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Expediting trial through motions for preference

BEFORE YOU RUSH TO BRING A MOTION FOR PREFERENCE, BE AWARE THAT PREFERENCE CASES ALSO HAVE DRAWBACKS

When a plaintiff's age or health makes an early trial date critical, preference in trial setting is a powerful tool. A case granted preference has enormous advantages: the trial date is expedited, and the trial date will be certain because courts are very limited in their ability to continue the trial date in a preference case. This also moves your case to the front of the line when assigning open courtrooms for trial.

Before you rush to bring a motion for preference, be aware that preference cases also have drawbacks. Because the trial date is expedited, your trial preparation will be, too, and the usual defense delay tactics will be especially difficult to fight. You will lose the ability to request a meaningful trial continuance, even if it is necessary for case preparation. And, if your preference motion is based on the plaintiff's age or medical prognosis, you risk lowering your damages. Consider whether you have a basis to seek preference, and whether the pros and cons of an expedited trial date will best serve your client's interests, before proceeding.

Preference motions generally

First, determine whether there is a basis for preference in your case. There are three main grounds for granting preference: the moving party is at least 70 years old and in ill health (Code Civ. Proc., § 36(a)); the moving party in a personal injury or wrongful death matter is under the age of 14 (§ 36(b)); or the moving party is unlikely to survive beyond another six months (§ 36(d)). The statute also has a catch-all provision allowing a court to grant preference "that is supported by a showing that the interests of justice will be served by granting the preference." (§ 36(e).) Finally, if the civil action is based on damages committed during the commission of a felony, for which the defendant has been convicted, the civil action is entitled to preference, though not a guaranteed trial date. (**Note:** All statutory references are to the California Code of Civil Procedure unless otherwise noted.)

Sections 36(a) and 36(b) are mandatory; the court "shall" grant preference if it finds all the requirements are met. (*Peters v. Superior Court* (1989) 212 Cal.App.3d 218, 224; *Swaithes v. Superior Court* (1989) 212 Cal.App.3d 1082, 1085; *Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 84; *Koch-Ash v. Superior Court* (1986) 180 Cal.App.3d 689, 694.) Conversely, Section 36(d) and Section 36(e) are discretionary, and the court "may," but is not required to grant preference to a party meeting their requirements. (*Peters* at 223.) You can and usually should, seek preference under

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multiple provisions; for example, if the plaintiff is an elder who is also terminally ill, move for preference under both Section 36(a) and Section 36(d).

You should move for preference as soon as it is practicable to do so, but as long as you are not dilatory, a motion can be brought at any time during the case. For example, if your plaintiff turns 70 during the pendency of the case, he or she is now eligible to move for preference based on age. (§ 36(c)(2).) Plaintiffs whose health deteriorates can seek preference on the grounds that they now have no more than six months to live. The only requirement is that all essential parties must have been served with process or appeared, and your motion must include a declaration saying so. (§ 36(c)(1).)

While the statute clearly contemplates that a party moving for preference is the same one whose age, health, or other situation deserves preference, there does appear to be leeway to move for preference based on the health of an *opposing* party where the interests of justice so require. (See, e.g., § 36(d).) Such a showing would almost certainly be opposed by the defense, and it would be a difficult burden to demonstrate that the interests of justice require forcing your opposing party into an expedited trial schedule.

C.C.P. section 36(a) – Advanced age

While it is no longer true that elders are entitled to preference based solely on their age, the law strongly favors granting preference when a party is 70 years of age and is in ill health. The primary purpose in enacting § 36 was to ensure an early trial date for persons who, because of their advanced age or serious medical problems, might die or become incapacitated before their cases come to trial. (*Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 532, fn. 12.) This is particularly critical since damages for pain and suffering are extinguished when the plaintiff dies, so that these damages have to be realized during the plaintiff's lifetime or not at all. (*Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 88-89; see also, *Williamson v. Plant Insulation Co.* (1994) 23 Cal.App.4th 1406, 1414 and *Cadlo v. Metalclad Insulation Corporation* (2007) 151 Cal.App.4th 1311, 1318.) In fact, failure to timely move for preference under § 36(a) could be malpractice where it deprives the plaintiff of the substantive right to obtain those damages. (*Granquist v. Sandberg* (1990) 219 Cal.App.3d 181, 187-188.)

