



Vlad Idelman

HI LAW GROUP



Olivia Ratiner

HI LAW GROUP

The clock starts now

USING TRIAL PREFERENCE AS A STRATEGIC LITIGATION TOOL WITHOUT LETTING DISCOVERY BECOME YOUR WEAKNESS

Most civil-litigation attorneys have dealt with some version of it. The elderly client who worries less about the number on the verdict than whether they will live long enough to see one. The terminally ill client whose greatest fear is not losing at trial but never making it to trial at all. Or the client whose deteriorating condition threatens to take critical testimony with it.

When the ordinary pace of litigation does not align with your client's circumstances, time can become a critical factor in the success of the case. However, an accelerated trial date comes with strategic considerations that counsel must carefully weigh while prioritizing the best interests of the client. California's trial preference statutes exist for exactly those cases. Code of Civil Procedure section 36 recognizes that justice delayed can, in some circumstances, become justice denied by allowing qualifying claims to move their cases to the front of the line.

But obtaining a preferential trial setting is much more than securing an earlier trial date. It changes the entire complexion of the litigation. Discovery begins sooner and moves faster. Evidence that might ordinarily be obtained through routine motion practice suddenly becomes time sensitive. Experts can no longer be retained at the leisurely pace many litigators have grown accustomed to. Every strategic decision becomes compressed by time. Getting a court to grant trial preference is only the beginning. The lawyers who truly capitalize on a preferential trial setting understand that the motion is not simply a procedural device, it is a litigation tool, and, like any strategic tool, can be a double-edged sword.

Trial preference is more than just an earlier trial date

California's trial-preference statutes provide multiple avenues for obtaining an expedited trial date. Code of Civil Pro-

cedure sections 36, subdivisions (a) and (b) mandate preference for litigants over the age of 70 and under 14 who satisfy the statutory requirements, while section 36, subdivision (d) permits discretionary preference where the interests of justice will be served by an accelerated trial.

Regardless of the subdivision invoked, the effect is the same: once preference is granted, the court generally must set trial within 120 days absent a showing of good cause. That compressed timeline is precisely what makes trial preference such a powerful litigation tool.

Greyhound Corp. v. Sup. Ct. (Clay), 56 Cal.2d 355 (1961) is the foundational case for California's modern discovery procedure and was decided shortly after the Discovery Act of 1957 was enacted. The defendant in *Greyhound* sought to prevent enforcement of a court order that required production and inspection of documents in a case involving personal-injury damages from a motor-vehicle accident. The Court used a memorable line to frame *why* discovery matters: discovery tends to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent." (*Id.* at 376.) Modern legal authors have also accepted this view as the purpose of discovery procedures. (*Ibid.*)

For plaintiffs, it can preserve testimony, protect clients' interests, reduce delay, and move a deserving case toward resolution while it still matters. For defendants, it eliminates one of the most effective litigation tactics available in modern civil practice: delay.

Delay provides inherent value to the defense. Witnesses disappear, memories subside, medical conditions improve and, in some unfortunate cases, clients pass away. Trial preference disrupts that dynamic by forcing both parties to prepare for trial on an accelerated schedule. That is precisely why trial preference should be

viewed as more than simply a scheduling motion. It is one of the few procedural mechanisms that can fundamentally alter the pace, and often the leverage, of litigation. But not every case belongs on the fast track.

Choose your battlefield carefully

Before filing a motion for trial preference, it is important to consider not only whether the client qualifies, but also whether the case is suited for preference. Generally, it is in the client's best interest to move for an accelerated trial date if the client qualifies. However, certain cases are the exception. Simpler cases with fewer parties, limited expert testimony, and more straightforward liability are often better suited because they can realistically be prepared within the compressed timeline. More complex litigation may require extensive discovery, numerous expert depositions, or ongoing medical development that becomes difficult to complete before trial. Because trial preference pushes the trial date sooner, this may put the moving party at a disadvantage, directly contradicting what the motion is intended to achieve.

Counsel should also consider whether they are prepared to proceed to trial on an expedited timeline because once the court grants preference, you are locked into an earlier trial date and, therefore, a compressed schedule. When you file a preference motion, it naturally signals to the court that you are prepared to try the case quickly. If that turns out not to be true, you could put yourself and your case at a disadvantage by not allowing the case the time it needs to develop in your client's favor.

