

Invitation to Comment

Title	Trial Preference: Updating Outmoded Statutory Language (amend Code of Civ. Proc., § 36)
Summary	The proposed amendments to section 36 of the Code of Civil Procedure on trial preferences would remove anachronistic references to “the memorandum to set or the at-issue memorandum” and bring the statute into accord with contemporary practice and procedure.
Source	Civil and Small Claims Advisory Committee Hon. Lee Smalley Edmon, Chair
Staff	Patrick O’Donnell, Committee Counsel, Civil and Small Claims Advisory Committee, 415-865-7665, patrick.o’donnell@jud.ca.gov
Discussion	<p>The references in the trial preference statute, Code of Civil Procedure section 36, to “the memorandum to set or the at-issue memorandum” are outmoded and obsolete. Section 36 was last amended in 1990. In 2001 the Judicial Council adopted <i>Case Management Conference Statement</i> (form CM-110¹) as a mandatory form that supplanted—and preempted—at-issue memoranda, memoranda to set, and many other pretrial practices and rules that varied widely throughout the state. The references in section 36 to “the memorandum to set or the at-issue memorandum” in establishing the appropriate timing of a request for trial preference are out-of-date and confusing.</p> <p>Amending Code of Civil Procedure section 36 as proposed will bring the statute into accord with contemporary practice and procedure, which no longer call for memoranda to set or at-issue memoranda. Instead, litigants would be permitted to request a trial preference by motion once all essential parties have been served with process or appeared (subsection (c)(i)) or at any time after a litigant reaches age 70 (subsection (c)(ii)). The amendment would update, but otherwise preserve, the provision giving courts the discretion to grant a motion for preference based on a party’s grave illness or medical condition (subsection (d)), as well as the catch-all provision that gives courts the discretion to grant preference at any time on a showing that the interests of justice will be served (subsection (e)).</p>
	Attachment

¹ 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, but under amended section 36 this would not constitute a motion for, or a grant of, trial preference.

Section 36 of the Code of Civil Procedure would be amended, effective January 1, 2009, to read as follows:

1 § 36. (a) A party to a civil action who is over the age of 70 years may petition the
2 court for a preference, which the court shall grant if the court makes all
3 of the following findings:

4
5 (1) The party has a substantial interest in the action as a whole.

6
7 (2) The health of the party is such that a reference is necessary to prevent
8 prejudicing the party's interest in the litigation.
9

10 (b) A civil action to recover damages for wrongful death or personal injury shall
11 be entitled to preference upon the motion of any party to the action who is
12 under the age of 14 years unless the court finds that the party does not have a
13 substantial interest in the case as a whole. A civil action subject to
14 subdivision (a) shall be given preference over a case subject to this
15 subdivision.
16

17 (c) Unless the court otherwise orders, ~~notice of a motion for preference shall be~~
18 ~~served with the memorandum to set or the at issue memorandum by the party~~
19 ~~serving the memorandum, or 10 days after such service by any other party; or~~
20 ~~thereafter during the pendency of the action upon the application of a party~~
21 ~~who reaches the age of 70 years. (i) a party may file and serve a motion for~~
22 ~~preference supported by a declaration of the moving party that all essential~~
23 ~~parties have been served with process or have appeared; or (ii) a party who~~
24 ~~reaches the age of 70 years may file and serve a motion for preference at any~~
25 ~~time during the pendency of the action.~~
26

27 (d) In its discretion, the court may also grant a motion for preference ~~served with~~
28 ~~the memorandum to set or the at issue memorandum and that is~~ accompanied
29 by clear and convincing medical documentation which concludes that one of
30 the parties suffers from an illness or condition raising substantial medical
31 doubt of survival of that party beyond six months, and which satisfies the
32 court that the interests of justice will be served by granting the preference.
33

34 (e) Notwithstanding any other provision of law, the court may in its discretion
35 grant a motion for preference ~~served with the memorandum to set or the at-~~
36 ~~issue memorandum and that is accompanied~~ supported by a showing of cause
37 which satisfies the court that the interests of justice will be served by granting
38 this preference.
39

40 (f) Upon the granting of such a motion for preference, the clerk shall set the
41 matter for trial not more than 120 days from that date and there shall be no

1 continuance beyond 120 days from the granting of the motion for preference
2 except for physical disability of a party or a party's attorney, or upon a
3 showing of good cause stated in the record. Such a continuance shall be for
4 no more than 15 days and no more than one continuance for physical
5 disability may be granted to any party.

6
7 (g) Upon the granting of a motion for preference pursuant to subdivision (b), a
8 party in an action based upon a health provider's alleged professional
9 negligence, as defined in section 364, shall receive a trial date not sooner
10 than six months and not later than nine months from the date that the motion
11 is granted.

Item LEG07-03 Response Form

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

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

Address: Ms. Camilla Kieliger,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102
Fax: (415) 865-7664 **Attention:** Camilla Kieliger
Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Wednesday, June 20, 2007

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

Circulation for comment does not imply endorsement by the Judicial Council, the Rules and Projects Committee, or the Policy Coordination and Liaison Committee. All comments will become part of the public record of the council's action.