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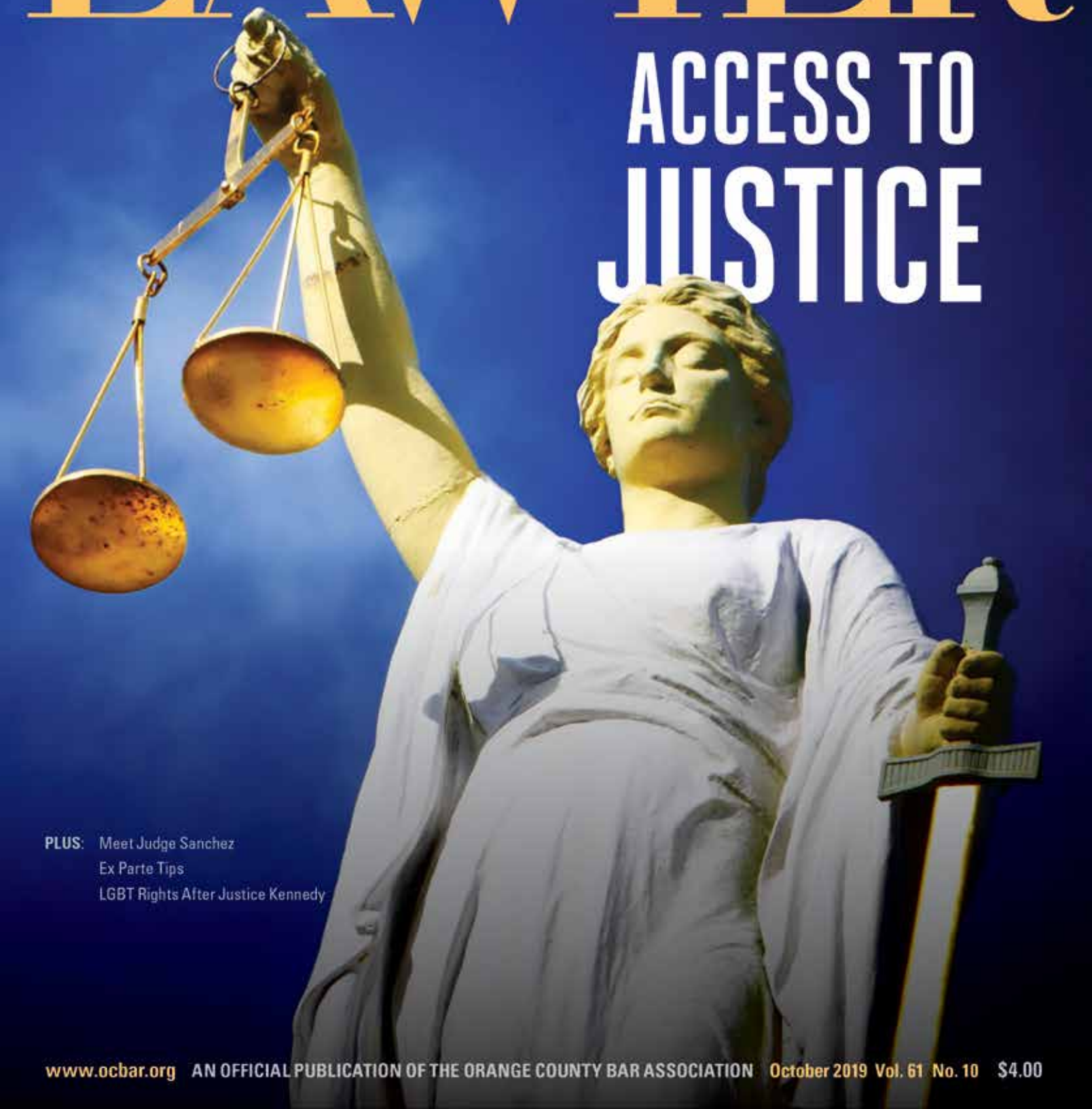

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*FOX*ING YOUR WAY TO TRIAL WITH STATUTORY PREFERENCE

by JAY P. BARRON

Civil litigation is not for the faint of heart, even when you have a good case. For parties and their attorneys, a civil lawsuit requires preparation, persistence, time, and money. You are only right on the merits if you win. While most cases settle before trial, and for justified reasons, that rarely is the goal when the lawsuit is filed. You file a case because you want to have your day in court, and get in front of a jury.