Ultimately, attorneys must consider their clients' best interests. Trial preference is an accelerator, not a shortcut. It rewards preparation and punishes procrastination. While attorneys have an obligation to advise clients of the avail-

ability of trial preference, they also have an equally important duty to explain the strategic risks of accelerating a case that is not yet ready for trial. Just because trial preference is available does not mean it is the right strategy.

Being granted trial preference is just the first step

Winning the motion for trial preference is a victory, but it is not the finish line. In many respects, it is the starting line. Once a motion for preferential trial setting is granted, the clock starts ticking and the litigation begins operating under a different set of realities. Trial is generally set within 120 days, continuances become the rare exception rather than the rule, and the luxury of getting to it later disappears. It now becomes critical for counsel to stay on top of obtaining the information and responses needed through discovery. Experts must be retained sooner. Evidentiary disputes can no longer wait. An opposing party's lack of diligence in responding to discovery can quickly prejudice a plaintiff's ability to adequately prepare for trial.

Many plaintiffs' attorneys do not take full advantage of how early California allows discovery to be initiated. In a preferential trial-setting case, this is exactly the kind of gap that cannot be overlooked. That means serving written discovery on the 10th day after the personal service of the summons and complaint, if discovery has not already been served or if new parties are added to the case. (Code Civ. Proc., § 2030.020.)

For substituted service, it is deemed served on the 10th day after the mailing date. Thus, written discovery may be served on a subserved defendant on the 20th day after the mailing date of the summons and complaint. If you are serving the defendant a deposition notice, the 20th day after the personal service of the summons and complaint is the first day you are permitted to serve the defendant a deposition notice. (Code Civ. Proc., § 2025.210.) If served via substitute service, you would add 10 days from the mailing date. Hence, the deposition notice may be served on a subserved defendant on the 30th day after the mailing date of the summons and complaint.

That does not mean serving discovery for discovery's sake. It means approaching discovery with purpose. The attorneys who derive the greatest benefit from trial preference are not necessarily those who obtain the motion. They are the ones who recognize that the motion fundamentally changes the way the case must be litigated.

Delay is now more prejudicial than frustrating

The compressed timeline also changes how counsel should think about discovery disputes. Although early service alone does not guarantee cooperation from the defense, plaintiffs can use these statutory timeframes to their advantage and position themselves to seek expedited relief when necessary. If the defense does not timely comply with discovery, counsel should consider whether ex parte relief is appropriate for an order shortening time.

Discovery delays can effectively run out the clock without the defense ever formally opposing the preferred trial date, allowing silence and delay to undermine the benefit of trial preference. Ordinarily, the remedy for discovery non-compliance is a motion to compel, which requires the meet-and-confer, notice, and motion process, which can take months that your client simply does not have.

Accordingly, where the defense's failure to produce necessary discovery would prejudice the plaintiff's ability to prepare for the preferred trial date, seeking appropriate discovery relief on an ex parte basis provides a means of obtaining compliance on a timeline consistent with the approaching trial date.

An ex parte applicant must make an affirmative factual showing based on personal knowledge of irreparable harm, immediate danger, or another statutory basis for ex parte relief. (Cal. Rules of Court, rule 3.1202(c).) In a trial preference situation, counsel should therefore identify the specific discovery being withheld, explain why it is necessary for trial preparation, and demonstrate how waiting for a regularly noticed motion would prejudice the client given the quickly approaching trial date. In doing so, counsel may establish that expedited

relief is necessary to prevent prejudice or irreparable harm to the client rather than simply being convenient.

Evidence becomes more valuable as time becomes scarcer

As we noted in the Supreme Court's decision in *Greyhound*, discovery should make trial "less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent." This takes on added significance in a preferential trial setting.

When trial is only months away, the consequences of discovery abuse become magnified. Documents withheld until the eve of trial, evasive interrogatory responses, or repeated failures to produce witnesses may create prejudice that simply cannot be cured before jury selection.

A party's conduct during discovery may qualify as a misuse of the discovery process. Code of Civil Procedure section 2023.010, subdivisions (a)-(i) identify conduct that qualifies as a misuse, including, but not limited to, failing to respond to or submit to an authorized method of discovery, providing evasive responses, and attempting to obtain information or materials that are outside the scope of permissible discovery. (Katherine Gallo, *When Money is Not Enough – The Request for "Drastic Sanctions,"* Resolving Discovery Disputes (July 10, 2023).)

If any of these situations arise, a court may impose an evidence sanction under Code of Civil Procedure section 2023.030, subdivision (c), which precludes the noncomplying party from introducing evidence that might otherwise be admissible at trial. (Gallo, *supra*.)