Under Section 36(a), when a party age 70 or older moves for preference, the court must grant the request if it finds both that (1) the party has a substantial interest in the action as a whole, and (2) the party's health is such that preference is necessary "to prevent prejudicing the party's interest in the litigation." This is the 'highest' form of preference, the statute explicitly ranks it above cases granted preference under Section 36(b).

The first requirement is straightforward; your plaintiff either is or isn't at least 70 years old at the time you move for preference.

The second requirement is also very easy to meet; a plaintiff obviously has a substantial interest in the action as a whole. Only if the party in question is peripheral to the case, such as a nominal defendant, is the court likely to question whether your client meets this requirement.

The third requirement is also lenient – at least on paper. You do not need to show that the plaintiff is in extremely poor health or dying, although these are certainly reasons to grant preference; as long as speeding up time to trial is necessary to "prevent prejudicing" his or her interest in the case, you have met this requirement.

Evidence regarding the plaintiff's condition can be a simple declaration by an attorney, based on information and belief, regarding the plaintiff's medical diagnosis and prognosis. The declaration is not admissible for any purpose other than the preference motion. (§ 36.5.) This can include your personal observations of your client's health and medical condition, and statements from medical records based on information and belief. However, the de facto requirement of proof may end up being higher, especially if you are in a court that has multiple preference cases on its calendar and is reluctant to add more. If the plaintiff's treating physician is cooperative, a signed declaration explaining the patient's symptoms, course of treatment, and injuries or disease can be very powerful in convincing a judge that preference is appropriate. This is particularly true if you are requesting trial to be set less than 120 days from the hearing, and need to prove that there is a medical necessity to set trial even sooner.

C.C.P. section 36(b) – Below the age of 14

In a personal injury or wrongful death case, a court may grant preference if a party is under 14 years of age. The intent is to ensure that children have timely access to the courts for relief, particularly in cases where they have suffered personal injury or a parent's death. (*Peters* at 226.) While preference in such cases is mandatory, they come in second to Section 36(a) preference cases on the court's calendar.

Meeting the requirements of Section 36(b) is fairly straightforward; you show evidence that the plaintiff is under the age of 14. The statute is worded such that you do not have to affirmatively show that the plaintiff has an interest in the case. While the wording of the statute suggests that the "substantial interest in the case as a whole" prong is a negative – the court grants preference *unless* the plaintiff's interest is peripheral – it is wise to present affirmative evidence of your plaintiff's stake in the case. If the plaintiff was personally injured, or is closely related to the decedent in a wrongful-death case, that should be sufficient.

C.C.P. section 36(d) – Dying plaintiff

A plaintiff of any age who is dying may be granted preference under Section 36(d). Unlike a Section 36(a) preference, the declaration of an attorney is not evidence of the plaintiff's condition. You must present clear and convincing medical documentation that one of the parties "suffers from an illness or condition raising substantial medical

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doubt of survival beyond six months," and which demonstrates to the court's satisfaction that the interests of justice will be served by granting preference. It cannot be emphasized enough how critical your doctor's declaration will be in deciding whether or not the court chooses to grant preference.

Ideally, you should obtain the declaration from one of the plaintiff's treating doctors with the expertise to judge the plaintiff's condition. A treating physician, unlike an expert, will be treated by the court as unbiased, and their opinions accorded greater respect. The declaration should set out the doctor's education, training, and credentials, including their licensure and any board-certifications. If they regularly treat patients with the plaintiff's condition, include this information. The declaration should generally describe past visits, treatment, and symptoms the doctor has observed. Attach key medical records as exhibits. Having laid a strong foundation, the doctor can then declare that, to a reasonable degree of medical certainty, there is substantial doubt of the plaintiff's survival beyond six months from the date the declaration was signed.

