all fact witnesses."⁴² The defendants' witness list included "[a]ll parties to this action and/or their authorized representatives."⁴³ The defendants attempted to call their witness, an administrator of the defendant's corporation, in rebuttal, and the plaintiff objected.⁴⁴ The trial court sustained the objection, only allowing the witness to testify to conversations she had had with the plaintiff's witness about which the plaintiff's witness had already testified, and prohibited her from testifying to several factual matters.⁴⁵ The defendants argued that *Casa de Alabanza* was controlling, and therefore their unnamed representative should have been able to testify as a representative of a corporation.⁴⁶ The court of appeals

³⁶ 669 So. 2d 338 (Fla. 3d DCA 1996).

³⁷ *Id.* at 339.

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ 723 So. 2d 314 (Fla. 4th DCA 1999).

⁴¹ *See id.* at 317.

⁴² *Id.* at 316.

⁴³ *Id.*

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See id.*

rejected both the defendant's argument and the Third District Court of Appeals' view,⁴⁷ certifying the question of whether a listing of a generic term on the pretrial catalog is sufficient disclosure when one party is a corporation.⁴⁸

Since the district court in that case answered the first question in the negative, that the witness was not sufficiently disclosed, the court then found it necessary to consider whether allowing the witness to testify would prejudice the objecting party. After quoting the *Binger* test, the court stated that the record was insufficient to show whether the defendant was prejudiced by not allowing the witness to testify to the excluded facts,⁴⁹ whether the plaintiff could have cured the prejudice, whether there was bad faith noncompliance, or if the trial would have been disrupted.⁵⁰ In short, the court described the primary difficulty with applying the *Binger* test, in most cases, the trial court record is not going to show consideration of these factors. It is left up to the reviewing courts to see if there is any evidence in the record that could support the trial court judge's ruling. If no such evidence can be found one way or the other, the reviewing court is unlikely to question the trial judge's ruling.⁵¹

Although the two prior cases dealt with non-disclosure of fact witnesses, Florida courts make no distinction between non-disclosure of fact witnesses and expert witnesses when determining whether surprise witness testimony should be excluded.

2. WAS THERE PREJUDICE TO THE OBJECTING PARTY?

A survey of Florida's appellate cases dealing with surprise expert witness testimony reveals, in general, there is no surprise in fact, and therefore no prejudice, when the testimony of the witness is known, regardless of whether he/she is listed on the pretrial witness list.

In *Office Depot, Inc. v. Miller*,⁵² the Fourth District Court of Appeals concluded there was surprise in fact where the witness was listed on the

⁴⁷ See *id.* at 317 ("We conclude that listing an 'authorized representative' does not comply with a pretrial order requiring the exchange of names and addresses of fact witnesses. . . . We thus disagree with *Casa de Alabanza*.").

⁴⁸ See *id.* (certifying the conflict with *Casa de Alabanza*).

⁴⁹ See *id.* The Defendants had profered the administrator's testimony to rebut the Plaintiff's witness' testimony that medical records had been forged. See *id.* at 316.

⁵⁰ See *id.* at 317-18.

⁵¹ See *id.* at 318 ("The trial court's discretion in determining whether an uncalled witness can testify is broad.").

⁵² 584 So. 2d 587 (Fla. 4th DCA 1991).

pretrial catalog, but reversed his opinion prior to testifying.⁵³ In that case, plaintiff alleged she sustained an injury while shopping in the defendant's store. At the defendant's request, plaintiff was examined by a neurologist who rendered an opinion favorable to the plaintiff. Prior to trial, the defendant requested that the neurologist again review his notes and notes supplied by other physicians. While reviewing these notes, including notes from other treating physicians that he claims not to have looked at previously, the neurologist changed his opinion.⁵⁴ The plaintiff's counsel objected to the neurologist testifying, but the court allowed the testimony.⁵⁵ On motion, the trial court entered an order granting the plaintiff a new trial premised in part on "the direct recanting of deposition testimony by defendant's expert witness, . . . which totally surprised plaintiff and resulted in a trial by ambush on the part of defendant."⁵⁶

