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Write to Win

Gerald Lebovits

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Calling All Members

Now is the time to come to the aid of your fellow citizens

BY SAMUEL B. FREED*

In September, 2008, the Chief Judge of the State of New York, Judith Kaye and the Chief Administrative Judge of the State of New York Ann T. Pfau called a meeting of the Bar Presidents of the City of New York and other concerned parties to solicit their aid in fulfilling the obligations under the new RPAPL law requiring, after September 1, 2008, that all mortgagors, with sub-prime and high interest mortgages who respond to foreclosure proceedings have a right to have a conference before the court. The time for the conference must take place within 90 days of the foreclosure actions filing during which time no other action can take place to enforce the foreclosure.

At the time of the conference, the sub-prime and high interest mortgages appeared to be at the core of the foreclosure crisis and there was momentum for the Bar Associations to give attention to these matters. At that time of the conference, the Justices were unaware that the sub-prime mortgage crisis, generally, would be only one aspect of the mortgage crisis affecting America.

On November 17, 2008, a stated meeting was held at the Queens Bar Association. Bar members appeared in overwhelming support to volunteer their services to these mortgagors, however, despite the wonderful turnout more volunteers are needed to address this crisis. Your specialty need not be real estate or real estate related matters. Attorneys of all specialties and languages are needed to volunteer time and talent to negotiate. Simply stated, and generally, the pro bono services you provide will be to attend the mandated court conference(s) along with the mortgagors and the mortgagors to determine if the mortgage can be re-negotiated to allow the mortgagors to remain in their home.

Your individual efforts, when combined with your sisters and brothers of Bar, offers hope to the economic suffering of our local communities while providing a united voice and therefore strength in defense of their rights.

To earn 8 credits in Professional Practice, AT NO COST TO YOU, attend the December 15, 2008 jointly sponsored conference entitled “Dealing with Residential Foreclosures; Representing Homeowners in the New Mandatory Settlement Conferences”. The one day conference will take place at the Queens County Bar Association, 8:30 am to 4:45 pm. This conference is sponsored by the New York State Bar Association, The Queens County Bar Association, The Queens Volunteer Lawyers Project, the Brooklyn Bar Association, the Brooklyn Volunteer Lawyers Project and the Empire Justice Center. You will receive an overview of the recent legislation from an expert faculty. The Federal government is continuing modifying and establish new programs to aid in the crisis which will be key to the foreclosure resolutions.

“How can I help” you ask - to register for the free one day conference on December 15th and earn 8 Professional Practice credits go to www.nysba.org/dealingwithresidentialforeclosures; do not call the Queens County Bar Association. However, if you attended the stated meeting of November 17th and the Queens County Bar Association has not heard from you indicating your intent to commit to the program and lend a much needed helping hand, please do call the Queens County Bar Association. For additional information or questions, call the Associations’ Department of ProBono Affairs at 518 487 5641 or e-mail to www.probono@nysba.org.

The adverse effect of these foreclosures is not confined solely to the homeowners who are facing foreclosure, neighborhoods generally will suffer from the consequences of multiple foreclosures. If you have given thought to pro bono services, THIS IS YOUR TIME TO ACT.

Respectfully, Sam Freed, Chair, Real Property Committee

Foreclosures Increasing Dramatically In Queens

BY TRACY CATAPANO-FOX*

In October 2008, Queens Supreme Court opened the first Residential Foreclosure Conference Part in New York State. This part was developed in response to Chief Judge Kaye’s determination that the courts get involved in addressing the foreclosure crisis, and also as a result of legislation passed this summer by the New York State Legislature and Governor David Paterson.

Queens County has become the epicenter in New York for the mortgage foreclosure crisis affecting the entire nation. Queens Supreme Court has seen foreclosure actions increase dramatically, resulting in five hundred new filings per month in 2007 and 2008. The judges have seen a tremendous increase in the number of ex parte applications for orders of reference and judgments of foreclosure. These foreclosure actions have historically proceeded by ex parte order, as approximately 90% of homeowners do not answer the Complaint or appear in the foreclosure action. The foreclosure crisis can be seen not only in the increased court filings, but also in the growing number of auctions held in court, which often result in a buy back of the property by the mortgagee banks.