But clients often discover that getting to that point is fraught with obstacles—uncooperative opposing counsel, endless discovery, a plethora of motions, lengthy scheduling delays, and repeat trial continuances. Meanwhile, court dockets are overflowing with cases. Judges and court staff are overworked and overburdened, while simultaneously being asked to adjudicate complex claims more quickly.[1] Given these circumstances, it's hard to get your case to trial.

An increasingly powerful tool is a statutory trial preference found in Code of Civil Procedure section 36 (Section 36), especially subdivision (a), which applies to litigants over seventy years of age. If a litigant qualifies, the effect of a preference order is profound. The case jumps the line. It must go to trial within 120 days of the order.[2] That accelerated deadline affects everything else going forward: the timing for motions, discovery, and pretrial filings may be compressed to ensure trial readiness within the proscribed time. More importantly, the court's ability to continue a case beyond 120 days is limited. The statute limits any continuance to a maximum of fifteen days and typically only one continuance is permitted.[3] An order granting preference means the jury will be empaneled (or opening arguments will commence, if a bench trial) within no more than 135 days.

In the past, trial courts have held litigants requesting trial preference to opaque standards that often set an unreasonably high threshold. But those days are gone after the recent Court of Appeal decision in *Fox v. Superior Court*, which reinforces the strength of the preference statute. In short, where trial preference is ordered, the parties had better be ready to go.

A Litigant's Right to Preference Under Section 36

Section 36 provides various avenues for obtaining trial preference. Subdivision (b) entitles a party under fourteen years old to get preference in wrongful death or personal injury actions. Subdivision (d) has no age requirement and permits trial preference where there is "substantial medical doubt" that a party will survive beyond six months, but a preference order is premised on the moving party providing "clear and convincing medical documentation" and a finding by the court that the "interests of justice will be served by granting the preference."[4] Likewise, subdivision (e) is a "catch-all" that permits the court to grant preference where there is a showing that such preference will serve the "interests of justice."[5]

But the avenue with the most widespread applicability and force lies in subdivision (a). It provides the trial court "shall" grant a petition by a civil litigant over 70 if the court finds that (1) the party has a substantial interest in the action and (2) the "health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation."[6] Section 36 is not a procedural rule but one that confers a critical substantive right on qualifying litigants. Shortly after enacting the statute, the Court of Appeal emphasized that Section 36 confers a "legislatively acknowledged substantive right to trial and to obtain the full measure of damages during the litigant's lifetime."[7]

A Statutory Amendment Threatens to Erode Section 36(a)'s Force

Before a 1991 amendment, Section 36(a) provided for automatic trial preference for litigants over the age of seventy. The legislature enacted the statute to "ensure that elderly persons not be denied their rights in civil litigation because of the current lengthy delays in having cases set for trial."[8] Without preference, an elderly litigant may be unable to participate in the trial, recover full damages, or enjoy the fruits of any judgment.[9] An elderly litigant with a substantial interest in a case had an "absolute substantive right to trial preference."[10]

The amendment eliminated automatic preference. The statute retains its mandatory component—courts *must* grant trial preference to a qualifying party—but an elderly litigant only qualifies for preference where the court finds it necessary to avoid prejudice. Lawmakers paired the amendment with the enactment of Code of Civil Procedure section 36.5, which states the evidentiary threshold of Section 36(a) is satisfied with as little as an attorney affidavit "based upon information and belief as to the medical diagnosis and prognosis of any party."[11]

Still, the prospect of disrupting a judge's overloaded calendar to allow a case to cut the line often makes courts inherently skeptical and resistant to preference motions. And the amendment injected an element of discretion by opening the door for trial courts to weigh whether trial preference is genuinely "necessary" to prevent prejudice to the moving party due to his or her health.[12] Must the health concern reach a level of severity, such as a terminal diagnosis, for preference to be *necessary*? Must the prejudice to the moving party reach a level of probability or significance, such as a near-certain inability to testify absent preference? And what about potential prejudice to other parties if the court grants preference?

In *Fox*, the Court of Appeal Reinforces the Power—and Low Threshold—of Section 36(a)

Trial courts often used these gray areas to justify denial of trial preference motions. The de facto threshold needed to establish entitlement was ratcheted up. Often, courts apply a standard that more closely resembles the heightened requirements of Section 36(d) (i.e., clear and convincing evidence of substantial medical doubt the party will survive beyond six months) in cases which otherwise meet the much lower threshold for preference under Section 36(a). Some courts justify denial of preference motions by capitalizing on a few statements in pre-amendment opinions describing the legislative purpose of Section 36(a) as intended to safeguard against "death or incapacity."[13] Without a specific terminal illness, preference was difficult. Meanwhile, for decades, the courts of appeal did not weigh in on the post-amendment standards under Section 36(a) or the distinction between the evidentiary thresholds under subdivisions (a) versus (d).

