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Joel Boxer Authors Daily Journal Article on Expert Discovery in Retrials

In his January 23, 2014 article "Retrials Happen" published in the *Daily Journal*, founding partner Joel Boxer discusses the strategic concerns trial lawyers face in a retrial, especially expert discovery.

In the 1993 case *Beverly Hospital v. Superior Court*, the 4th District Court of Appeal held that discovery is re-opened when a retrial is ordered, thus leaving parties free to initiate new discovery without leave of court. In 1998, another division of the same appellate court disagreed; it ruled in *Fairmont Insurance Company v. Superior Court* that all discovery deadlines are calculated throughout the pendency of a suit based on a single, initial trial date. The California Supreme resolved this split in 2000 in *Fairmont Insurance Company* by reversing the appellate decision and expressly adopting *Beverly Hospital's* holding that discovery is reopened when a retrial is ordered. In essence, *Beverly Hospital* ruled that there can be multiple "initial" trial dates for the same case.

The 2000 *Beverly Hospital* Supreme Court decision did not mandate that discovery should always be served after a retrial is ordered. That is the implication of the 2005 decision in the Court of Appeals in *Hirano v. Hirano.* In *Hirano*, the appellate court held that unless a new expert designation request was served after a retrial was ordered, any litigant was free to present at the retrial new expert witness testimony through new or previously designated experts even though such experts and their proposed expert testimony were not disclosed before the discovery deadline for the original trial date. Mr. Boxer notes: "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 where there is a retrial."

Mr. Boxer draws two conclusions from *Hirano*: first, litigants can be creative following a retrial order in finding new expert witnesses or new areas of testimony for previously designated expert witnesses; second, "The trial lawyer should always promptly serve an expert designation request following a retrial or a 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."

Article- Retrials Happen (January 23, 2014)