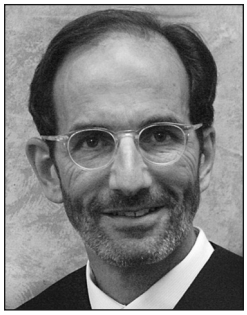
ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl REPORT
LOS ANGELES
SUMMER 2017

STAY CLEAR OF THE *KENNEMUR* OBJECTION


Hon. Lawrence P. Riff

I. A *Kennemur* Objection is a Showstopper

The two sure-fire ways to stop a trial dead are: spill coffee all over counsel table, or say "Objection, *Kennemur*." Both cause a mess.

The objection decoded means: "The Court should not permit the pending question to the expert witness because of discovery abuse. At deposition, she was fully interrogated about all opinions she had formed in this case. She testified that she disclosed all her opinions. Counsel did not say otherwise, nor did counsel later tell me the witness had new opinions. The pending question elicits a new opinion. My client is prejudiced because he is now unable effectively to cross-examine or to marshal competing expert evidence." A *Kennemur* objection thus implies ambush, sandbagging and foul play.

Because the objection asserts unfair surprise, it cannot be addressed pretrial. It arises in trial during a witness examination. It always requires a sidebar if not a full hearing. And it is an asymmetrical and awkward proceeding. The objection asserts: "Something pretrial [the expert proffering this opinion in discovery] did not happen." The assertion is easily made. Objecting counsel's mere words are enough. The burden shifts to the proponent of the witness to demonstrate, through documentary evidence and not mere words, that "yes *it did happen*." Or more awkwardly, "it did not happen but it *could have happened* had objecting counsel done her job correctly—she brought this on herself." It's a lot to bite off at sidebar.

Proof that the witness did proffer the opinion, or that opposing counsel unreasonably failed to inquire, often requires resort to a single question buried in voluminous deposition transcripts, expert reports, discovery disclosure documents and correspondence. Thus, a *Kennemur* objection frequently results in frenzy as counsel dig to find the needle in a haystack while the judge's and jury's patience wears thin. The objection is a major monkey wrench, and accordingly the potential for its abuse abounds. At a minimum, the objection badly interrupts the flow of the witness's evidentiary presentation. If sustained, it can devastate. It may lead to a judicial death sentence by excluding critical evidence.

It is serious business.

II. The Law Behind the Kennemur Objection

Kennemur v. State of California (1982) 133 Cal.App.3d 907, 917 (*Kennemur*) construed then-novel legislation requiring a civil litigant to identify experts expected to offer an opinion at trial and to serve on the opposing party a declaration describing " 'a brief narrative statement of . . . the general substance' " of that testimony. (Emphasis omitted.) Those same rules apply today. (See generally Code Civ. Proc., § 2034.210 et seq.) (The important ins, outs and pitfalls of expert demands and disclosures are beyond the scope of this article.)

Kennemur concerned an accident reconstruction expert's undisclosed opinion that plaintiff sought to elicit following the defense case. Plaintiff asserted, among other arguments, that he simply was not required to disclose the proposed opinion pretrial. The court disagreed:

> The Legislature has singled out the pretrial discovery of expert opinions for special treatment. When appropriate demand is made for exchange of expert witness lists, the party is required to disclose not only the name, address and qualifications of the witness but the general substance of the testimony the witness is expected to give at trial. In our view, this means the

> party must disclose either in his witness exchange list or at his expert's deposition, if the expert is asked, the substance of the facts and the opinions which the expert will testify to at trial. Only by such a disclosure will the opposing party have reasonable notice of the specific areas of investigation by the expert, the opinions he has reached and the reasons supporting the opinions, to the end the opposing party can prepare for cross-examination and rebuttal of the expert's testimony.
> (*Kennemur, supra*, 133 Cal.App.3d at p. 919, internal citations omitted.)

The California Supreme Court followed suit in *Bonds v. Roy* (1999) 20 Cal.4th 140, a medical malpractice case. The defendant's expert witness declaration stated the expert would testify only about damages. The witness specifically so confirmed at deposition. But late in the trial, the defendant sought to elicit the expert's opinion on the standard of care. The trial court sustained the plaintiff's objection for two reasons: (1) there was not enough time to adjourn the trial to reopen the expert's deposition, and (2) the resulting unfair surprise would prejudice the plaintiff. The Supreme Court affirmed: "[T]he very purpose of the expert witness discovery statute is to give fair notice of what an expert will say at trial. This allows the parties to assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on that subject area." (*Id*. at pp. 146-147.) Thus, "[w]hen an expert is permitted to testify at trial on a wholly undisclosed subject area, opposing parties similarly lack a fair opportunity to prepare for cross-examination or rebuttal." (*Id*. at p. 147; see also *Jones v. Moore* (2000) 80 Cal.App.4th 557, 565 ["When an expert deponent testifies as to specific opinions and affirmatively states those are the only opinions he intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial"]; but see *Easterby v. Clark* (2009) 171 Cal.App.4th 772, 780 [party permitted to elicit opinion undisclosed in deposition when opposing counsel was explicitly advised post-deposition of that opinion].)