In January 2008 Administrative Judge Jeremy S. Weinstein held a meeting with the Justices of Queens Supreme Court, Civil Term, to discuss the disturbing increase in foreclosure actions. At this meeting, the judges expressed their concerns and discussed the impact of this problem on litigants and the courts. To address these growing concerns, Chief Judge Kaye held a press conference announcing the Residential Mortgage Foreclosure pilot project. As Queens Supreme Court has one of the largest inventories of foreclosure actions in the state, it was chosen as the site for the project. The pilot project would establish a foreclosure residential part that would enable homeowners to confer their cases with the banks before the court with the hope of trying to keep homeowners in their homes with reasonable, sustainable mortgages. Homeowners would also be given information with regard to legal and housing services available in Queens.

Subsequent to the selection of Queens County

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Write To Win

BY HON. GERALD LIBOVITS

Mastering the art of written advocacy is critical for lawyers. They must write to win. Written briefs are the first and best opportunity to persuade the court. Sometimes they are the only way to persuade the court. Often little or no time is time is allotted for oral advocacy. Even if oral argument takes place, the judge or law clerks might not recall the argument or might not have paid attention, but they will still have the briefs to help them.

Lawyers write persuasive briefs by making them easy to understand. They should write for the decision maker, not for their client or for their adversary. They should consider the reader’s needs. Judges are busy professionals: They need to be educated, they want to rule correctly, and they have no time to waste. Lawyers must make every word count by ensuring their briefs are organized and concise. Good briefs follow the twin pillars of persuasion: They make the court want to rule in the lawyer’s favor, and they make it easy for the court to do so.

Good writing enhances lawyers’ credibility. It shows that the lawyer took the case seriously, and so should the court. It also helps the court trust the lawyer. A court that finds the lawyer trustworthy is more likely to rule for the client.

Poorly written briefs create bad impressions, not only about the lawyer’s forensic skills, but also about the client’s case. Poor writing means losing. Poorly written briefs are long, boring, and lack coherence. Well-written briefs are clear, effective, and focused. Poor brief writing misses arguments and does not apply law to fact. Good brief writing is a martial art.

Here are ten pointers to guide lawyers in persuading the court through written advocacy.

1. Argue the issues. For briefs to persuade, lawyers should stress issues, not citations. An issue is an independent ground on which the relief sought can be granted if the reader agrees with the argument on that issue and disagrees with everything else. Lawyers should discard trivial issues. Unless the lawyer must preserve the record for appeal, the lawyer should winnow the argument to no more than three or four issues. Otherwise, the weaker issues will dilute the stronger. Lawyers should present their issues by strength, starting with the argument most likely to succeed. If they are unsure which argument is the strongest, they should pick the argument with the biggest relief for their clients. There are two exceptions to that rule. The first is when lawyers have a dispositive threshold issue — jurisdiction or statute of limitations. The threshold issue should become the first argument. The second is that lawyers must follow the order established by a statute or the factors articulated in a leading case.

After lawyers have explained their argument, they should address the other side’s position to contradict it. They should begin with their argument, however, to show that they are right because they are right, not merely because the other side is wrong. Lawyers submitting opposition or response papers should not copy the way the other side ordered the issues. They should tell the court which issues they oppose but order them the way it works for their clients. Briefs should be written to persuade the court. Briefs are not meant to be law-journal articles, which give objective, neutral, and fuzzy exposition of the law, not hard-hitting reasons why one side should win and the other side should lose.

2. Be clear. Lawyers must explain their point of view so that courts can understand them in their first read. Confusing briefs will frustrate judges, who might simply give up and rely on the other side’s brief. To get their points across, lawyers should not assume that their readers know nothing about the case. They should not write in a conclusory way. They must show; they must not tell. They show by describing people, places, and things. They must use concrete nouns and vigorous verbs and limit adjectives. For example, they do not say that the man was “very tall” but rather that the man was seven feet tall.

