

**JUDICIAL COUNCIL OF CALIFORNIA**  
**ADMINISTRATIVE OFFICE OF THE COURTS**  
455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Policy Coordination and Liaison Committee  
Hon. Marvin R. Baxter, Chair  
Civil and Small Claims Advisory Committee  
Hon. Lee Smalley Edmon, Chair  
Case Management Subcommittee  
Patrick O'Donnell, Committee Counsel, 415-865-7665,  
patrick.o'donnell@jud.ca.gov

DATE: October 26, 2007

SUBJECT: Trial Preference: Updating Outmoded Statutory Language (Code Civ. Proc., §  
36) (Action Required)

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Issue Statement

Code of Civil Procedure section 36, on trial preferences, contains anachronistic references to the "memorandum to set" and the "at-issue memorandum." The Judicial Council should sponsor legislation to revise the language and bring the statute into accord with contemporary practices and procedures.

Recommendation

The Policy Coordination and Liaison Committee (PCLC) and the Civil and Small Claims Advisory Committee recommend that the Judicial Council sponsor legislation to amend Code of Civil Procedure section 36 to delete obsolete language and modernize the statute.

The text of the proposed legislation is attached at page 3.

Rationale for Recommendation

The references in the trial preference statute, Code of Civil Procedure section 36, to "the memorandum to set" and "the at-issue memorandum" are outmoded and obsolete. Section 36 was last amended in 1990. Since that time, the law on civil case management has developed extensively.

For instance, in 2001 the Judicial Council adopted the *Case Management Statement* (form CM-110) as a mandatory form.<sup>1</sup> This new form supplanted at-issue memorandums, memorandums to set, status conference statements, and many other pretrial forms that varied widely throughout the state. Thus, section 36's references to "the memorandum to set" and "at-issue memorandum" for establishing the appropriate timing of a request for trial preference are out of date and confusing.

Amending Code of Civil Procedure section 36 as proposed will bring the statute into accord with contemporary practices and procedures. Under the amended statute, litigants would be able to request a trial preference by motion once all essential parties have been served with process or appeared (subdivision (c)(1)), or at any time after a litigant reaches age 70 (subdivision (c)(2)). The amendments would update, but otherwise preserve, the provision giving courts discretion to grant a motion for preference based on a party's grave illness or medical condition (subdivision (d)), as well as the broad provision that gives courts discretion to grant preference at any time on a showing that the interests of justice will be served (subdivision (e)).

Finally, subdivision (f) would be amended to provide that, after a motion for preference is granted, the court—rather than the clerk—shall set the matter for trial. This conforms to contemporary practices and procedures for trial setting.

#### Alternative Actions Considered

The preference statute could be left unchanged. But for reasons explained above, the PCLC and Civil and Small Claims Advisory Committee believed that it would be better to eliminate the obsolete language in order to avoid any confusion.

#### Comments From Interested Parties

This legislative proposal was circulated for public comment in spring 2007. Four comments were submitted on the proposal. All of the commentators supported the proposed legislation. A chart summarizing the public comments and the advisory committee's responses is attached at page 4.

#### Implementation Requirements and Costs

The proposed amendment should improve the statutory procedures for handling motions for preference by making these procedures clearer and consistent with other current law and practices.

#### Attachments

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<sup>1</sup> Item 9 of the *Case Management Statement* (form CM-110) asks parties to state whether a case is entitled to trial preference and on what grounds; however, under the proposed amended section 36 this would not constitute a request for trial preference. A separate motion for trial preference would still need to be filed.

Section 36 of the Code of Civil Procedure would be amended to read:

1    **§ 36**

2  
3    (a)–(b) \* \* \*

4  
5    (c) Unless the court otherwise orders, ~~notice of a motion for preference shall be~~  
6       ~~served with the memorandum to set or the at issue memorandum by the party~~  
7       ~~serving the memorandum, or 10 days after such service by any other party; or~~  
8       ~~thereafter during the pendency of the action upon the application of a party who~~  
9       ~~reaches the age of 70 years.:~~ (1) a party may file and serve a motion for  
10       preference supported by a declaration of the moving party that all essential parties  
11       have been served with process or have appeared; or (2) at any time during the  
12       pendency of the action, a party who reaches the age of 70 years may file and  
13       serve a motion for preference.

14  
15    (d) In its discretion, the court may also grant a motion for preference ~~served with the~~  
16       ~~memorandum to set or the at issue memorandum and that is~~ accompanied by clear  
17       and convincing medical documentation which concludes that one of the parties  
18       suffers from an illness or condition raising substantial medical doubt of survival  
19       of that party beyond six months, and which satisfies the court that the interests of  
20       justice will be served by granting the preference.

21  
22    (e) Notwithstanding any other provision of law, the court may in its discretion grant a  
23       motion for preference ~~served with the memorandum to set or the at issue~~  
24       ~~memorandum and that is accompanied~~ supported by a showing ~~of cause~~ which  
25       satisfies the court that the interests of justice will be served by granting this  
26       preference.

27  
28    (f) Upon the granting of such a motion for preference, the ~~clerk~~ court shall set the  
29       matter for trial not more than 120 days from that date and there shall be no  
30       continuance beyond 120 days from the granting of the motion for preference  
31       except for physical disability of a party or a party's attorney, or upon a showing  
32       of good cause stated in the record. Such a continuance shall be for no more than  
33       15 days and no more than one continuance for physical disability may be granted  
34       to any party.

35  
36    (g) \* \* \*

**LEG07-03**

**Trial Preference: Updating Outmoded Statutory Language (Code of Civ. Proc., § 36)**

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee's Response</b>
1.	Joseph L. Chairez President Orange County Bar Association	A	N	This proposed change appears to simply remove terms that are not used anymore, specifically, "Memorandum to set or the at-issue memorandum." An "at-issue memorandum" is defined as: A document that states that all parties to a case have been served, that the parties disagree (or are "at issue") over one or more points to be resolved at trial, and how much time the parties estimate will be required for trial. These terms are no longer practicable, and therefore, this seems to be a positive change.	The committee agreed that the amendments will remove obsolete terms and will constitute a positive change in the statute.
2.	Superior Court of California, County of Los Angeles	A	Y	No specific comments.	No response required.
3.	Pam Moraida Program Manager Superior Court of California, County of Solano	A	N	No specific comments.	No response required.
4.	Michael M. Roddy Court Executive Officer Superior Court of California, County of San Diego	A	N	No specific comments.	No response required.