III. Advice for Counsel

Upon hearing "objection, Kennemur," your trial judge will immediately look for evidence of ambush and undue prejudice. I suggest that the responding party (the proponent of the witness and the disputed opinion) faces only a modest burden to defeat the objection given judges' inclination for trials to be resolved on the merits, not discovery sanctions. The responding party must show only that the objecting party had reasonable advance notice of the opinion and an opportunity to learn of it. But the judge will not be satisfied by mere words. "Oh, I'm sure this all came up in deposition, Your Honor; my associate who was there just texted me that it did, he thinks." That won't cut it.

The responding party's goal is to get away from sidebar and back to eliciting killer expert testimony. Thus, on direct examination of an expert, counsel should have the following documents very handy—not in the trunk of a car or even in boxes in the back of the courtroom: (a) the disclosure documents, especially the "brief narrative statement of the general substance of the [expert's] testimony" (Code Civ. Proc., § 2034.260, subd. (c)(2)); (b) a full-sized copy of the deposition with word index and all exhibits; and (c) any post-deposition communications with other parties concerning any new or different opinions of the witness. Note well: the key inquiry is not simply whether the expert expressed the opinion at her deposition (although if so, that is dispositive). It is whether the objecting attorney was on reasonable notice that she could have asked the witness about such an opinion. A lawyer who, whether for strategic reasons or from carelessness, fails to inquire about a topic staring him in the face during the deposition is not unfairly ambushed later at trial by that issue.

Thus, when objecting counsel at sidebar says, "The pending question on topic X was never covered at the witness's deposition," the objection will be overruled if the responding party can show the judge: (a) a Code of Civil Procedure section 2034.260 declaration that states that the witness is expected to offer opinion testimony on topic X; (b) a transcript showing that topic X was indeed discussed, however briefly, at the deposition—this is why one wants a word index handy; (c) an expert's writing produced before or at the deposition, and marked as an exhibit, that addresses topic X; or (d) a post-deposition letter or e-mail from the proponent counsel to the objecting counsel to the effect, "The witness has a new opinion on topic X and in fairness, you are entitled to depose her further to learn about that. Please call to discuss the arrangements."

Indeed, it is preferable to cut off the objection even before getting to sidebar. Upon hearing the objection, the responding counsel should ask the court for a moment to

confer with counsel sotto voce. The proponent can then show objecting counsel what she would show the judge at sidebar. This should result in a "never mind" withdrawal of the objection. This happy outcome accomplishes two things. First, it demonstrates responding counsel's mastery of the courtroom—the jurors may not understand "*Kennemur*," but they will see that objecting counsel was wrong and that responding counsel promptly schooled him. Second, it all but eliminates the interruption to the flow of the witness's testimony.

Under the ounce of prevention rule, counsel shouldn't be cute when it comes to expert disclosure. Some counsel are as unspecific as possible in the Code of Civil Procedure section 2034.260 "statement of general substance" declaration, believing this cleverly "keeps options open." Thus, "The witness is expected to testify about liability, causation and/or damages." Very bad idea. At the *Kennemur* sidebar scrum, the responding counsel is immediately on the defensive, sullied by his opacity where the law calls for transparency. And it deprives the responding party of the single easiest answer to the *Kennemur* objection: "Your Honor, it's right there in my declaration—she was going to offer testimony on this topic. It's not my fault if counsel didn't ask any questions about it in deposition."

Yes, embrace transparency; it is your friend. It is a good practice to produce a short "summary of expected opinions" at the beginning of your expert's deposition. Mark it as an exhibit. Counsel who grumble that this is too much "helping the other side" misapprehend the situation: it is self-immunization against a potentially fatal disease at trial.

At the deposition, listen carefully for the *Kennemur* "cut-off" question: "Have we now discussed at least the gist of all the opinions you have formed in this case?" (Asking for "the gist" rather than "each and every opinion and the bases therefor" will save a great deal of expert pettifogging at the deposition.) Recall, if no "cut-off" question is asked at deposition, then no *Kennemur* objection may be made at trial. Thus, counsel making the objection must be ready to show the judge immediately where in the transcript that question was asked. (It is plainly insufficient to say "I'm sure it's in there Your Honor; I always ask it.") When the "cut-off" question is asked at deposition, and counsel realizes that for whatever reason, the witness's opinion on topic X has not yet come up, she should immediately pipe up: "Counsel, I also expect at trial the witness will offer an opinion on X. You may wish to inquire about that now." Examining counsel who says, "Sorry, too late, she already said she gave me all her opinions, and I need to get to the airport" is unlikely to prevail on that point at sidebar during trial.

Lastly, the moment you realize that your expert's opinion on topic X was not disclosed and the cut-off question was asked in deposition, notify opposing counsel in writing of the omitted or new opinion, and offer to make the expert available for further deposition. Consider offering to pay the associated expense; that shows good faith. Be prepared to cite *Easterby* to the trial judge at sidebar for the proposition that a party is permitted to elicit an opinion that was not disclosed in deposition when opposing counsel was explicitly advised post-deposition of that opinion. And if your expert has now developed critiques of the opposing experts' opinions that were not available to the expert at the time of her deposition, the safest course is to let opposing counsel know in advance and be prepared to disclose those critiques, perhaps in a short expert report. You may not be required to do so, but you may save yourself heartache at trial if you do.

Bottom line: keep your trial moving. Don't let it become a *Kennemur* quagmire.

Hon. Lawrence P. Riff is a Judge of the Los Angeles County Superior Court.