

When is a Writ Worthy? Lawyers are Dying to Know

By Herb Fox

There are certainties in law as in life: death, taxes, and denial of your writ petition by the Court of Appeal. But one Ventura litigant recently found that the death of his attorney changed the nature of fate, resulting in the rarest of appellate events: a worthy writ.

It all began with a car accident. The seriously injured plaintiff retained attorney Stewart (no first name given), who guided him through pre-trial litigation and discovery up through the designation of experts. Stewart designated an expert on the issue of damages only, and not liability. The defendant designated an expert on liability. Stewart then missed the August 18, 2003 deadline to supplement his expert witness list to add a liability expert.

A few weeks later, in September 2003 plaintiff learned that his attorney Stewart was suffering from pancreatic cancer. On September 12, 2003, three days before the initial trial date, the trial court heard Stewart's ex parte application for a continuance due to his illness. The trial court continued the trial to December 15, but Stewart died on September 20.

After learning of his attorney's death, plaintiff immediately began to search for new counsel. In early October, he met with attorney Rosenberg who advised that his own trial schedule prevented him from taking the case unless the December 15, 2003, trial date could

be continued. He advised plaintiff to seek a continuance and obtain permission to reopen discovery and supplement his expert witness list.

At the hearing on plaintiff's motions to continue the trial date and reopen discovery, Ventura County Superior Court Judge Steven Hintz noted that he continued the first trial date for three months because of Stewart's illness. Judge Hintz chastised the plaintiff:

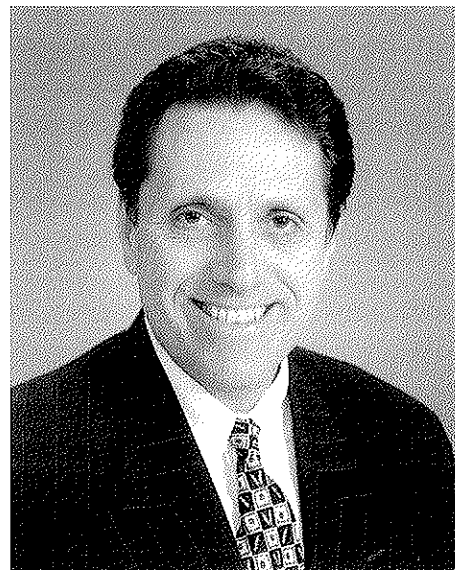
And now a month after he dies, you come in and ask for more time. That could have been done better.

Defendant's counsel, perhaps emboldened by the trial court's less than tactful comment, argued that plaintiff should not be permitted to supplement his expert witness list simply because his terminally ill attorney had missed the deadline to do so:

That was his decision as attorney. You can't change that after you die. That will prejudice my client.

Judge Hintz agreed to continue the trial date, but only to January 26, 2004 – even though plaintiff was scheduled for spinal surgery in December. The trial court denied the request to reopen discovery to supplement the expert witness list.

Plaintiff filed a petition for writ of mandamus. The Court of Appeal granted the order to show cause, and after briefing and hearing issued the peremptory writ. Associate Justice Ken



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Yegan, who is the writ guru for Division Six because of his experience as a writs attorney for the Court of Appeal earlier in his career, reiterated that normally the Court of Appeal does not and should not "micromanage law and motion rulings."

Absent extraordinary circumstances, most writ applications seeking review of discretionary rulings are easily denied because of traditional appellate rules... However, some writ applications are more "writ worthy" than others.

The Court found that while the trial court's orders "promote judicial efficiency by maintaining strict time deadlines," such efficiency "is not an end in itself... What is required is balance." And that balance was lacking here:

"[C]ommon sense and respect for the grim reality of terminal illness make it more likely that, during the waning period of his life, Stewart was not as organized, focused or vigorous an advocate as he had been in healthier times."

The Court dismissed defendant's cry of prejudice as a conclusionary argument with no evidentiary support. The Court also disposed of defendant's claim that

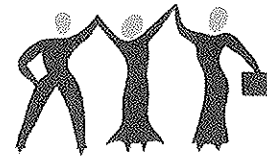
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there was “no evidence” that attorney Stewart’s terminal illness affected his ability to assess his client’s case:

“[Attorney Stewart] wasn’t healthy. He was dying of pancreatic cancer. We cannot assume that Stewart was able to conduct business as usual while in the grip of such a severe illness. The trial court failed to appreciate that this medical condition adversely impacted his trial preparations.”

Justice Yegan concluded that the death or serious illness of a trial attorney or a party should, under normal circumstances, be considered good cause for granting the continuance of a trial date and should generally constitute good cause to reopen discovery after a trial date has been continued. The writ of mandate was issued, directing the trial court to reopen discovery and continuing the trial date until sometime after June 1, 2004.

Appellate Brief

This was, of course, a heaven-sent writ petition that should give pause to trial courts and advocates alike that judicial efficiency and tactical advantage should give way to the occasionally tragic realities of life outside the courtroom.

The case is *Hernandez v. Superior Court* (Feb. 24, 2004) 2004 WL 326722. George M. Rosenberg and Anthony C. Ferguson, of Jacobs, Jacobs & Rosenberg in Los Angeles, represented the petitioner (plaintiff).

The Real Party in Interest (defendant below) was represented by Harveen S. Simpkins and Robert J. Brantner of Ventura. ■

Herb Fox, our Appellate Courts Editor, was a research attorney for Justice Arthur Gilbert between 1987 and 1990.

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