In *Garcia v. Emerson Electric Co.*,⁵⁷ the district court determined that the trial court abused its discretion when it "reversed its pretrial ruling after plaintiffs had substantially completed their case in chief to permit [defendant] to introduce additional expert evidence which could not be reviewed by plaintiffs' expert until the day of the trial."⁵⁸ In that case, while the trial court had initially ruled that taped experiments done by defendant's expert prior to his pretrial deposition would be admissible, those that were not completed would be excluded.⁵⁹ During trial however, the defendants notified the court that they could not edit the tapes to erase the excluded testimony.⁶⁰ Over the plaintiffs' objections, the trial court allowed in all the tapes, concluding that plaintiffs could eliminate the prejudice to themselves during rebuttal.⁶¹ The district court determined this was an abuse of discretion, because during rebuttal was the first opportunity that plaintiffs' expert had to hear the opinion of defendant's expert.⁶² Therefore, the

⁵³ See *id.* at 590. The court stated "[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." *Id.*; see also *Keller Indus. v. Volk*, 657 So. 2d 1200, 1201 (Fla. 4th DCA 1995) (concluding the exclusion of an expert's mid-trial revelation of how an accident occurred was proper, but exclusion of all expert witness' testimony went too far).

⁵⁴ See *id.* at 588.

⁵⁵ See *id.* The court indicated that it would entertain appropriate motions at a later time. See *id.*

⁵⁶ *Id.*

⁵⁷ 677 So. 2d 20 (Fla. 3d DCA 1996).

⁵⁸ See *id.* at 20.

⁵⁹ See *id.* at 21. The expert in that case testified by video tape, and the experiments were part of this taped testimony. See *id.*

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.* Plaintiffs' expert was also excluded from hearing direct testimony during trial. See *id.*

introduction of new evidence, even though the expert was listed on the pretrial catalog, was grounds for reversal.⁶³

On the other hand, in *Lugo v. Florida East Coast Railway Co.*,⁶⁴ the Third District Court of Appeals did not find surprise or prejudice even though the witness was not listed on the pre-trial catalog, where the witness' testimony was known prior to trial. In that case, the plaintiff was injured while at work and filed suit to recover damages. The pretrial order required the parties to trade names and addresses of all expert witnesses they intended to call. The plaintiffs failed to file a list with the name of their expert witness. Prior to trial, however, defendant's moved for summary judgment, and in opposition, plaintiffs submitted an affidavit of their expert witness.⁶⁵ The motion for summary judgment was denied and defendants took the plaintiff's expert's deposition several days prior to trial. On the fourth day of trial, the defendants moved to have the plaintiffs' expert witness excluded from testifying because he was not listed on the pretrial catalog.⁶⁶ The trial court granted defendant's motion stating that "the pretrial order 'must be strictly complied with.'"⁶⁷ The Third District Court of Appeals reversed. After quoting the four-factor test from *Binger*, the Court determined that the trial court had abused its discretion stating:

It is . . . evident from the record that (1) the defendants were not surprised in fact, (2) there was adequate time to cure the prejudice, if there was any, and (3) allowing the witness to testify would not have disrupted the orderly and efficient trial of the case.⁶⁸

Another case where the Third District Court of Appeals found it necessary to reverse and remand a case was *Melrose Nursery, Inc. v. Hunt*.⁶⁹ In that case, the district court found that it was error to exclude a court-appointed expert witness, even though not listed on the defendant's pre-trial catalogue, because the plaintiffs' had "possession of the expert's report for several months prior to the trial and would, therefore, not have been prejudiced by his testimony."⁷⁰

⁶³ See *id.*; see also *Sayad v. Alley*, 508 So. 2d 485, 486 (Fla. 3d DCA 1987) ("The trial court did not abuse its discretion in restricting the testimony of the Defendant's expert . . . to subject matter which had been timely revealed in discovery and in precluding his opinion as to an area which had not.").

⁶⁴ 487 So. 2d 321 (Fla. 3d DCA 1986).

⁶⁵ See *id.* at 323.

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 324.

⁶⁹ 443 So. 2d 441 (Fla. 3d DCA 1984).

⁷⁰ See *id.* at 441-42.

The apparent trend of the Florida district courts therefore, is that there is no surprise if it is an expert witness, and the witness' testimony is known, even if it is only contained in a report.⁷¹

Contrary to the above cases, in *Davis v. Pfund*,⁷² the Third District Court of Appeals determined that the trial court had abused its discretion when it excluded expert testimony where the expert had made clarification to his original drawings after the close of discovery.⁷³ In that case, the expert returned to the scene of an accident in the period after the pretrial conference and the close of discovery to take measurements to clarify his drawings. The trial court had concluded that this was a violation of its order that closed discovery and excluded the expert's testimony.⁷⁴ The district court reversed, stating that there was no authority that stated that an expert could not continue to prepare materials he will testify about.⁷⁵ A fine distinction can be made of *Pfund*, however, between a substantial reversal of opinion and a clarification of a known opinion. However, it seems that any clarification of an opinion will lead to some surprise testimony. Additionally, there would be no chance for the surprised party to cure the prejudice because the expert had "clarified" his drawings *after* the close of discovery. Therefore, since the report containing the original opinion was discoverable and the clarified opinion was not, there is surprise to the opposing party.⁷⁶

As these cases illustrate, there is significant difficulty in determining not only when to apply the *Binger* four-factor test, but in the application of the test itself.

