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Kickin' it with *Kennemur*

A *KENNEMUR* OBJECTION CAN STRIKE FEAR INTO THE HEART OF A TRIAL ATTORNEY. COULD *EASTERBY* HAVE HELPED YOU?

Have you read *Kennemur*? All the way through? Not just the Keycites? Have you read it recently? *Kennemur* is the origin of that one question you always ask at the end of an expert deposition. Or, if not, you may remember *Kennemur* as that sinking feeling in the pit of your stomach followed by a forehead slap as you realize you didn't ask the one question and now defense can add/amend their experts' opinions at the time of trial.

The truth? *Kennemur* is more nuanced than a simple, "If it was not said in the expert deposition, it is not coming in." Most do not know or understand the depth of *Kennemur* until forced to hurl "Objection, *Kennemur*" at opposing counsel – or until those same words send you frantically tearing through deposition transcript to find a way to defeat opposing counsel's objections.

Protecting yourself from getting burned by *Kennemur* while simultaneously preparing to use it to your advantage requires strategizing at expert disclosure, deposition, and trial. While the deposition questions are helpful, you can utilize *Kennemur* at all stages of expert discovery.

Avoiding trial by ambush: Limitations on expert opinion under *Kennemur*

The subject of the opinion *Kennemur v. State of California* (1982) 133 Cal.App.3d 907 is the use of an undisclosed expert opinion to impeach an opposing expert. In *Kennemur*, the defense expert opined that tire tracks in a roadway belonged to a certain vehicle. Plaintiff's expert did not testify about who the tire tracks belonged to, specifically opting at deposition to defer that opinion to another expert. Plaintiff then attempted to use this same expert to opine that the tire tracks did belong to a different vehicle. Plaintiff tried to qualify this new expert opinion as impeachment testimony, and argued that because it was impeachment, Plaintiff did not need to disclose it during expert depositions or in the expert disclosure.

The *Kennemur* court disagreed, and did not allow this testimony because merely contradicting another expert's opinion does not qualify as impeachment testimony. To qualify as an impeachment expert, the expert must provide testimony contradicting or proving false *a fact* upon which the defense expert relied in providing an opinion. Impeachment in the realm of expert testimony means negating the *basis* of the opinion, not disagreeing with the opinion itself. For example, in *Kennemur*, Plaintiff would have been permitted to call an expert or percipient witness to prove that the photographs relied upon by the defense expert were not reliable, or perhaps that the photographs were of a different area of the roadway entirely.

Applied more broadly, the idea is that a party's experts may not offer testimony at trial that exceeds the scope of their designation and/or deposition testimony if the opposing party has no expectation or notice that the expert will offer new testimony. This fits with the purpose of discovery generally: avoiding trial by surprise. Courts wish to avoid trial by ambush, including through expert discovery.

Crafting a proper expert disclosure

Using *Kennemur* to your advantage begins with your expert disclosure. Many attorneys believe that keeping their expert disclosure as vague as possible will give them more agility as they move through expert discovery. Not so. A vague expert disclosure sets you up for rounds of motions to continue trial or to allow for further discovery and the supplemental disclosure of new experts. You are better off providing something more specific than "Dr. X will testify regarding liability, causation, and damages."

Drafting a comprehensive expert disclosure means being prepared for trial (to the best of your ability) when drafting the initial disclosure, not a week before trial. Anticipate the issues and begin tackling them at the time of the disclosure. Attorneys often belatedly ask their experts to opine on hot-button issues such as the reasonable costs of past and/or future care, necessity of future treatment, or matters relating to causation. If such areas are not included in the expert disclosure, you risk not only a *Kennemur* objection at trial but also a motion to continue trial on the basis of surprise during expert discovery.

The more specific your expert disclosure, the more protection you have. It is difficult for opposing counsel to claim an opinion is new at the expert's deposition and necessitates further discovery if you have disclosed that your expert would be providing opinions in that realm in your initial expert disclosure. If defense counsel raises a *Kennemur* objection, a judge will be hard-pressed to grant that objection if defense counsel had ample notice of that territory of opinion because it was listed in your expert disclosure.

Also be mindful that your expert disclosure can limit your ability to call certain medical providers as non-retained experts at the time of trial. Many attorneys opt to list "employees and medical treatment providers at ABC Hospital" instead of specifying the

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individual treaters expected to potentially testify at trial. Even worse, some opt to rely on the catch-all "any and all of plaintiff's past/future medical treatment providers." Under Code of Civil Procedure section 2034 and *Kalaba v. Gray* (2002) 95 Cal.App.4th 1416, 1422-1423, this may result in the court precluding these vaguely designated non-retained treaters from testifying at trial. *Kalaba* holds that the spirit of Code of Civil Procedure section 2034 requires the parties to specifically list the names, addresses, and telephone numbers of all non-retained treaters. Specifically, *Kalaba* holds that the catch-all statement does not provide sufficient notice and cannot be relied upon when calling witnesses at trial.