Lawyers also state clearly and repeatedly what relief they seek. Clarity is more important than conciseness. Good briefs should never let two sentences pass without letting the reader know which side the lawyer represents, using emotional, policy-driven arguments without arguing emotionally. Lawyers should write directly, not indirectly. (“Justice is an important concept.” Becomes: “This Court should reverse the conviction.”) Lawyers should also always mention and argue the standard of review and the burden of proof. Doing so tells the court how to evaluate the arguments.

3. Be succinct and concise. Lengthy briefs are boring; judges might not read or understand them. The best lawyers keep their briefs short and sweet. They delete the obvious and do not dwell on givens. One way to ensure succinctness is to establish a theme. Themes help lawyers explain that they are right, not just because of the law, but also because if their clients lose, the bad will prosper and the good will suffer. Lawyers should include every important and helpful authority, fact, and issue that supports their theme or which contradicts the other side’s theme. They should exclude everything else. They should eliminate irrelevant dates, facts, people, places, and procedural history. They should not try to fit every possible argument into their briefs. They should stick to their stronger contentions. Weaker arguments will undermine their credibility and make the lawyer seem untrustworthy. They should also limit themselves to the case law that adds weight to an argument rather than those that add bulk and impress only non-lawyers.

Lawyers should also replace coordinat- ing conjunctions with a period and start a new sentence. Doing so shortens the sentence and thus is concise, even though it might add text. They should not start a sentence with “in that.” (“In that the judge’s cousin was a litigant.” Becomes: “The judge recused herself.”) They should excise unnecessary prepositions like “of” and delete the following metadiscourse, or wordy running starts: “in fact,” “as a matter of fact,” “the fact is that,” “given the fact that.” Lawyers should also watch out for redundancies. (“Advance planning” becomes “planning.”)

4. Be logical. From the presentation of facts to the argument, structure is vital. Arguments should come naturally, without being interrupted. Lawyers must know
Lawyers should write
writing a persuasive
to win. Rather, the brief should rely on syllogisms; it leads to incorrect conclusions. For example, the post hoc fallacy assumes that because "every time I tell my colleagues that I am going to win a trial, I lose." The fallacy is not that I win the trial by night, but that the conclusion is not the antecedent neutral. Also correct: "Perfectionists like their briefs to be perfect." Also not: "A perfectionist likes his or her briefs to be perfect." Correct: "A perfectionist likes his or her briefs to be perfect." (Making the antecedent neutral.) Also correct: "Perfectionists like their briefs to be perfect." (Making the subject plural.)

(10) Review the brief. Writing a persuasive brief takes time and effort. Lawyers should not believe they are done after their first draft. Editing is essential to writing. Briefs are not going to win the trial, they will win. Rather, the brief should rely on syllogism and move the reader from the general to the particular.

(5) Lawyers should write precise arguments supported by precise citations. Correct pinpoint citations are persuasive. They build lawyers' credibility by showing research. Citations, presentation, and analysis. They also make it easy for the reader to find the piece in a lengthy case or secondary authority. Not using pinpoint citations suggests that the citation might not stand for the position the lawyer is asserting. Lawyers should also cite case law precedent and statutory authorities. They offer the opportunity to demolish the other side's position honestly and refute it. They should never underestimate the judges' need to check the title of the law. They should not confuse by throwing the lawyer down the stairs a motion." Briefs should be readable. They should never drive readers to a dictionary. They should also use ellipsis and square brackets to shorten long quotations through omission and alternation. They should not write in generalities, using cowardly words like "generally," "typically," or "usually," unless the lawyer wants to avoid the reader reaching out for the real meaning. They should also use elliptic and square brackets to shorten long quotations through omission and alteration.

(9) Ethics also demands gender neutrality in content, not the writing or the writer. Ethics also demands gender neutrality in content, not the writing or the writer. Persuading the court through writing is an important aspect of the administration of justice. Also not: "A perfectionist likes his or her briefs to be perfect." Correct: "A perfectionist likes his or her briefs to be perfect." (Making the antecedent neutral.) Also correct: "Perfectionists like their briefs to be perfect." (Making the subject plural.)

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(7) Becomes. "I threw the motion down the stairs to the lawyer." Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer." Brevity is essential to writing. Briefs should be as short as possible. Becomes: "I threw the motion down the stairs to the lawyer."