

Memorandum 90-75

Subject: Study J-501 - Discovery After Judicial Arbitration (Tentative Recommendation)

Attached is a revised staff draft of a *Tentative Recommendation Relating to Discovery After Judicial Arbitration*. Under Code of Civil Procedure Section 1141.24, if trial de novo is sought after judicial arbitration, further discovery "other than that permitted by Section 2037" is prohibited, except by leave of court for good cause. Section 2037 has been repealed and replaced by new Section 2034. Former Section 2037 authorized a demand for exchange of expert witness lists and reports and writings of experts. The TR proposes to substitute a reference to Section 2034 for the present reference to Section 2037. This would pick up provisions not in former Section 2037.

The Commission considered a previous draft of this TR in April, but was not enthusiastic about it. The Commission thought discovery after judicial arbitration should not be expanded. There was some sentiment on the Commission for requiring good cause and a court order for any discovery after judicial arbitration, including exchange of expert witness lists.

The C.E.B. book on the subject says the demand for exchanging expert witness lists does "not work well for arbitration." *Practicing California Judicial Arbitration* § 3.35 (Cal. Cont. Ed. Bar 1983). 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 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. Cal. R. Ct. 1611. 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. Code Civ. Proc. § 2034(d). The result is that "the practitioner has an apparent right under Cal Rules of Ct 1612 to obtain the names of experts and to take their depositions . . . but is denied a workable mechanism to do so." *Practicing California Judicial Arbitration, supra*.

Because of these problems, the judicial arbitration statute was amended in 1985 to permit a demand for exchange of expert witness lists 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 would not work without former Sections 2037.1 to 2037.8 dealing with date of exchange, duties of parties, contents of witness list, supplemental list, prohibition against calling witness not on list, permission of court to call witness not on list, deposing expert, and protective orders.

When Section 2037 was repealed in 1987, Sections 2037.1 to 2037.8 were also repealed. The replacement section, Section 2034, now has all the provisions that were in former Sections 2037-2037.9. (See Exhibit 1 for table of corresponding provisions of old and new law.) So, by revising Section 1141.24 to replace the reference to Section 2037 with a new reference to Section 2034, the attached revised draft of the TR will accomplish the imperfectly-realized objective of the 1985 legislation. The staff recommends the Commission approve the attached TR for distribution for comment.

Respectfully submitted,

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Exhibit 1

CORRESPONDING PROVISIONS OF OLD AND NEW LAW

<u>Subject</u>	<u>Old law</u>	<u>New law</u>
Demand to exchange list of expert witnesses and experts' reports and writings	§ 2037	§ 2034(a)
Date of exchange is 20 days after service of demand	§ 2037.1	§ 2034(c)
Duty to produce list and reports and writing	§ 2037.2	§ 2034(f)
Contents of witness list; duty to produce reports and writings	§ 2037.3	§ 2034(f)
Supplemental list of expert witnesses	§ 2037.4	§ 2034(h)
Prohibition against calling witnesses not on list	§ 2037.5	§ 2034(j)
Permission of court to call witness not on list	§ 2037.6	§ 2034(k)
Deposition of expert witness	§ 2037.7	§ 2034(i)
Protective orders, compensation of witnesses	§ 2037.8	§ 2034(e)
Inapplicability to eminent domain proceeding	§ 2037.9	§ 2034(a)

Staff Draft

TENTATIVE RECOMMENDATION
relating to
DISCOVERY AFTER JUDICIAL ARBITRATION

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

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.

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 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.

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

5. Cal. R. Ct. 1611.

6. Code Civ. Proc. § 2034(d).

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 Civ. Proc. § 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.