Writing Bad Briefs: How to Lose a Case in 100 Pages or More

Gerald Lebovits

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Tax Law: The 2011 Offshore Voluntary Disclosure Initiative

By Eric L. Morgenthal

As you read this article, someone, somewhere in the world, is gathering strength. Hoping and working toward someday coming to America to seek out a better life. But today this Ellis Island narrative plays out far differently than it did in generations past. Now, with the Patriot Act and the Financial Crimes Enforcement Network (FinCEN), the U.S. government wants to know about these transfers. I would like to describe the Federal Foreign Bank Account Reporting ("FBAR") Voluntary Disclosure program as a pathway back for tax evading criminals and financiers who intended to circumvent the U.S. tax system. And it is for many clients. But based upon significant experience in this area of International Tax practice, it hasn’t always been the case. Often, I have heard from Holocaust survivors, refugees and immigrants from impoverished parts of the globe who are first learning about the compliance and financial reporting burdens that come when combining U.S. residency with money. (Note: the standard for compliance is U.S. residency, not U.S. citizenship.)

Due to their success in receiving 15,000 applications under the 2009 enforcement initiative ("OVDI"); the Federal Government has recently unveiled Round II: The 2011 Offshore Voluntary Disclosure Initiative ("OVDI"). And if anything, it proves Will Rogers was wrong. Sometimes you do get a second chance to make a first impression. Under the program, U.S. "persons" making a "voluntary disclosure" can again avoid criminal liability by declaring their offshore bank accounts and reporting certain foreign transactions. And of course, it wouldn’t feel like an FBAR disclosure program without a whole new list of IRS FAQ’s to follow. But before, not all nuances about the application of tax law set forth in the Code and Regulations are addressed in the IRS list of FAQ’s about the OVDI.

The origins of the FBAR filing requirements are rooted in the Bank Secrecy Act of 40 years ago but were not heavily enforced. In 2003, the IRS was provided authority by FinCEN to police these provisions. In 2004, Congress assisted the IRS by raising the ante for those who failed to comply with the FBAR compliance provisions. And failure carried some severe penalties, raising the potential liability to the greater of $100,000 or 50 percent of the account balance per offense, as well as potential criminal exposure. In fact, even tax return preparers can now... (Continued on page 20)
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By Gerald Lebovits

Writing a really bad brief — a brief so bad you’re sure to lose your case — is a skill few attorneys acquire. Only a select few can do that more than once or twice in a lifetime. You might wonder why you’d ever want to lose a case. Perhaps you hate your client. Let’s face it: Some clients are scam artists, especially those who don’t pay you. Perhaps you hate your client’s case. On an ethical level, the world will be better off, frankly, if some of your clients lose. Or perhaps you like your client, but you realize that your client will lose sooner or later. You might want to throw your client’s case before your legal fees grow too high. Or perhaps you’re in league with your adversary. The job market is tough, after all, and the prospect of getting a job at your adversary’s law firm. Or perhaps you want to ingratiate yourself with a judge who’ll probably rule against your client. Judges have little sense of style anyway.

The reasons you might want to lose are shallow pockets, and you need to cut your losses. You don’t want to lose sight of your next downsize. That can happen a lot these days.

Rule #1: Ugly’s in the Eye of the Beholder

Stimulate readers visually. Make sure you have a bad cover. Because first impressions count when it comes to briefs, judges will notice a bad cover. They’ll assume that if you don’t care about presentation, you probably won’t care about getting the law right. Include a border, preferably with a seasonal motif. Flowers and snowflakes add a great touch. If the cover is specific requirements about how the cover should look, ignore those rules. Judges have little sense of style anyway.

Include lots of footnotes, all in a small typeface. That’ll cause the judge to dwell on the irrelevant red herrings in your case. Buried somewhere, some of your footnotes is how you’ll get judges and their law clerks to make law, even if the law they’ll make favors your adversary. Great law is started in the footnotes. Ask any Supreme Court clerk.

To lose, don’t bind your brief. If you must bind it, use a rubber band or string. That’ll help judges lose some or all of your pages. Or bind the brief with a metal clip with razor-sharp edges. You spilled blood writing the brief. Why shouldn’t the judge and law clerk? They’ll reward your thoughtlessness when they make their decision. If you decide to bind your brief, make sure the binding prevents the judge from reading the brief. Every time the judge turns a page, the brief should snap shut. When submitting the brief, include a paperweight to hold the brief open. The judge might think it’s an exhibit.

Non-neutral writing is like a bump on the road that focusses travelers on the trip rather than the destination. Make the judge dwell not on your content but on why your writing is bad. Write “she” or “he,” or “it” use all three, like so: “she/it.” There’s nothing like a few “she/its” to make your brief look like a bump on the road. Boylester doesn’t work, and that’s what you should use it. Your brief should look like a cut-and-paste job. Reuse large portions from other briefs you’ve written. Another tactic is to regurgitate a brief an intern wrote 10 years ago, and neither update nor check the old citations. Git the judge to read a brief an intern wrote 10 years ago, and neither update nor check the old citations. That’ll help the judges lose some or all of their paragraphs.

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Don’t Miss Judge Lebovits’s CLE: “Persuasive Writing for Litigators.”