III. FEDERAL LAW PRIOR TO 1993

A. Federal Rule of Civil Procedure Rule 16(e)

The *Federal Rules of Civil Procedure* prior to the 1993 amendment primarily relied on Rule 16 to guide case management. Rule 16 is the equivalent of Rule 1.200 of the Florida Rules of Civil Procedure. Rule 16(e) allows the

⁷¹ See William VanDercreek, *Civil Procedure: 1992 Survey of Florida Law*, NOVA L. REV., Fall 1992, at 96 ("Inadequate notice [of an expert's opinion] can result in a new trial . . .").

⁷² 479 So. 2d 230 (Fla. 3d DCA 1985).

⁷³ See *id.* at 231.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ Once discovery is closed, there is no opportunity for the parties to take depositions or request documents to support their cases.

federal district court to enter an order, which controls the subsequent events of an action.⁷⁷

B. *Federal Case Law Standard for Exclusion of a Witness for Violations of Rule 16(e)*

Generally, the Federal district courts and circuit courts have adopted the same formulation for exclusion of a witness not listed in compliance with the pre-trial order as the Florida courts.

In *Spray-Rite Service Corp. v. Monsanto Co.*,⁷⁸ the Seventh Circuit Court of Appeals listed the four factors that a district court should consider “[i]n ruling on a party’s motion to call a witness not included on a pretrial witness list ordered pursuant to rule 16 of the Federal Rules of Civil Procedure”⁷⁹ The court stated:

- (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;
- (2) the ability of that party to cure the prejudice;
- (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court;
- (4) bad faith or willfulness in failing to comply with the court’s order.⁸⁰

In that case, the district court had no trouble determining whether or not the prospective witness had been disclosed. He was not.⁸¹ Additionally, the district court, after considering the factors above, concluded that “permitting

⁷⁷ See FED. R. CIV. P. 16(e). Rule 16 provides:

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Id.

⁷⁸ 684 F.2d 1226 (7th Cir. 1982).

⁷⁹ *Id.* at 1245.

⁸⁰ *Id.* (citing *De Marines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1202 (3d Cir. 1978)).

This is particularly relevant to the issue in this comment as the Florida Supreme Court relied on the same test. See *Binger v. King Pest Control*, 401 So. 2d 1310, 1314 n.10 (Fla. 1981) (citing *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978)).

⁸¹ See *Spray-Rite*, 684 F.2d at 1245 (“McGuire was not listed on the final pretrial witness list, . . .”).

[the defendant] Monsanto to call McGuire would prejudice Spray-Rite because Spray-Rite did not have adequate time to prepare for the witness."⁸²

In *Price v. Seydel*⁸³ the Ninth Circuit Court of Appeals agreed with the *Spray-Rite* formulation.⁸⁴ The court determined that the magistrate judge abused his discretion when he refused to allow the plaintiff to call a defendant party where the defendant's name was not listed on the plaintiff's witness list.⁸⁵ In that case, plaintiff sued defendant for fraudulent inducement in the purchase of a motel. At trial, the plaintiff called one of the defendants to the witness stand, and the defendants objected.⁸⁶ The trial court sustained the objection. On appeal, the Ninth Circuit reversed, stating "the magistrate judge abused his discretion by refusing to allow Price [plaintiff] to call Thomas Seydel [defendant] as a witness."⁸⁷ Applying the Seventh Circuit's formulation, the Ninth Circuit concluded that the defendant could not have been surprised because the defendant was listed as a witness on his own witness list. "He expected to be rigorously cross-examined by Price's attorney when he took the stand."⁸⁸ Additionally, the court noted that there was no evidence of bad faith and that the defendant's testimony was crucial to the plaintiff's claims of misrepresentation.⁸⁹

IV. FEDERAL LAW AFTER 1993

A. *The Federal Rules of Civil Procedure*

One of the most significant changes made in the 1993 amendments to the *Federal Rules of Civil Procedure* was the adoption of Rule 26(a)(1). This rule "impose[d] on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement."⁹⁰ One of the things that is required in the initial disclosure provision is "the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity

⁸² *Id.* The court noted that the Defendant had only given the Plaintiff three days notice that it intended to call the witness. *See id.*

⁸³ 961 F.2d 1470 (9th Cir. 1992).