Treating physicians may be reluctant to cooperate, sometimes because they are members of large practices with legal constraints, but more often because they are uncomfortable stating with finality that the plaintiff has no more than six months to live. If the treating physician is uncooperative or is involved in the case, consider a physician with solid credentials and expertise directly relevant to the plaintiff's condition, and preferably give them the opportunity to directly examine the plaintiff as well as reviewing the medical records. The court will scrutinize this declaration much more closely than that of a treating physician, so you must have laid an absolutely solid foundation for the expert's prognosis.

C.C.P. section 36(e) – Everything else

Separately, or in conjunction with any of the other provisions of this law, the court may grant preference "that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference." There is little guidance as to what this means; it seems to be a generic clause allowing the court to grant preference when it believes that is necessary to achieve a just result, but when no other statute would apply. Do not rely on Section 36(e) alone if at all possible, but do cite it as a secondary ground for granting preference when you are moving on any other basis.

C.C.P. section 37 – Felon tortfeasors

One separate and often overlooked basis for preference is a civil suit in which the defendant was convicted of a felony, and plaintiff's damages resulted from the commission of that felony. These cases are entitled to preference on that basis alone, without a showing of the plaintiff's age, severity of injuries, or 'interests of justice.' (§ 37(a).) The lesser standard unfortunately comes with a less rigid trial date; the court is directed only to "endeavor" to try the case within 120 days of the grant of preference. (§ 37(a).)

The benefits

In almost all civil cases, preference means that the case must be set for a trial date no more than 120 days from the date of granting the motion. (§ 36(f).) If the action is based on a health provider's professional negligence, trial must be set "not sooner than six months and not later than nine months" away. (§ 36(g).) If preference is granted only on the basis that the tortfeasor was convicted of a felony that gave rise to plaintiff's damages, the court "shall endeavor" to try the matter within 120 days. (§ 37(b).)

The court's ability to continue the trial date is also extremely limited; it cannot be continued except for physical disability of a party or party's attorney, or on a showing of good cause, and then for a maximum of 15 days. Even delay-reduction programs and overstuffed calendars are not a basis for a court to assign out nonpreference cases first. (*Miller v. Superior Court* (1990) 221 Cal.App.3d 1200, 1211.) It is not uncommon for courts to rely on this 'two-week window' to manage their calendars, or set further settlement conferences in the hope that the case resolves, but at the end of that time you must have a courtroom. Additionally, preference cases have priority in trial assignment over almost all other civil cases, especially if preference was granted under Section 36(a).

Defendants hate preference cases. A grant of preference limits their ability to delay and drag out a case to the maximum extent billable. The immediacy of the trial date creates deadlines that loom very quickly and must be met, rather than just pushed out or ignored. An imminent trial date that puts your case at the head of the line also impedes their ability to delay a personal injury case until an elder or an extremely ill plaintiff dies, extinguishing their pain and suffering damages and lowering the value of the case.

The drawbacks

Expedited deadlines cut both ways. Unless you are aggressive about enforcing deadlines and pushing defendants on discovery, their delay will hurt you even more than usual. Your time to get your case in chief together is much more compressed, and you will have no ability to continue a trial date to gather more evidence or make sure that key witnesses are available.

Also be sure to carefully consider whether a preference motion will hurt your overall damages. If you are moving based on the plaintiff's declining health or imminent death, you cannot credibly argue that there will be many more years of lost income or medical expenses. Even if your preference motion is brought under Section 36(a) and relies solely on an attorney declaration – which is not admissible for other purposes – you will signal to the defense that your arguments for large future damages are weak. Even if there is no question that the plaintiff's lifespan is short, a declaration under Section 36(a) or Section 36(d) warns the defense early on of the plaintiff's fragile condition, and may encourage them to engage in lengthy, harassing depositions and other delays designed to hurry the plaintiff to the grave and a financial windfall for the defendant.