But that changed with the court of appeal's recent decision in *Fox v. Superior Court*, 21 Cal. App. 5th 529 (2018), which reinforced the important, *mandatory* provisions of Section 36(a). In *Fox*, the plaintiff, an 81-year-old woman undergoing chemotherapy and other treatment for various ailments, sought trial preference for her personal injury claims stemming from asbestos exposure.[14] To support her motion, she and her attorney submitted declarations outlining her medical conditions. She acknowledged she was not incapacitated and was able to effectively participate in and assist with her case when the motion was filed.[15] But the plaintiff feared she would not live long enough to attend her trial unless she got preference.[16] The trial court denied the motion in language that mimics that of Section 36(a), finding the plaintiff's health was not such that preference was *necessary* to avoid prejudice to her interest in the case.[17]

In its detailed opinion, the First District of the Court of Appeal issued a peremptory writ of mandate directing the trial court to vacate its order and to grant a new order setting trial within 120 days. In doing so, the court rejected the real parties' attempt to conflate the standard for mandatory trial preference under Section 36(a) with the permissive standard under Section 36(d) that applies when there is a substantial risk that a party will not survive beyond six months.[18] All Section 36(a) requires is some potential prejudice to the moving party's interests due to his or her health. There is no requirement that a party be incapacitated or likely unavailable for trial, and such application of Section 36(a) "sets the prejudice standard too high."[19] It was sufficient that plaintiff had "good reason for concern" about protecting her interests absent preference.[20] Nor is there any specific level of medical certainty needed to prevail on a motion, as is required under subdivision (d). As the court recognized, "the end may come quickly with little warning; years may pass with gradual, relentless decline before the battle is lost; or, happily, there may be sustained remission after episodic periods of improvement and relapse."[21]

The *Fox* court also clarified that any potential prejudice to the non-moving party was irrelevant: "Where a party meets the requisite standard for calendar preference under subdivision (a), preference must be granted. No weighing of interests is involved."[22] A party opposing preference faces an uphill evidentiary battle to defeat a motion. Criticizing any perceived superficiality in the medical details or demanding the moving party provide more medical records cannot defeat a request for preference. As the court colorfully observed, "[i]f by way of opposition [the defendant] had submitted, say, a photograph of 81-year-old Ms. Fox scuba-diving in the

Galapagos Islands just last fall, there might be some basis to expect more medical detail."[23] Putting elderly parties to such heightened evidentiary demands improperly "grafts the more stringent standard of subdivision (d) onto subdivision (a) in derogation of the text and structure of the statute."[24] Following *Fox*, the courts of appeal have continued to issue opinions that uphold the strength of Section 36(a), including a January 2019 opinion that, though unpublished, denounced the denial of a preference motion based on perceived vagueness and lack of detail in the movant's showing of health concerns.[25]

The Impact of *Fox*

Fox reinforces that Section 36(a) remains a forceful tool for elderly litigants despite the 1991 amendment. Opposing parties and trial courts cannot evade its grasp by simply raising ancillary concerns or diminishing the potential impact of the moving party's health problems. And it halts arguments attempting to conflate the standards for preference under Section 36(a) and 36(d). After *Fox*, it is clear Section 36(a) does not require proof that the elderly party faces imminent death or incapacitation, nor must plaintiff establish such prognosis with any level of certainty. That makes sense. Otherwise, the distinction between Section 36(a) and (d) would be illusory—a party could not qualify for trial preference under the former without also qualifying under the latter.

Statutory trial preference for elderly litigants has widespread applicability. People are living longer and staying employed or engaged in business longer, increasing the chances someone involved in a lawsuit will be over 70. Trial preference may be an option in an employment or partnership dispute, in a breach of fiduciary duty case, in an insurance dispute, in a probate matter, or in a personal injury case. And California's elder abuse statute has increasingly encouraged private lawsuits to remedy the growing problem of elder abuse.[26] Such cases often qualify for preference.