Evidentiary sanctions often carry greater practical importance in preference cases than in ordinary litigation. Their purpose is not merely to punish misconduct, but to protect the integrity of the expedited trial schedule by preventing a party from benefiting from delay that leaves the opposing side without sufficient time to investigate, respond, or prepare.

So, when does the court consider imposing an evidentiary sanction? An express finding of *willful* failure to comply is required before imposing a sanction. (*Deyo v. Kilbourne* (1978) 84 Cal. App. 3d

771, 786.) Willfulness does not necessarily require a showing of wrongful intent, but rather a showing of a conscious or intentional failure to act, as opposed to accidental or involuntary noncompliance. (*Id.* at 787-88.)

In determining whether an evidentiary sanction is appropriate, the court then considers the nature of the party's discovery violation and whether the sanction would properly address the noncompliance based on the sanction's severity. (*Id.* at 783, 786.) In other words, the question is not simply whether discovery obligations were violated, but whether the violation has undermined the fairness of an expedited trial by creating prejudice that cannot realistically be cured before jury selection.

The solution is to stay ahead of the clock

The best way to avoid discovery problems in a preference case is to prevent them from developing in the first place. That begins with diligence long before any discovery dispute arises. Counsel should serve written discovery on the earliest date permitted by the code, notice key depositions promptly, subpoena records early, and begin working with potential experts well before designation deadlines. Trial preference is not the time to employ a reactive discovery strategy.

Further, when discovery disputes inevitably arise, the attorney who has consistently acted promptly and reasonably is in a far stronger position to seek expedited relief. Courts are far more likely to grant *ex parte* applications, compel compliance on shortened time, or impose evidentiary sanctions when the moving party demonstrates that any prejudice was caused by the opposing party's delay and not its own lack of diligence.

By serving discovery as soon as the code permits and pursuing it consistently, counsel establishes a record showing that they did everything reasonably possible to prepare the case within the court's expedited schedule.

That same diligence should extend to expert discovery. Trial preference compresses expert preparation perhaps more than any other aspect of litigation. Experts should not first become involved at designation. They should be consulted early enough to identify missing records, recommend additional discovery, evaluate liability issues, and assist in developing the evidence needed to prove the case. Treating physicians should likewise be identified and prepared well before trial so their testimony is preserved and any evidentiary issues can be addressed without jeopardizing the preferential trial date.

The attorney who is proactive demonstrates to the court that any request for expedited relief is both necessary and reasonable. In a preference case, diligence is not merely good practice, but the foundation upon which expedited discovery relief, evidentiary sanctions, and ultimately a successful trial are built.

Conclusion

A successful trial-preference motion does not simply change the date circled on your calendar. It changes the pace, priorities, and psychology of the entire case.

Discovery can no longer be approached as a series of deadlines. It becomes a race to develop the evidence necessary to tell your client's story. Experts can no longer be treated as the last step before designation. They become part of the litigation strategy from the outset. Discovery disputes can no longer linger. Trial preference forces lawyers to

become trial lawyers sooner.

This is why it is such a powerful litigation tool. It protects from unnecessary delay, one of the most effective defense strategies. But those advantages are realized only by lawyers who recognize that obtaining the order is not the objective. It is the opportunity. The same compressed schedule that prevents your opponent from delaying the case also prevents you from delaying your own preparation. The same expedited timeline that discourages gamesmanship leaves little room for mistakes. It is the ultimate equalizer.

So, if you decide to ask the court to move your case to the front of the line, do so with conviction. Because once the court grants the motion, the clock starts.



Vlad Idelman is a founding partner and trial attorney at HI Law, where he focuses his practice on catastrophic personal injury, wrongful death, product liability, premises liability, and other complex tort litigation. He has extensive experience litigating high-value cases through every stage of litigation. Vlad is licensed to practice in California, Arizona, and Nevada. He received his J.D., cum laude, from Pepperdine Caruso School of Law.

Olivia Ratiner is a J.D. Candidate at California Western School of Law, graduating in May 2028. She spent the summer of 2026 at HI Law, where she gained experience in litigation for catastrophic injury cases, after previously working in pre-litigation personal injury at the Law Office of Eduard Braun, P.C. Olivia graduated from Southern Methodist University in 2024, earning a Bachelor of Business Administration in Real Estate and a Bachelor of Science in Educational Studies.