⁸⁴ *See id.* at 1474.

⁸⁵ *See id.*

⁸⁶ *See id.* at 1472.

⁸⁷ *See id.* at 1474.

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ FED. R. CIV. P. 26 advisory committee notes (1993) (amended 2000).

in the pleadings, identifying the subjects of the information.”⁹¹ Additionally, the parties have a duty to supplement disclosures under Rule 26(e) when “the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.”⁹²

The combined effect of these rules was to shift the burden from the party trying to obtain information through traditional discovery devices to the other party to disclose it voluntarily. However, Rule 26(a) included an “opt out” provision allowing Federal district courts to promulgate local rules that did not require litigants to comply with Rule 26(a)(1).⁹³ Effective December 1, 2000, however, Rule 26(a)(1) initial disclosures became mandatory for all Federal district courts.⁹⁴

Rule 37(c)(1) is the enforcement provision, requiring the parties to comply with the initial disclosure requirement.⁹⁵ That rule states “[a] party without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) *shall not, unless such failure is harmless*, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed.”⁹⁶ Rule 37(c) therefore provides two ways of getting out of punishment for failing to disclose under Rule 26(a), substantial justification for failing to do so or the failure was harmless.⁹⁷ As we will see, significant amounts of case law have been addressed to answering when each clause has

⁹¹ FED. R. CIV. P. 26(a)(1)(A) (1993) (amended 2000).

⁹² FED. R. CIV. P. 26(e)(1) (1993) (amended 2000).

⁹³ See *supra* notes 3-13, and accompanying text.

⁹⁴ See FED. R. CIV. P. 26(a)(1) (amended 2000). The committee notes make clear that amended subdivision (a)(1):

Remove[s] the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal ‘standing’ orders of an individual judge or court that purport to create exemptions from — or limit or expand — the disclosure provided under the national rule.

FED. R. CIV. P. 26 advisory committee notes (amended 2000).

⁹⁵ See FED. R. CIV. P. 37(c) advisory committee notes. The notes make it clear that the 1993 revision “provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).” *Id.*

⁹⁶ FED. R. CIV. P. 37(c)(1)(emphasis added). The proposed 2000 amendment does not substantially change this rule, adding only that the parties have a continuing duty to supplement discovery in Rule 26(c)(2) as well. See FED. R. CIV. P. 37 advisory committee notes (amended 2000).

⁹⁷ See *Vance v. United States*, No. 98-5488, 1999 WL 455435, at *3 (6th Cir. June 25, 1999) (“It is well-established that Fed. R. Civ. P. 37(c)(1), enacted in 1993, mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was harmless or is substantially justified.”).

been satisfied, however, this comment focuses on the second clause and the adoption of the four-part test.⁹⁸

B. Federal Cases Interpreting Rule 37(c)

In 1995, the Seventh Circuit decided *Bronk v. Ineichen*,⁹⁹ which is generally cited for bridging the gap between Rule 16, Rule 26(a) and Rule 37(c).¹⁰⁰ In *Bronk*, deaf tenants brought an action against their landlord for alleged discrimination under the Fair Housing Amendments Act.¹⁰¹ The landlord put on expert witness testimony showing that the plaintiff's rights had not been violated, and plaintiffs attempted to call a rebuttal witness not listed on their pretrial witness list.¹⁰² In a short and not well set out analysis, the Seventh Circuit conflated Rules 16, 26(a), 37(c) and cited to *Spray-Rite* for the list of factor that should be considered in excluding witness testimony.¹⁰³ The problem is that the court applied these factors traditionally used when there was a violation of a *pre-trial order issued by a judge*, to an entirely new *self-executing rule* without any indication by the rules or any analysis of the court. It may be that application of these factors to self-executing disclosures makes as much sense as applying them to disclosures ordered by a judge, but there should be some guidance in either the rules or some reasoned explanation for doing so.

