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THE PIB REPORT

Views from the Bench: What Judges Expect from Attorneys

Judge Cohen – who has been Of Counsel to PIB Law since 2013 – had a long and distinguished career on the bench. He was first appointed to serve in the Juvenile and Domestic Relations Court in 1981. In 1984, he became a Judge of the Superior Court, Law Division. In 1998, he was assigned to the Chancery Division, General Equity and Probate Part, and was designated the Presiding Judge by the Chief Justice in 2000. In his tenure on the bench, Judge Cohen oversaw hundreds of family matters, criminal jury trials, and complex general equity and probate litigation. Judge Cohen retired from the bench in 2004. He served as a recall Judge until 2006, and then entered private practice. At PIB Law, Judge Cohen concentrates on mediation and arbitration and consults on commercial litigation and regulatory matters. Judge Cohen also serves as a mentor to the Firm's litigators.

There is a basic road map that leads to success in Court. Always remember the three "Bs" when appearing before a Judge:

1) **Be on time:**

• Always build in extra time to arrive at Court.

• If you are going to be late, contact all parties and the Court. Today, everyone has a cell phone.

• Do not ruin your reputation by arriving late. You owe a good reputation to the Court, your client, your adversary, your law firm and yourself.

2) **Be prepared:**

• **If you fail to prepare, you prepare to fail.**

• **Know your case:**

Intricately know all of the facts, legal theories, proof, and evidentiary problems. Evaluate all witnesses and assess the strengths and weaknesses of your case and your adversary's case.

• **Know your client:**

Understand all of the business considerations involved in the litigation, including any financial constraints. In addition, understand all of the emotional considerations involved in the matter, including the client's tolerance for risk.

• **Bring all critical documents and evidence to court.**

• **Be an efficient advocate by using the art of persuasion.**

The art of persuasion is a litigator's most essential tool. To be a persuasive advocate, a litigator must first be understood. To be understood, a litigator must be:

• Organized – Make a mental outline of your argument using the elements of an appellate brief (procedural history, statement of facts, controlling legal principles, application of the law to the facts, and conclusion).

• Clear – Tell a clear story to your audience. Ensure that the story is chronological and has a beginning, middle and end. Be listener-friendly, and avoid interruptions.

• Logical – Ensure that your argument makes common sense.

• Authoritative – Know all relevant case law, statutes, court rules, rules of evidence and the facts admitted into evidence.

• Concise, yet thorough.

• Aware of the audience (jurors, judge, adversary, litigants, etc.).

3) **Be Professional:**

Professionalism involves the delicate balance between representing the interests of a client or an employer and the duty to

Continued on next page

be honest, fair, respectful and civil to the court, your adversary and anyone else involved in the justice system. A lawyer's most valuable asset is his or her reputation.

• Always act in a civil manner.
• Stand up whenever addressing the Court.
• Be respectful to the Court, even if you disagree with the Court's ruling or reasoning.
• Attack your adversary's arguments, but never your adversary.
• If personally attacked by an adversary, do not respond in kind. Defend yourself vigorously, but stick to the merits of the issues before the Court. Never let an obnoxious adversary drag you down to his or her level.
• Be civil to all of the Court staff. When speaking to any member of the Court staff, act as though you are speaking directly to the Judge.

Act like a true professional, and you will be treated like a professional. There is nothing incompatible between diligently, effectively and vigorously representing a client and acting honestly, fairly and respectfully while doing so. ■

For more information, contact Hon. R. Benjamin Cohen @ benjamin.cohen@piblaw.com

New Jersey's Appellate Division Holds Bank Not Required to Pay Maintenance Assessments and Counsel Fees for Vacant Condominium Unit

On November 16, 2017, in *Union Hill Condominium Association v. Wells Fargo Bank, N.A., Docket No.* A -1513-16T1, New Jersey's Appellate Division affirmed the lower court's order that defendant Wells Fargo Bank, N.A. ("Wells Fargo") was not a "lender in possession" or a "mortgagee in possession" required to pay maintenance assessments and counsel fees for a vacant condominium unit against which Wells Fargo filed a foreclosure action.

Wells Fargo brought a pending foreclosure action against the record owner of the subject condominium unit in August 2012. The record owner died in 2013, and the foreclosure action has not reached final judgment. During the pendency of the foreclosure action, Wells Fargo took steps to maintain the property, including changing locks, winterizing the premises, landscaping, remediating stink bugs and repairing a door and handrail. The lower court issued a written decision rejecting the contention of Plaintiff Union Hill Condominium Association (the "Association") that Wells Fargo's actions to maintain the property "were sufficient to make it responsible for ongoing assessments," and finding that the Association's sole remedy against Wells Fargo was the lien priority statute (N.J.S.A. 46:8B-21). The Association appealed the lower court's findings.

In affirming the lower court's decision, the Appellate Division found that "a mortgagee or its assignee that brings a foreclosure action against a condominium unit owner is not liable for delinquent common charges unless and until it has engaged in sufficient activities to be considered 'in possession' of the premises." Whether a mortgagee or its assignee is "in possession" is determined on a case by case basis. In the instant matter, the Appellate Division found that the actions taken by the lender's assignee to protect the security interest in the property did not rise to a level of a lender in possession, noting that the actions were in the interest of safety rather than capital investments. If, however, Wells Fargo had engaged in more extensive repairs or improvements, the facts may have tipped in favor of the Association. In reaching this decision, the court relied heavily on *Woodlands Community Association v. Mitchell*, 450 N.J. Super. 310 (App. Div. 2017) – a case addressed by the PIB Report in June 2017 – in which the Appellate Division similarly found that, despite the lender's assignee's winterization of the subject property, the assignee was not a lender in possession liable for condo fees. ■

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Synopsis of December 2017 Federal Rule Amendments

On December 1, 2017, amendments to the Federal Rules of Evidence ("FRE"), the Federal Rules of Civil Procedure ("FRCP") and the Federal Rules of Appellate Procedure went into effect. A brief summary of the amendments is below:

• **FRE 803(16)** – The amendment narrows the ancient documents hearsay exception for documents whose authenticity has been established by requiring that the statement in the document at issue was prepared before 1998. The rule previously required that the document be at least 20 years old.

• **FRE 902(13)** – The amendment permits self-authentication of evidence "generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12)."

• **FRE 902(14)** – The amendment permits self-authentication of records "copied from an electronic device, storage medium or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12)."

• **FRCP 4(m)** – The amendment clarifies that notices of condemnation under FRCP 71.1(d)(3)(A) do not fall under the 90 day time limit for serving process.

• **FRAP 4(a)(4)(B)(iii)** – The amendment clarifies that amended notices of appeal do not require an additional filing fee. ■

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