Many judges will also require you to list the providers specifically before trial. Avoid digging for the names of treating providers at the last minute. The lack of preparation delays trial subpoenas and thus risks the treaters' unavailability at the time of trial. Should you need a provider to come to court and testify, and they are unavailable because you waited until the last minute to identify them, the judge may be quite unsympathetic to your plight and may opt to preclude them altogether. Further, the defense may raise issues that they were not identified until the eve of trial. Why take the risk? Providing at least the facility name may give you better protection, but best practice requires listing each individual doctor or other medical services provider.

Already disclosed experts? If your expert disclosure is vague, keep a list of all the areas you intend to ask your expert about at trial and be sure to inform opposing counsel of these areas at the time of deposition so they can ask questions as needed. You are better off being up-front about your experts' opinions.

Laying the foundation for a *Kennemur* objection in the expert deposition

Asking the right questions in the expert deposition is a protective measure and lays the foundation for your *Kennemur* objections at trial. Most attorneys have been taught to ask the classic, "Have we now covered all of your opinions and your basis for those opinions" question at the end of every expert deposition. Do not just trust that the magic question will give you all of the expert's opinions and their bases. Asking the defense expert whether you have all of their opinions can be fruitless. Why? Many defense experts are smart with this question. A response I've gotten many times is, "I've answered all of the questions you've asked," or "I don't know if you've asked me every question that would elicit my opinions."

After recovering from the massive annoyance and eye roll you want to let out, ask this instead: "Have I now gotten the gist of all of your opinions you anticipate giving at the time of trial?" Asking about the gist broadens the scope so that, if a *Kennemur* violation does occur at trial, the defense expert cannot say, "You didn't ask me that." You can also ask if they can think of any opinions or areas they have been asked to investigate. Take this opportunity to educate the expert, on the record, that it is not the questioning attorney's job to anticipate every opinion the expert could possibly give at trial, otherwise the deposition could take several weeks.

Have the expert disclosure with you at deposition. Look at all of the designated areas. Walk through each one slowly. If there are other areas of adjacent expertise, ask about those. Always ask retained medical experts if they intend to testify to the reasonable costs or provide opinions on billing. Ask whether they have actually reviewed any MRI films as opposed to just reviewing the reports. These are common areas where experts may try to do additional work after deposition. Asking specifically about these areas at deposition can help you limit or at least manage any additional testimony at trial.

Finally, remember that *Kennemur* fits with the principle of avoiding surprise at trial. Attorneys on both sides have an obligation to inquire into all designated areas. If, for example, your expert disclosure states that an expert will provide testimony regarding billing, and defense counsel does not ask said expert about billing, *Kennemur* may preclude your expert from testifying about the bills.

At the time of the deposition, you may think that questioning the expert yourself, or advising counsel that they failed to inquire about billing is strategically smart, because things may change between the deposition and trial. But consider that should you employ this move, you may effectively be precluding your own expert from testifying about these opinions should the judge grant a *Kennemur* objection on this issue. The risk of having those opinions excluded is too grave to justify the risk. If defense counsel does not inquire, advise defense counsel that there are opinions about billing that have not been explored, or do it yourself. Protect your expert and your client from a *Kennemur* objection at trial.

Admitting new opinions in light of *Kennemur*: *Easterby v. Clark*

Particularly in the age of COVID-19, many of us are dealing with trial delays extending several months or even years after the close of expert discovery. As plaintiff's counsel, you stare down a choice: Have your experts talk to your client again and deal with *Kennemur* or have your expert's opinions criticized as outdated and irrelevant. Fear not. You have an easy remedy under *Easterby*.

In *Easterby v. Clark* (2009) 171 Cal.App.4th 772, the plaintiff's expert testified at deposition that he did not have an opinion as to causation of the injury at issue. After his deposition, the plaintiff's expert received new information that changed his opinion. The plaintiff's counsel sent a letter to opposing counsel notifying them: (1) the plaintiff's expert had received new information; (2) based on that new information, the plaintiff's expert now had formed an opinion as to

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causation; and (3) offered to allow a second deposition of the plaintiff's expert on the causation opinion.

The defendant sought to preclude this testimony at trial under *Kennemur*, claiming this new opinion was an unfair surprise. The appellate court disagreed, and ultimately found that because opposing counsel was informed of the new opinions and declined to depose the plaintiff's expert on the new opinion, the defendant could not then cry foul and feign surprise at the time of trial.