The adoption of the four-factor test into Rule 37(c) seems to be well settled, however. In *Newman v. GHS Osteopathic, Inc.*,¹⁰⁴ the Third Circuit agreed with the Seventh Circuit and adopted the four-factor test when determining whether a trial judge abused his discretion in excluding witness testimony.¹⁰⁵ In that case, the plaintiff sued the defendant for alleged violations of the Americans with Disabilities Act.¹⁰⁶ In that case there was

⁹⁸ For an example of the use of the substantial justification defense, see *United States v. \$9,041,598.68* (5th Cir. 1998).

⁹⁹ 54 F.3d 425 (7th Cir. 1995).

¹⁰⁰ See, e.g., *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 71 (3d Cir. 1995).

¹⁰¹ The Plaintiffs alleged that the landlord violated their rights by refusing to allow them access to a "hearing dog". See *Bronk*, 54 F.3d at 427.

¹⁰² See *id.* at 429.

¹⁰³ See *id.* at 432.

¹⁰⁴ 60 F.3d 153 (3d Cir. 1995).

¹⁰⁵ See *id.* at 156 (citing *Bronk*, 54 F.3d 425 (7th Cir. 1995), as interpreting Rule 37(c)(1)). The court stated, "[i]n ruling on motion to call witness not previously identified, 'district court should consider prejudice or surprise to opposing party, ability of party to cure prejudice, likelihood of disruption, and moving party's bad faith or willingness to comply'." *Id.*

¹⁰⁶ The Plaintiff alleged that he was terminated because it was medically necessary to combine his break time with lunch time against hospital policy. See *id.* at 154.

some question as to whether the defendant's had complied with the self-executing disclosures required under Rule 26(a). The plaintiff contended that he never received the witness list and therefore the trial court erred in allowing those witnesses to testify.¹⁰⁷ The district court, having heard oral argument on plaintiff's motion to exclude the witnesses, concluded that the plaintiff "received either the list itself, or the cover letter attaching the list."¹⁰⁸ The court went on to explain that even if the plaintiff did not receive the list, it did receive the cover letter and that should have put the plaintiff on notice that an attachment was missing,¹⁰⁹ and the plaintiff "should have sought the list if he had not received it."¹¹⁰ After reviewing the four-factor test for exclusion of witnesses, the circuit court determine there was no abuse of discretion by the trial judge in allowing the testimony where "there was no reason to believe that Parkview acted in bad faith; and the court found that Newman [plaintiff] knew the names of its witnesses and the scope of their relevant knowledge well before trial."¹¹¹ The problem with the court's ruling is that it reverts back to pre-rule 26(a). It has the effect of shifting the burden back to the party seeking the information. As the court stated "he [plaintiff] *should have sought the list* if he had not received it."¹¹² Therefore, the court's entire analysis of the four-factor test was skewed from the beginning.

The next two cases also apply the four-factor test, and reach nearly the same general understanding as the Florida state courts. Generally, if the witness' testimony is known there is no prejudice to the objecting party, regardless of whether or not they are listed on the witness list.

In *Licciardi v. TIG Insurance Group*,¹¹³ the First Circuit Court of Appeals determined that an expert witness' testimony should have been excluded where it was directly contradictory to and beyond the expert's report.¹¹⁴ In that case, the plaintiff sued the defendant for injuries sustained on an amusement park ride. Defendant requested that plaintiff submit to a medical examination by its expert witness, and the court agreed.¹¹⁵ Accordingly, after the medical examination, the defendant's expert produced a report which stated that in his opinion, the plaintiff had suffered a "trauma from the accident, but that this trauma was not the cause of the fibromyalgia [the

¹⁰⁷ See *id.* at 155.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ *Id.* at 156.

¹¹¹ *Id.*

¹¹² *Id.* (emphasis added).

¹¹³ 140 F.3d 357 (1st Cir. 1998).

¹¹⁴ See *id.* at 363.

¹¹⁵ See *id.* at 360.

injury complained of].¹¹⁶ Therefore, the plaintiff's case at trial focused on proximate causation, not whether a trauma occurred in the first place. However, at trial, the Defendant's expert changed his opinion, stating the plaintiff did not suffer the trauma from the accident that she claimed.¹¹⁷ The plaintiff objected to this new testimony, but the trial court allowed it.¹¹⁸ On appeal, the circuit court reversed, stating that it was highly prejudicial to allow the defendant's expert to change his testimony.¹¹⁹ In effect, the "Plaintiff was prejudiced by presenting a case addressed to one key issue, only to have defendant put on a case addressed to a different predicate key issue."¹²⁰ The circuit court also determine that the defendant's actions were deliberate and in bad-faith.¹²¹ Evidence of this was the fact that four months after defendant's expert examined the plaintiff and issued his report, he visited the amusement park and inspected the ride.¹²² Nearly a year after that, two days after the jury had been impaneled, the defendant supplemented his answers to plaintiff's interrogatories stating that the subject matter, substance, and scope of the expert's opinion was stated in his report.¹²³ As evidenced by this behavior, it would be impossible to find that the defendant's had inadvertently failed to disclose the changed testimony.

