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Aug. 15, 2022

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Using the undisclosed expert witness at trial

We had a witness that was competent to interpret the test results and provide testimony concerning the fact that formed the basis of the opinion we wanted to challenge; however, we knew we could not get one of our existing experts to testify at trial beyond the scope of their deposition testimony.

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In the last month before the pandemic, I completed a jury trial where I had to use a previously

undisclosed expert. This was an expert intensive case where the depositions proceeded close to trial and well after the designation and exchange.

As a result of the various experts' schedules, a key defense expert was the last to be deposed. One of the "facts" he relied on was that the soil underlying the subject property was highly expansive. However, he had not performed any testing to determine the underlying fact. This "fact" was actually an assumption based on his investigation of information concerning the soil conditions in the general area.

As I was preparing exhibits for witness testimony and for cross examination, I discovered that early in the case (I was not the original attorney handling the matter), a soil expansion test had been conducted on site, and the soil was not highly expansive. The test result was produced along with volumes of other data; however, it was not in the file the expert produced at his deposition, and not part of his 333-page report.

By this time, all expert depositions had been completed and all the attorneys had asked each expert the obligatory closing questions at each deposition: Have you testified about all your opinions; have you completed all of your work on this assignment; is there additional work you wanted to perform; is there any additional work you will do before trial; etc.

For reasons too in-depth to explain in this article, none of our experts had used or relied on the soil test. I had to decide whether to have one of my experts testify, get a new expert, or try to impeach with cross examination alone. I knew I could not simply cross examine him with the test results because I had no one to counter what I am sure would have been his interpretation of what the test results meant and how those results were consistent with his opinion.

I decided not to use a previously designated expert. Code of Civil Procedure Section 2034.260 requires all parties to exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. Subsection (b) provides the guidelines for what should be exchanged, and Section 2034.270 provides for production of expert reports. None of our existing experts would work.

The formal exchange can be supplemented when another party exchanges an expert on a subject that was not included in the supplementing party's exchange. For example, when both sides exchange structural engineering experts, but only one exchanges an architect. The party without the architect can supplement with one, so long as it is done within 20 days as described in Section 2034.280. The problem we faced was that there was no time to supplement, and this was not a new subject. We could not use one of our existing experts because they had all been deposed and stated the full extent of their opinion and planned testimony. Opposing counsel was experienced and had asked all the necessary questions to confirm there was nothing left that was not addressed at the deposition.

The case law is clear that an expert's trial testimony is limited to what they testified to at deposition (if opposing counsel asked the correct questions which he did here). In *Jones v. Moore*, 80 Cal.App.4th

557, 565 (2000), the court held expert opinion that went beyond opinions stated at deposition were properly excluded, where the expert stated that no other opinions would be expressed at trial. In *Bonds v. Roy*, 20 Cal.4th 140, 148 (1999), the California Supreme Court found no error in precluding an expert from testifying at trial as to the standard of care of physician defendant where the expert declaration said the expert would address only the issue of damages.

We had a witness that was competent to interpret the test results and provide testimony concerning the fact that formed the basis of the opinion we wanted to challenge; however, we knew we could not get one of our existing experts to testify at trial beyond the scope of their deposition testimony. In addition to the case law, the Code is clear. Section 2034.300 requires the court to exclude an expert opinion not properly exchanged. We were also outside the window to supplement. Arguably, you can request leave; but that was not the best option.

The option I settled on is described in Code of Civil Procedure Section 2034.310(b). Rather than risk the argument that one of my existing experts would work because (s)he was or was not only providing impeachment testimony, I opted for an expert not previously designated. Section 2034.310(b) provides: A party may call as a witness at trial an expert not previously designated by that party if [. . .] that expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial.

Impeachment must address the falsity of a foundational fact relied on by the opposing party's expert. It is not rebuttal. All impeachment is rebuttal, but not all rebuttal is impeachment. (*Kennemur v. State of California*, 133 Cal.App.3d 907, 916 (1982).) *Kennemur* is the key case relied on when asking the court to resolve the foundational fact issue. An undisclosed expert witness called for impeachment purposes is only permitted to testify that a foundational fact relied upon by a prior expert is either incorrect or nonexistent. (*Kennemur*, at 925.)

The *Kennemur* court explained that a broad definition of "impeachment" meaning "to dispute, disparage, deny, or contradict" arguably supported allowing the proffered testimony; however, "calling an expert witness to express an opinion contrary to that expressed by another expert witness is not the 'impeachment' contemplated by the code." (*Kennemur* looked at the language of section 2034(m), the predecessor to 2034.310, the Black's Law Dict. definition of impeachment and Evidence Code Section 780.)

In *Kennemur* the testimony was disallowed; but the Court also addressed the type of impeachment that would be permitted. In *Pina v. County of Los Angeles*, 38 Cal.App.5th 531 (2019), the court also discussed what was permitted and not permitted as impeachment. In *Pina*, the undesignated expert was permitted to testify that the designated expert was incorrect in his testimony about what an MRI showed - a foundational fact; but was not permitted to testify that recommended surgery would not be medically justified - a contradictory opinion about the application of medical science.

Section 2034.300 provides for the exclusion of expert testimony not properly exchanged. There are remedies for exceptional circumstances; here however our experts had clearly stated the limits of their

testimony. Since the test result was already disclosed and presumably available to all experts, including ours before their depositions, *Kennemur* was the best way to go.

That said, when you can, the better course is to disclose. As the Rutter Group explains under the heading "Game Playing," relief will not likely be granted where the party seeking relief made a deliberate, tactical decision not to disclose the expert earlier (e.g., keeping an expert "in the closet" until after opposing experts have testified, in an effort to "sandbag" the opposing party). (Civil Procedure Before Trial (the Rutter Group 2019) ¶ 8:1747, citing *Kennemur* at 920; *Sprague v. Equifax, Inc*., 166 CA3d 1012, 1039-1040 (1985).)

If you need to impeach, a previously undisclosed expert will work. Section 2034.310 specifically allows it and *Kennemur* decided in 1982 is still a good explanation of the dos and don'ts.

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