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Joel E. Boxer is a founding partner of Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg PC, a Los Angelesbased law firm devoted to litigation.

Retrials happen. Commonly ordered following a reversal on appeal, a hung jury, or the grant of a motion for new trial, retrials present trial lawyers with special challenges: Should the same witnesses and documents be presented or should the evidence be refocused? Should the opening argument be rewritten because of juror reaction in the first trial? Should a different representative of the corporate party attend the trial? Should the trial team be recast?

In addition to these strategic concerns, a retrial is a minefield in the arena of discovery, especially expert discovery.

In 2000, the state Supreme Court resolved a conflict within the Court of Appeal on the question of whether additional discovery can be initiated without court permission when there is a retrial. In Beverly Hospital v. Superior Court, 19 Cal. App. 4th 1289 (1993), the 4th District Court of Appeal held that, notwithstanding the language of Code of Civil Procedure Section Â 2024(a) (now Section 2024.030) providing that the Deadline for expert discovery runs from the "date initially set for the trial," discovery is Re-opened when a retrial is ordered and the parties are free to initiate new discovery, Including expert discovery, without leave of court.

Five years later, another division of the 4th District expressly rejected Beverly. In Fairmont Insurance Company v. Superior Court, 66 Cal. App. 4th 1294 (1998) (review granted Dec. 22, 1998), another division of the same appellate court reasoned that the statutory phrase "date initially set for the trial" meant there could be only one initial trial date and that initial trial date must have already passed sometime before the first trial took place (and, therefore, before any retrial was ordered). In Fairmont the Court of Appeal ruled that all discovery deadlines are calculated throughout the pendency of a suit based on a single, initial trial date.

The state Supreme Court granted review in Fairmont to resolve its manifest conflict with Beverly. In a 5-2 opinion written by Justice Stanley Mosk, the Supreme Court expressly adopted Beverly and overruled Fairmont. 22 Cal. 4th 245 (2000).

Mosk's opinion in Fairmont held that the statute is ambiguous and that the clock for discovery starts anew when there is a new trial for any reason, although the statutory limits still apply on the quantity of discovery available to all litigants. Under Fairmont, absent leave of court, depositions of individuals are still limited to one and special interrogatories and most requests for admissions are likewise limited for the entirety of a case, whether or not they are served before or after the retrial order. In dissent, Justice Joyce Kennard opined that since, in her view, the discovery statute provides for a single "initial" trial date, a litigant seeking more discovery after a retrial order could and should apply to the trial court if circumstances warranted additional discovery.

While Fairmont clearly resolved the appellate split over whether any discovery is permitted when a retrial is ordered, it did not in effect compel such discovery. That issue was presented in Hirano v. Hirano, 158 Cal. App. 4th 1 (2008). In Hirano, before

the initial trial date in 2002, the defendant served on the plaintiff a request for designation of expert witnesses. The plaintiff did not respond to the expert designation request, thus forfeiting his right to call an expert witness at trial or to seek leave to designate an expert at a later date. The plaintiff's complaint was dismissed before trial for failure to prosecute, but the appellate court later reversed and sent the case back to the trial court for trial. No party served any discovery after the remittitur.

Before the 2005 trial, the plaintiff announced he planned to introduce an expert witness - one not disclosed by him in response to the original expert witness designation request served before the 2002 trial date. On the defendant's motion in limine, the trial court excluded the proffered expert testimony, concluding that the plaintiff, by not responding to the original expert designation discovery request served before the 2002 initial trial date, had no right to call any expert witness at the trial in the same case set for 2005.

The Court of Appeal reversed. Justice Laurence Rubin held that litigants on a retrial are not bound by any expert designation request served before the first trial, i.e., before the initial trial date for the first trial. He held also that, unless a new expert designation request were served after a new trial was ordered, any litigant was free to present new expert witness testimony through new experts even though such experts and their proposed expert testimony were not disclosed in the original exchange of expert witness information.

The Court of Appeal reasoned in Hirano that issues are often narrowed or clarified when a retrial is ordered and it would be inequitable for the court to hold the parties to their pre-first trial designation of expert witnesses when the case may, with the passage of time, have changed in scope or availability of expert witnesses. The Hirano opinion is not grounded in any statute but relies on the unstated assumption that Fairmont anticipated that a new expert designation request should be anticipated when there is a retrial.

Hirano remains valid precedent; although it has not been cited in subsequent published appellate decisions it has been referenced in unpublished opinions. Hirano appears to have received no notoriety at the time it was issued six years ago and it has received scant attention in the popular treatises.

Hirano teaches two lessons.

First, litigants can be creative following a retrial order about finding new expert witnesses or new areas of testimony for expert witnesses previously designated because they are not limited by their prior responses (or lack thereof) to expert disclosure requests served before the initial trial date.

Second, if a trial lawyer does not want to be surprised at a retrial by an expert witness she has never heard of or one who testifies about issues and opinions not previously disclosed or scrutinized in an expert deposition, the trial lawyer should always promptly serve an expert designation request following a retrial or new trial order and make sure the new "initial" trial date is set sufficiently far in the future to allow time for the expert discovery. Hirano simply compels that practice.

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