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Finally, while there is no such requirement in any of the statutes, judges can and usually will impose conditions on a preference order, such as expedited deadlines for summary judgment motions, shortened times to respond to discovery, and early disclosure of witnesses and experts. Carefully consider which of these you can live with; even though the court may not officially have the power to force you to accept them (for example, shortened notice on summary judgment), objecting means risking that the court will find a reason to deny preference or give you the latest possible trial date. Also insist that any special provisions apply to defendants, not just to the plaintiff. Judges will almost always agree, especially in cases with multiple defendants with conflicting interests, and you will find that defendants are less enthusiastic about their "wish lists" when they realize that they, too, will have to move quickly.

Preparation

Anticipate that defendants will fight your preference motion, and that you will need to show the court that you have done everything to move the case along so that preference won't create a procedural traffic jam. Make sure that you are up to date on discovery requests and obtaining key records, such as medical records from the plaintiff's treating physicians. Consider proactively supplying all necessary records to defendants rather than waiting for them to request production. Create a case management and discovery plan that takes into account shortened deadlines and the necessity of aggressively following up on defense delays. It is much harder for defendants to complain about prejudice when you can show the court that you have been cooperative, proactive, and voluntarily done all you can to make sure that the parties have necessary information and documents.

If your plaintiff is in extremely poor health and death is imminent, you can apply ex parte to have your preference motion heard on shortened time. Be prepared to waive your reply brief and to demonstrate that you have gone above and beyond in moving the case along, and expect your medical declaration to be closely questioned.

Your motion for preference should, to the extent possible, anticipate the defense's objections to preference. They will argue that due process rights prevent the court from granting preference, or at least from granting preference without acceding to a laundry list of one-sided and onerous demands (for example, that you immediately produce all documents you intend to use at trial). Commonly, defendants argue that there is a "due process" requirement or balancing test that must be met before the court can grant preference, citing *Roe v. Superior Court* (1990) 224 Cal.App.3d 642 and *Peters v. Superior Court* (1989) 212 Cal.App.3d 218. Neither of these cases support any such requirement.

Roe actually stated that the due-process implications of truncated discovery "have not yet been decided." (*Roe* at fn. 2, citing *Swaithes, supra*.)

Similarly, in *Peters*, due process was not at issue; the parties did not claim they had inadequate time to prepare for trial, and thus had no standing to raise that argument for the first time on appeal. (*Peters* at 227.)

You can also blunt "due process" arguments if you have produced documents such as medical records and scheduled depositions, showing your willingness to cooperate in making sure that all parties have information and documents to which they are entitled.

In preference based on the plaintiff's health, expect defendants to attack the declaration. They will rarely offer a competing declaration by their own expert. If the declaration is by an attorney, they will argue that it lacks foundation and that you are not a medical expert. If the declarant is the plaintiff's treating physician, they will argue that the doctor lacks the appropriate level of expertise and specialization to offer an opinion. If the declarant is a retained expert, they will instead argue that he or she is not a treating physician and therefore has no foundation to opine on the plaintiff's health or prognosis. If any time at all has passed between the date of the declaration and the date of the motion, they will argue without supporting authority that the declaration should be disregarded as "stale." (In one instance, a defendant argued that a declaration was "stale" because two weeks had elapsed between the date it was signed and the date it was filed with the motion.)

Defendants will also present a list of demands that must be met before the court grants preference, all of which impose heavy burdens of production and cooperation on you but none on defendants. In a multiple-defendant case, these lists will often conflict with each other.

In your reply brief, reiterate the basis of your request for preference and point out the lack of evidence presented by your opponents; arguments of counsel are not evidence. (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 139; *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1379-1380.) Demonstrate that you have been proactive, not obstructionist, in producing relevant information, and have made every reasonable effort to move the case along. Agree to reasonable provisions (again, making sure they are bilateral) such as truncated deadlines and keeping discovery open until shortly before trial, where appropriate. Courts are far more willing to grant preference, and to do so with very reasonable conditions, when your conduct matches your claim that preference is necessary to protect the plaintiff.

Conclusion

A grant of preference can be difficult to obtain and can make case preparation harder and riskier. It can also protect the rights of the most vulnerable plaintiffs to recovery and peace of mind in their lifetime.

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