In *Burlington Insurance Co. v. Shipp*,¹²⁴ the Fourth Circuit Court of Appeals held the trial court judge did not abuse his discretion by denying the defendant's motion to amend its trial witness list six days prior to trial.¹²⁵ In that case, the issue before the court was whether a bar owner could reasonably rely on an expectation of coverage of insurance based upon statements made to her by an insurance salesman.¹²⁶ The defendant insurance company failed to list the salesman on their pre-trial witness list, claiming that at the time the joint pre-trial order was submitted, the company believed the salesman to be incompetent.¹²⁷ The court rejected this substantial justification argument stating that they could have listed him on the pre-trial order and then simply not called him if he was later determined

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 361.

¹¹⁹ See *id.* at 363.

¹²⁰ See *id.*

¹²¹ See *id.* at 367.

¹²² See *id.* at 361.

¹²³ See *id.*

¹²⁴ No. 98-2722, 2000 WL 620307 (4th Cir. May 15, 2000) (per curiam).

¹²⁵ See *id.* at *2.

¹²⁶ See *id.* at *1.

¹²⁷ See *id.* at *5. The salesman had suffered a stroke. See *id.* at *1.

incompetent.¹²⁸ The court went on to discuss the factors that tended to show prejudice to the plaintiff if the trial court had allowed the defendant's to amend their witness list at that late date. The trial court had cited concerns about disruption to the trial as well as the plaintiff's pre-trial preparation, while "yielding testimony that would be marginally useful to the fact finder."¹²⁹

V. CONCLUSION

The present test for exclusion of a "surprise witness" under Florida rules is the same test employed by the Federal courts under Rules 26(a) and 37(c) of the *Federal Rules of Civil Procedure*. The question then becomes that if the test is the same in the end, does it make any sense for Florida to adopt a similar provision?

The Florida courts mainly deal with surprise witnesses in the area of expert witness disclosure. Therefore, since the self-executing disclosure requirements are for fact witnesses only, adoption of Rule 26(a)(1) would not substantially improve the surprise witness problem in Florida. Indeed judges seem much more willing to exclude fact witness over expert witness because an expert witness is central to the trial.

However, judges have expressed some dissatisfaction with the current disclosure system in Florida. Many would like to see, in particular, that there be a continuing duty to disclose updated information. Currently, the *Florida Rules of Civil Procedure* contains no such obligation.¹³⁰ There is, however, such a duty in the *Federal Rules of Civil Procedure*. Rule 26(e)(1) states:

A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to the information contained in the report and to information provided through a deposition of the expert¹³¹

Therefore, the adoption of all of Rule 26 of the *Federal Rules of Civil Procedure*, would help to eliminate the problem of surprise witness disclosure.

¹²⁸ See *id.* at *5.

¹²⁹ See *id.*

¹³⁰ See Fla. R. Civ. P. 1.280(e) ("A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired.").

¹³¹ FED. R. CIV. P. 26(e).

Not only would there be a mandatory duty to disclose, but there would also be an additional duty to supplement those disclosures.

The test for exclusion of a surprise witness cannot be the focal point in the fight against "trial by ambush" as the *Binger* court believes.¹³² Rather, the focus must be more on the willingness of the parties to participate in liberal permissive discovery, to eliminate surprise, and to produce a speedy and efficient trial.¹³³ The question that is left unanswered is whether attorneys will be more willing to participate when they have no choice. That is the only way that the new rule is going to be more effective than when it was discretionary, assuming that the courts are going to keep the same test for exclusion. Studies are indicating that this will be the case.¹³⁴ If this is true, the beneficial effects of the rule can be felt in Florida if the state decides to adopt *all* of Federal Rule 26, including the new mandatory disclosure rule.

¹³² See *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981); see also discussion *infra* Parts II.A-B.

¹³³ See Green, *supra* note 1, at 279.

¹³⁴ See Churchill & Manickam, *supra* note 12.