

Memorandum 90-87

Subject: Study J-501 - Discovery After Judicial Arbitration

Attached is a staff draft of a *Tentative Recommendation Relating to Discovery After Judicial Arbitration*. The Commission considered this draft at the May-June meeting. The Commission was not enthusiastic about excepting the exchange of expert witness lists from the general requirement that discovery after judicial arbitration may only be conducted with court approval for good cause. The Commission asked the staff to consider whether, as an alternative, the present 60-day period within which the arbitration hearing must be held should be increased. There was some sentiment on the Commission that 60 days is too short. The Commission asked the staff to get the views of the California Judges Association and the State Bar Section on Litigation.

Judge Donald Smallwood, Chairman of the Civil Law and Procedure Committee of the California Judges Association, has responded to the staff request (Exhibit 1). Although he says he cannot speak for the Judges Association as a whole, he thinks the approach in the *Tentative Recommendation* is correct. He says the obsolete section reference in Code of Civil Procedure Section 1141.24 should be replaced with a reference to new Section 2034, as the TR would do. He would not extend the time limit for the arbitration hearing. He thinks that would detract from the value of arbitration as a speedy and inexpensive way to resolve disputes.

The State Bar Section on Litigation declined to comment now because of the U. S. Supreme Court decision in *Keller v. State Bar of California*. See Exhibit 3 to Memo 90-104. The staff also asked for the view of the Administrative Office of the Courts. Their staff is analyzing the question now, and will respond within a few weeks.

In view of Judge Smallwood's response, the staff recommends the Commission approve the attached TR for distribution for comment.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

AUG 01 1990

RECEIVED

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DONALD E. SMALLWOOD

Judge of Superior Court

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July 27, 1990

Robert J. Murphy III, Esq.
Staff Counsel
California Law Revision Commission
4000 Middlefield Road Suite D-2
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Dear Mr. Murphy:


Once again I wish to make it clear that neither I nor any other single judge speaks for the California Judges Association. That body speaks officially only through its executive board.

Having said that my opinion is that you should simply seek a change in the language of CCP 1141.24 from a reference to Section 2037 to that of Section 2034.

One purpose of arbitration is to provide a low cost, speedy and efficient method of resolving cases involving relatively little money. Extending the time for arbitration would allow for discovery of experts but, in my opinion, would also tend to increase costs and delay.

Because the current problem appears to have been the result of an oversight, I think it would be unwise to go beyond that which is necessary to correct it.

Very truly yours,


DONALD E. SMALLWOOD
Judge of the Superior Court

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90-028

cc: Constance Dove
Executive Director

STAFF DRAFT

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Discovery After Judicial Arbitration

September 1990

This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN DECEMBER 1, 1990.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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Letter of Transmittal

This recommendation replaces a reference in the judicial arbitration statute to repealed Section 2037 of the Code of Civil Procedure with a reference to new Section 2034 of the Code of the Civil Procedure which deals with the same subject matter as the repealed section.

This recommendation is made pursuant to Resolution Chapter 15 of the Statutes of 1975.

RECOMMENDATION

If trial de novo is sought after judicial arbitration, there may be no further discovery "other than that permitted by Section 2037" without leave of court for good cause.¹ Former Section 2037 of the Code of Civil Procedure provided for a demand for exchange of expert witness lists and reports and writings of experts, but the section has been repealed.² The new statute providing for a demand for exchange expert witness lists and reports and writings of experts is Code of Civil Procedure Section 2034.

The judicial arbitration statute should be amended to refer to the new section for exchange of information concerning expert witnesses. This would preserve former law permitting the demand to be made without leave of court and without a showing of good cause. The policy of the arbitration statute is to limit discovery after the arbitration award and before trial de novo to force the parties to use arbitration as the primary forum to resolve their case.³ But the scheme for demanding an exchange of information concerning expert witnesses does not work well for arbitration.⁴

The main reason to get an opponent's list of experts is so their depositions may be taken. But, as a practical matter, there is not enough time under the accelerated schedule for

1. Code Civ. Proc. § 1141.24. Judicial arbitration may be ordered where the amount in controversy is not more than \$50,000. Code Civ. Proc. § 1141.11. "Judicial Arbitration" is obviously an inapt term, for the system it describes is neither judicial nor arbitration. The hearing is not conducted by a judge, and the right to a trial de novo removes the finality of true arbitration. "Extrajudicial mediation" would be closer to correct." *Dodd v. Ford*, 153 Cal. App. 3d 426, 432 n.7, 200 Cal. Rptr. 256 (1984).

2. 1986 Cal. Stats. ch. 1336, § 3, operative July 1, 1987.

3. Practicing California Judicial Arbitration § 3.7, at 61 (Cal. Cont. Ed. Bar 1983). In judicial arbitration, the parties have full discovery rights. Cal. R. Ct. 1612; 6 B. Witkin, *California Procedure Proceedings Without Trial* §§ 320, 336, 341 (3d ed. 1985). Expert witnesses may be called, and their reports are admissible in evidence. Cal. R. Ct. 1613; 6 B. Witkin, *supra*, § 339.

4. Practicing California Judicial Arbitration § 3.35, at 80 (Cal. Cont. Ed. Bar 1983).

arbitration to discover the opponent's experts and to take their depositions: The arbitration hearing must be held not later than 60 days after the case is assigned to the arbitrator.⁵ But the demand for exchange of expert witness lists must be served by the later of 10 days after the hearing date is set, or 70 days before the hearing.⁶ The result is that the parties have an apparent right to obtain the names of experts and to take their depositions, but are denied a workable mechanism for doing so.⁷

The Law Revision Commission recommends that the reference in Code of Civil Procedure Section 1141.24 to former Section 2037 be replaced by a reference to Section 2034.

5. Cal. R. Ct. 1611.

6. Code Civ. Proc. § 2034(b).

7. Practicing California Judicial Arbitration § 3.35, at 80 (Cal. Cont. Ed. Bar 1983). Because the demand for exchange of information on expert witnesses could not be used effectively in arbitration, Code of Civil Procedure Section 1141.24 was amended in 1985 to permit the demand to be made after arbitration without the usual requirement of good cause and court authorization. However, by referring only to Section 2037, the 1985 amendments were defective: The provision for demand for exchange in former Section 2037 could not work without the succeeding sections, which dealt with date of exchange (former Section 2037.1), duties of parties (former Section 2037.2), contents of witness list (former Section 2037.3), supplemental list (former Section 2037.4), prohibition against calling witness not on list (former Section 2037.5), permission of court to call witness not on list (former Section 2037.6), deposing expert (former Section 2037.7), and protective orders (former Section 2037.8). When former Section 2037 was repealed in 1987, Sections 2037.1 to 2037.9 were also repealed. The replacement section (Section 2034) now has all the provisions that were in former Sections 2037-2037.9. So by revising Section 1141.24 to replace the reference to former Section 2037 with a reference to Section 2034, the imperfectly-realized objective of the 1985 amendments will be achieved.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following provision.

Code of Civil Procedure § 1141.24 (amended). Discovery after judicial arbitration

1141.24. In cases ordered to arbitration pursuant to subdivision (a) of Section 1141.16, absent a stipulation to the contrary, no discovery other than that permitted by Section 2037 2034 is permissible after an arbitration award except by leave of court upon a showing of good cause.

Comment. Section 1141.24 is amended to correct a section reference. Although new Section 2034 includes matters covered by former Sections 2037.1 to 2037.9 as well as by former Section 2037, the reference to former Section 2037 apparently was also intended to incorporate those related sections.