The Honorable Gerald Lebovits will share the secrets of good writing at an Academy seminar scheduled for March 31. The seminar will include legal writing do’s and don’ts; organizing a draft; making writing powerful and precise; the art of storytelling; concise procedural history from your client’s perspective. Misstate the law. Make it up if the court’s holding favors your client. Logic tells you that the law can be wrong. Don’t explain how the law applies to your client’s facts. The law is what it is. You can’t change anything about it. Avoid common sense. If you want to win and you decide to integrate law and fact, start the sentence as follows, “In my humble opinion . . . .” Every judge will know that true enlightenment will come at the end of the sentence. That’s why you’re guaranteed to lose in the end.

When you’ve lost all hope, and things aren’t going well, keep up your efforts, or lack thereof, throw all the pages to the brief down a flight of stairs, collect them, and submit them in the order the pages fell on the floor. Every case is a puzzle waiting to be solved.

Rule #3: Quote Other Judges and Because Your Ideas Don’t Matter.

No one wants to hear what you have to say. Someone smart said it before. Just repeat it. Using lots of long quotations means you didn’t do independent research and analysis. Make your lack of effort obvious. Block quotations are essential in a loser brief. They waste tons of space. And no one reads them. The less the judge reads, the likelier you’ll lose. When you quote, misquote. How else will you know whether the judge reads your brief? Make sure you quote directly. No footnotes. Also, quote language that sounds good, even if the case goes against your client’s position — and even if the case is facts are different from your case. If you’ve read it before, it must be true. Don’t bother checking other authorities. Quote all the language from the source. Include everything. Regurgitate the holding, the case, paragraph by paragraph. Take the holdings from the headnotes. Better yet, quote from the headnotes.

Rule #4: Citations Are for the Lame and Popular.

Miscite your authorities. Get the volume of the reporter right, but forget page numbers. Close enough is good enough, unless

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your goal is to lose by winning. If a deci-
sion is looming, lose your case, never give the
pinpoint citation. Your goal is to make it so
difficult for the judge to find any morsel of
accuracy that the judge will turn to your
adversary’s brief. String cite whenever possible. If
you have 20 cases for the same proposition, add
them all. To show that you’re smarter than the
case — a losing and therefore effective strategy — cite after every propo-
sition in your brief, even for obvious state-
ments. But don’t cite the record below.
Point out, "Notoriously, you should be late. That’s why, when
judges can’t concentrate for more than 10
pages, ignore the page limit. Rules are
mending" — by the mid-afternoon from all the
heavy briefs will give the judge the excuse
from scratch. If they don’t, and they prob-
ably won’t, you’re half-way to your losing
game.

Never write the name of the case cor-
rectly in your brief and leave the other
one out of the citation. Annoying the court will
help you lose.

Don’t cite the official reporters. Make
the judge to deliberate over your brief.

Two-hour lunches. The longer and more
time, without question, they call it “deliberat-
ing” — by the mid-afternoon from all the
nominalizations are wordy and abstract, rely-
less. And never use para-
enthetical explanations after citations. Parentheticals just throw judges a curve.

Don’t cite binding cases from your juris-
dictions, or any cases. Cite and quote only from dissenting and concurring opin-
ions. Don’t cite constitutions, statutes, or other
cases from a different jurisdiction.

Never attack the hard-to-find cases or
the law you’ve cited.

Rule #5: Being a Lawyer Means
Knowing How to Break the Rules.

The secret to your greater chances of losing. If the judge presid-
over your case limits your brief to 15
pages, ignore the page limit. Rules are
made to be broken. The more you ignore the limit, the better
you know it doesn’t mean that more is better. Exceed
the limit. Make it 25, 50, 100, or more
pages. The longer your brief, the less the judge will read it. The
attorney who’s listing on one paragraph
will judge you twice as intelligent.

Heavy briefs will give the judge the excuse
not to read your brief. Besides, most
can’t judge not concentrate for more than 10
minutes at a stretch. And judges will usu-
ally fall asleep — they call it “deliberat-
ing” — by the mid-afternoon from all the
hard work they’ve done digesting their two-hour lunches. When
longer and more
boring the faster you’ll get the judge
to deliberate over your brief.

If you’re a stickler for the rules, con-
dense your 100-page brief to fit a 15-page
limit. It doesn’t matter whether the text is
too small to read. It’ll give the judge an
opportunity to take out a magnifying glass
and see your case for what it really is: a
loser.

Deadlines are for deadbeats. The more
important it is to the court or your adver-
sary, the longer the deadline. The longer,
more you should be late. That’s why, when
you get a project, you shouldn’t start early.

Don’t include a table of contents or a
table of authorities. Including either one of
them, or including both of them, means
you’re a showoff.

Rule #6: Make It Personal.

If you’ve tried all the above rules, and
you still haven’t lost, go for the jugular.

Attack the court, opposing counsel, and
your adversary. Slander, ridicule, abusive
language, sneer remarks, irony, and
humor. Destroy them: Denigrate their
intelligence, motives, and integrity. Tell
them how you really feel about the court’s
earlier decisions. Pour it on like salt on a wound. Critique your adversary’s
writing skills. It’s obvious you went to the
court for legal help. Don’t be deferral-
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your client. Sometimes judges will feel so sorry for you that they’ll wade through your brief to find a nugget of merit. You might have a chance to win — or, lose — after all. But if losing is your goal, just read your brief, typos and all, at oral argument.

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at Columbia Law School and St. John’s University School of Law. He thanks Alexandra Standish, his court attorney, for her help with humor. Judge Lebovits’s e-mail address is GLebovits@aol.com.