Under *Easterby*, as long as you notify opposing counsel that your expert has new opinions and provide the opportunity for opposing counsel to depose your expert on the new opinions, those opinions will not be precluded at the time of trial. But that opportunity must be reasonable and sufficiently in advance of the trial. In *Easterby*, plaintiff's counsel notified opposing counsel of the new opinions three months before trial. While a court will likely permit one supplemental, brief deposition during trial, you would be pushing your luck to expect multiple depositions.

Easterby is not just your remedy in the event you have a new visit or new medical treatment that impacts your expert's opinions. *Easterby* can be your remedy if there are any new opinions at all. The moment you become aware of a new opinion, your safest course of action is to inform opposing counsel of the new opinion and give them the opportunity to take a second deposition.

Kennemur objections at trial

At trial, if you object on *Kennemur* grounds, the court will first ask if the expert witness testified to these opinions at deposition. If not, the analysis turns to "Was it asked?" Have your *Kennemur* questions flagged before you get to court and save yourself the headache of sorting through your deposition transcripts on the fly, praying the right questions are in there. You will need to point to: (1) your "close out questions" ("Have we discussed the gist of everything you intend to testify to at the time of trial?"); and (2) if you are seeking to exclude sub portions of a certain topic, where you asked the expert about that topic.

Anecdotally, one of the authors was recently able to preclude a significant portion of an expert's PowerPoint presentation. The expert's trial PowerPoint had several new facts and bits of information, including percentages and citations to publications and organizations. None of this came up at his deposition when he was asked about these topics. A *Kennemur* objection resulted in the trial judge reviewing the deposition transcript and finding that the expert was indeed asked about this topic and had not disclosed the new information in the PowerPoint. Direct examination was several hours shorter, and the jury cheered inside.

If you are responding to a *Kennemur* objection, the trial judge should overrule the objection if you can show: (1) the topic was listed in your Code of Civil Procedure section 2034.260 expert disclosure; (2) the topic was discussed, even briefly, at deposition; (3) the topic was discussed in one of your expert's writings; or (4) you have a post-deposition letter or email informing opposing counsel of new opinions.

Additional practical considerations at trial

Contemplating utilizing a *Kennemur* objection at trial? Keep in mind that the objection cannot be used as both a sword and a shield. Counsel who successfully pose a *Kennemur* objection often find themselves opening the door to the precluded testimony on cross-examination.

In a recent trial, counsel did not avail themselves of *Easterby* and failed to notify opposing counsel that a retained expert had a recent visit with the plaintiff and had formed new future treatment recommendations based on that visit. Opposing counsel objected to the new visit under *Kennemur*. The court offered plaintiff's counsel two options: suspend testimony to allow for a brief deposition on the new visit or forgo testimony on the new visit. Counsel for plaintiff opted to forgo the testimony on direct examination, sensing the expert would be able to provide the testimony regardless. On cross-examination, opposing counsel proceeded to question the expert witness about how it had been over a year and a half since he had seen the plaintiff. The court was quick to find that opposing counsel had opened the door. As counsel for plaintiff predicted, the court then permitted the expert witness to testify about the new visit and his new opinions.

Also keep in mind that *Kennemur* objections can be uncomfortable to make and address during trial. *Kennemur* objections often result in lengthy sidebars as attorneys shuffle through deposition transcripts trying to find the area of concern. Sometimes these objections cannot be foreseen and are made on the spot (the "wait a second, I've read this deposition 12 times and I don't remember this testimony happening" so you cross your fingers and object, for example).

Be prepared. Always have the full copy of the deposition transcript with the word index near you when an expert is testifying. Electronic copies allowing for a quick ctrl+f search can be helpful as well. Deposition summaries are crucial if a word index or document search does not provide clarity. Have copies of *Kennemur* at counsel table. If you know there will be new opinions from your expert and you gave opposing counsel the opportunity to depose your expert on those new opinions, have *Easterby* with you as well.

When you are deciding whether to make a *Kennemur* objection, consider how important it is. Making twelve *Kennemur* objections during defense counsel's examination may make you feel like a legal superstar inside, but it will irritate the jury and they will take it out on you. Raise the *Kennemur* objection if it is important, abandon it if the issue is petty. You appearing as if you've memorized the deposition transcript will only impress you.

Kennemur objections can be a scary thing. But, like most trial concerns,

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Kennemur objections are best managed by preparation, preparation, and then more preparation, starting with the expert disclosure 50 days before your initial trial date and diligently continued all the way through trial. The better you know your own case and what you need out of your experts in advance, the better you will be able to use *Kennemur* to your advantage before and during trial.

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