

To: Assigning Partner
From: Alexander Conn
Re: Witness Preclusion as a Sanction

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Question Presented:

Under what circumstances can a court preclude a witness's testimony as a sanction for discovery abuse?

Brief Answer:

Where a party fails to properly and timely identify a witness, as required by a court order, the judge may sanction that party. As a sanction, the court may preclude all or part of the witness's testimony. Under extreme circumstances, an order compelling discovery may not be necessary to preclude testimony.

Facts:

In the present motor vehicle accident case, we represent the pedestrian struck by the defendant's vehicle. The defendant has asserted the existence of an "independent" witness who will testify on behalf of the defendant. When asked to provide contact information for the witness, the defense attorney provided an old phone number that no longer works. Subsequent inquiries did not result in obtaining valid contact information for the witness. Recently, one week before trial, the defendant scheduled a deposition of the witness in question.

Rules of Court:

Several rules of court apply in this situation. In particular, Supreme Court Rules 4:1(e)(1), 4:5(b), and 4:12 each contain provisions specifically applicable to these facts.

Rule 4:1 contains general provisions governing discovery and requires supplementation of all discovery responses. Rule 4:1(e)(1) states, "A party is under a duty *promptly* to amend and/or supplement all responses to discovery requests directly addressed to (A) the identity and location of persons having knowledge of discoverable

matters...” *Rule 4:1(e)(1)* (emphasis added). This rule applies here because the defendant has failed to supplement interrogatories with the identity and location of a witness alleged to have knowledge of the accident.

Rule 4:5 governs depositions by oral examination. The rule requires the deposing party to give “reasonable notice” to other parties to the action. *Rule 4:5(b)(1)*. In this case, the defendant provided only 5 days’ notice of the deposition. Originally, the defense attorney took no steps to accommodate the plaintiff counsel’s schedule in setting the deposition. Now, the defense attorney is attempting to accommodate the other party’s schedule; however, trial begins next week and there is little time to schedule the deposition.

Rule 4:12 applies where a party fails to make discovery and sets forth available sanctions. The rule allows a party to move for an Order Compelling Discovery where the opposing party fails to answer, or provides an evasive or incomplete answer, to discovery requests. *Rule 4:12(a)(2)* and *(3)*. The moving party must certify that it has made a good faith effort “to resolve the dispute without court action.” *Rule 4:12(a)(2)*. Subsection (b) of Rule 4:12 allows the court to impose sanctions on parties that violate the order. *Rule 4:12(b)(2)*.

In the present case, an order compelling production of the witness’s contact information may have been appropriate at an earlier stage in the pre-trial process. In the absence of an order compelling discovery, the court likely cannot sanction the defendant.

Case Law:

Despite the lack of a discovery order in the present case, an argument exists that the court should nonetheless preclude the witness from testifying. The Arlington County

Circuit Court case of *Skibinski v. Lunger* dealt squarely with the current issue. See *Skibinski v. Lunger*, 74 Va. Cir. 428; 2008 Va. Cir. LEXIS 1 (2008) (Arlington). The court discussed whether a specific order to compel was necessary and the appropriateness of witness preclusion as a sanction.

In the underlying suit in *Skibinski*, the plaintiffs alleged that defendants failed to disclose latent defects in the sale of residential realty. *Id.* at 429. The plaintiffs intended to call a contractor to testify about information he revealed to the defendants prior to the sale. *Id.* at 429-430. The defendants sought specific information from the plaintiffs concerning witnesses via written interrogatories and requests for production of documents. *Id.* at 430. When the plaintiffs did not identify the witness prior to his deposition, the defendants asked for various sanctions. *Id.* The plaintiffs argued that the court could not impose discovery sanctions because (1) they had not violated a specific discovery order, and (2) any violation had not prejudiced the defendants because they eventually revealed information concerning the witness, six months before trial. *Id.*

First, the court rejected the plaintiffs' argument that they had not violated an order compelling discovery. *Id.* at 433. The court reasoned that until the witness's deposition, the defendant "had no way to know that Plaintiffs' discovery responses were insufficient and there would have been no good faith basis for the Defendants to file a motion to compel." *Id.* The court continued to state that it did not "believe that the Rules of the Supreme Court are to be so narrowly construed as to allow the type of discovery evasion as occurred here simply because the issue had not squarely been the subject of an order to compel." *Id.* As a result, the court decided to sanction the plaintiff for discovery abuse, even though it had not violated a specific discovery order. *Id.*

Second, the court selected a sanction tailored to the prejudice that had occurred. *Id.* The available sanctions included dismissal with prejudice, preclusion of the witness's testimony, and monetary sanctions. *Id.* The plaintiffs had repeatedly failed to identify the witness and details of his knowledge. *Id.* at 434. However, the court did not preclude the witness's testimony because plenty of time remained after the witness's deposition. *Id.* Rather, a monetary sanction was imposed on the offending party. *Id.* at 435. The court further stated, "Had this information come to the attention of the [aggrieved party] and the Court with a shorter time until trial than six months, more rigorous sanctions of witness preclusion and possibly dismissal would have been warranted and imposed." *Id.*

Application:

In the current case, there is no time to follow the procedures set forth in Supreme Court Rule 4:12. However, we could argue that the court should exclude the witness because the defense has provided insufficient information concerning the witness. Like *Skibinski*, the opposing party in this case has had access to the witness, while we have not. Further, the opposing party failed to provide a working phone number for the witness and failed to supplement its response to interrogatories with valid contact information. Unlike *Skibinski*, where no prejudice occurred because of the amount of time left before trial, this case is set for trial next week. Here, the defendant has prejudiced the plaintiff's case by failing to provide access to a crucial witness. There is far less than the six months described in *Skibinski* to respond to the witness's testimony. As a result, the court in the present case could preclude the witness's testimony.

On the other hand, the defense is currently attempting to provide access to the witness. The defense has scheduled the witness's deposition and attempted to

accommodate the plaintiff's schedule in doing so. However, in the short time available, only so much accommodation can occur. Ultimately, it does not appear that the defense intended to prevent the plaintiff from contacting the witness, but was merely negligent in providing full disclosure.

A decision to preclude the witness's testimony in this case serves two functions. First, it adequately redresses the harm caused to the plaintiff's case. Precluding the witness's testimony will level the playing-field. Neither plaintiff nor defense have the benefit of testimony from a witness at trial, where only the defendant had the benefit of access to the witness before trial. Second, the sanction is appropriate to encourage future litigants to provide full access to non-party witnesses. The sanction will motivate parties to provide full access to the witnesses before trial, so that they do not lose the witness's testimony. Such a sanction would encourage parties to provide one another with all contact information available for potential witnesses.

Conclusion:

Where disputes concerning discovery arise, the rules of civil practice require an Order Compelling Discovery prior to imposition of sanctions. In extreme cases, involving pervasive abuse that causes prejudice, a trial court may impose sanctions without a discovery order.