For a plaintiff, obtaining trial preference can have substantial benefits. Besides the obvious advantage of ensuring one's day in court, an order granting preference raises the stakes for a defendant, who might otherwise seek to employ a strategy of delay. A trial on an approaching "date certain" limits time for a defendant to complete and respond to discovery, prepare and file a summary judgment motion, retain and educate experts, and schedule key depositions. Defendants may acquiesce to settlement (or more favorable settlement terms) that would not be possible without that pressure. Once an elderly plaintiff feels he or she has what is needed to win at trial—whether that is a year into a case or immediately upon its filing—a trial preference motion can be filed.[27]

While the party seeking trial preference most often is the plaintiff, nothing in the statute prevents a qualifying defendant from seeking one. And, sometimes, that makes sense. Typically, a defendant will seek to dispose of a case by filing a demurrer or motion for summary judgment. If those efforts are defeated or not an option due to obvious factual issues, a defendant could minimize costs and force a posturing plaintiff or unprepared plaintiff's counsel into a trial they are unlikely to win.

Don't Ignore Your Client's Potential Right to Trial Preference

Attorneys must give strong consideration to filing a trial preference motion, especially if a client is over seventy. At a minimum, it must be addressed and discussed with the client, as not to do so when representing a qualifying litigant could open the door for a legal malpractice claim under certain circumstances.[28] With *Fox* reinforcing Section 36(a)'s teeth, and the relatively low evidentiary threshold, trial preference may be a viable option to ensure your day in court. Just be careful, as you might get your wish. If preference is granted, trial will not be a distant mirage but a rapidly-approaching certainty. You'd better be ready to try your case.

ENDNOTES

(1) The Standards of Judicial Administration establish the dispositive goals for superior courts, including targets of reaching disposition of 75% of unlimited civil cases within one year of filing and 100% of such cases within two years of filing. *See* 2018 Court Statistics Report, available at https://www.courts.ca.gov/documents/2018-Court-Statistics-Report.pdf (last visited June 25, 2019), 64. Those targets have been less and less obtainable. For fiscal year 2017 (the most recent year for which such data is available), only 66% of unlimited civil cases resolving within a year and only 84% of such cases reaching disposition within two years of filing, which is down from 72% and 93%, respectively, from 2010. *Id*. at 95.

(2) Cal. Civ. Proc. Code § 36(f).

(3) *Id*.

(4) *Id*. § 36(d).

(5) *Id*. § 36(e).

(6) *Id*. § 36(a).

(7) *Rice v. Superior Court*, 136 Cal. App. 3d 81, 90 (1982).

(8) *Greenblatt v. Kaplan's Restaurant*, 171 Cal. App. 3d 991, 994-95 (1985).

(9) *See, e.g.*, Looney v. Superior Court, 16 Cal. App. 4th 521, 532 (1993).

(10) *Swaithes v. Superior Court*, 212 Cal. App. 3d 1082, 1085 (1989).

(11) Cal. Civ. Proc. Code § 36.5.

(12) *See, e.g., Kline v. Superior Court*, 227 Cal. App. 3d 512, 514 (1991).

(13) *Rice*, 136 Cal. App. 3d at 89; *see also*, *Greenblatt*, 171 Cal. App. 3d at 995.

(14) *Fox*, 21 Cal. App. 5th at 531-32.

(15) *Id*. at 532.

(16) *Id*.

(17) *Id*. at 532-33.

(18) *Id*. at 533-34.

(19) *Id*. at 534.

(20) *Id*. at 534-35.

(21) *Id*. at 535-36.

(22) *Id*. at 535; *see also, Swaithes*, 212 Cal. App. 3d at 1085-86.

(23) *Fox*, 21 Cal. App. 5th at 535.

(24) *Id*. at 536.

(25) *See Ellis v. Superior Court*, 2019 WL 365768, at *4 (Cal. Ct. App. Jan. 30, 2019).

(26) *See* Cal. Wel. & Inst. Code § 15600 et seq. The World Health Organization now reports that one in six people aged sixty and over experience some form of elder abuse. *See* World Health Organization, Elder Abuse, June 8, 2018, https://www.who.int/news-room/fact-sheets/detail/elder-abuse (last visited June 25, 2019).

(27) Cal. Civ. Proc. Code § 36(c)(2) ("At any time during the pendency of the action, a party who reaches 70 years of age may file and serve a motion for preference.").

(28) *See, e.g., Granquist v. Sandberg*, 219 Cal. App. 3d 181, 185-86 (1990).

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