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When It Is All Not Said And Done.....Court Of Appeal Rules  
That Expert Witness Will Not Be Precluded From Testifying As To  
Matters Not Touched On In Deposition Where Opposing Counsel Is  
Provided Notice Following Completion Of Deposition And Such  
Notice Is Given A Reasonable Amount Of Time Before Trial

By: Edward F. Morrison, Jr., Esq.  
Brett C. Drouet, Esq.

For about twenty-five years, the trial courts of California have limited an expert's testimony to those matters which were testified to in deposition by the witness. This rule arises from the California Court of Appeal, Fifth District decision in Kennemur v. State of California (1982) 133 Cal.App.3d 907 ("Kennemur") wherein the Court ruled that a party could not call witnesses to testify on subject matters which were not described in the disclosure of general substance of expert testimony now found in Code of Civil Procedure section 2034.260. This decision based rule was expanded upon in a number of published opinions including Jones v. Moore (2000) 80 Cal.App.4th 557 (case where legal malpractice plaintiff expert was precluded from testifying as to standard of care matters not discussed in deposition) and Bonds v. Roy (1999) 20 Cal.4th 140 (medical malpractice case where defense expert testified he would only testify as to damages and was later precluded from testifying as to standard of care).

In an opinion published February 5, 2009, the California Court of Appeal, Second District in Easterby v. Clark (2009) DJDAR 2856 ("Easterby") ruled that, while Kennemur was still good law, it would not apply where the opposing counsel was provided adequate notice, following the expert deposition, that an expert had expanded his or her scope of opinions.

The facts of Easterby are routine enough. The plaintiff suffered injuries on March 2, 2004 at a dental office when a dental assistant stepped on a wire connected to an x-ray sensor that was in the plaintiff's mouth. Suit was later filed for malpractice against the dental assistant, the dentist and the dental group. In September 2006, the defendants took the deposition of the plaintiff's orthopedic doctor, a Dr. John Regan. At that time, Dr. Regan testified that he did not have any opinions as to the March 2, 2004 accident or whether injuries sustained at that time resulted in the need for any later surgery.

In January 2007, three months before trial, plaintiff's counsel sent correspondence to defense counsel indicating that Dr. Regan had signed his transcript without making changes, but stated that there was a mistake in the records and that Dr. Regan would testify that the March 2, 2004 incident was a cause for the need for later surgery. Defense counsel did not take the deposition of Dr. Regan thereafter and, in a pre trial motion, moved to exclude Dr. Regan's testimony citing the rule in Kennemur. At trial, Dr. Regan was permitted to testify subject to the defendants' pre trial motion. After Dr. Regan testified, the defendants moved to exclude Dr. Regan's testimony on causation, which motion was granted. Thereafter, the defendants moved for nonsuit, which was also granted.

On appeal, the Court of Appeal reversed. The Court ruled that while the rule of exclusion in Kennemur is still good law, it limited the Kennemur rule to one of reasonable notice and ruled that since the defense was made aware of Dr. Regan's additional opinions, Dr. Regan should have been permitted to testify as to causation. The Court of Appeal also ruled that it made no difference that Dr. Regan had read and signed his deposition transcript without making changes.

The Easterby decision is an important case, and not one limited to the facts of that matter. It will apply in any case where expert witness testimony is required. Therefore, if notice of a change of scope in testimony is made, opposing counsel should take reasonable steps to determine what the new testimony is or run the risk of having the expanded scope of testimony admitted at trial without the benefit of pre trial examination.

About the Authors: Edward F. Morrison, Jr. is the founding partner and Brett C. Drouet is a partner of The Morrison Law Group, a professional corporation. Their biographies can be viewed at [www.morrisonlawgroup.com](http://www.morrisonlawgroup.com).

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