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CRAFTING AN INFLUENTIAL AND EFFECTIVE REPLY BRIEF

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Even though reply briefs offer the opportunity for the last written word on appeal, many read like an appellant's afterthought. Anecdotal reports indicate that some judges and clerks read reply briefs first, assuming that appellants will have distilled the most critical and compelling arguments by then. Yet, too many reply briefs are focused entirely on rebutting the appellee's arguments and fail to effectively present the appellant's position. Whether read first or last, an effective reply brief must leave the judges with a coherent understanding of the reasons why the appellant should prevail on appeal.

A reply brief should serve as a reprise – a return to the original theme. In musical theater, a reprise repeats an earlier song or theme, usually with changed lyrics to reflect the story's development. The theme developed in the opening brief needs to be brought back to the forefront, refashioned or refocused as needed to respond to the appellee's arguments. The opening and reply brief must share the persuasive theme.

Crafting an influential reply brief is difficult. Most jurisdictions have short page or word limits (2). Courts rarely grant motions to file reply briefs exceeding page limits. Within these confines, an appellant must respond to the appellee's arguments, refresh the arguments from the opening brief, and make a final push to persuade the court to reverse. Reply briefs test appellate counsel's ability to concisely and effectively distill winning arguments on appeal.

Deciding whether to file a reply brief

In almost all courts, reply briefs are optional. Yet, there are very few – if any – circumstances that justify the decision to forgo the chance to file a reply. Trying to lighten the reading burden for busy appellate judges is not a good reason for waiving a reply. Although judges can be irritated by a reply that just repeats the same arguments in the opening brief, courts appreciate a succinct and well-written reply brief that demonstrates the merit of the appellant's position despite the appellee's response arguments. Judges want to get it right. A good reply brief can help.

A reply should be filed even when counsel hopes to send a message that an appellee's brief is so lacking that no response is needed. An effective approach is to highlight the arguments that the appellee did not contest or discuss. This provides an opportunity to briefly restate the appellant's arguments and add that the ap-

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(2) The limits in state appellate courts range from 10 to 30 pages. F.R.App.P. Rule 32(a)(7)(B)(ii) allows a fairly expansive limit of 7,000 words.

pellee "does not challenge" or "does not dispute" those points.

Selecting the arguments to address

Many lawyers, including experienced appellate practitioners, suffer from the advocate's compulsion to respond to every argument in appellee's brief. However, the appellant's job never changes. The reply brief, just like the opening brief, must explain why the appellate court should correct the trial court's errors. Before drafting a reply brief, try to identify which response arguments will interest the judges and what questions the panel might ask at oral argument. If an appellee's argument does not deal with these critical and dispositive issues, an appellant should not waste valuable space by replying. In some cases, a brief footnote explaining why the argument can be ignored may be appropriate.

Use an introduction

A brief introduction allows the appellant to concentrate on the key legal issues and develop a statement of the critical arguments that counters the appellee's response. The urge to jump directly to a rebuttal of the appellee's arguments should not obscure the benefit of a succinct reprise of the reasons why the trial court reversibly erred.

Point out concessions and omissions

A very effective approach is to identify and highlight the arguments that the appellee concedes, or more commonly, the arguments that the appellee does not address. An introduction with a bulleted list allows the appellant to restate the arguments that are conceded or uncontested.

Structuring the reply brief

When representing an appellee, a skillful appellate advocate will commonly restate and reorder the arguments rather than accept the appellant's organization. Faced with this approach, an appellant's counsel must decide whether to retain the organization from the opening brief or reply to the appellee's arguments as presented in the response. In almost all cases, acceding to an appellee's reorganization is a mistake and forfeits the appellant's advantage of framing the arguments. The reply to appellee's arguments should be woven into the appellant's reprised themes. Following the opening brief's organization and structure helps to refocus the court on the issues presented by the appellant.

Avoid the defensive trap

Many lawyers fall into the defensive trap and make the mistake of repeating the opponent's argument before rebutting it. A typical paragraph begins with the appellee's argument as the topic sentence. The remainder of the paragraph is the appellant's response. This approach combines two errors – the opposing argument is repeated for the court and given the prime real estate occupied by the topic sentence. A better approach is to begin the paragraph with a sentence stating the appellant's argument and the error in the appellee's argument: "The plain language in the contract supporting appellant's interpretation cannot be overcome by the extrinsic evidence asserted by appellee."

Counsel should also be careful when replying to an appellee's argument requires explaining it. Restating a confusing response carries a risk of clarifying it. Although the approach will vary, it is often effective to state the appellee's argument in general terms without any of the supporting details that are or should have been presented.

Responding to the counterstatement of facts

Because the statement of facts in the opening brief should cover the relevant facts in a non-argumentative but persuasive manner with sup-

porting record citations, there should not be any need to engage in an exhaustive point-by-point rebuttal of the appellee's factual statement. It may be enough to simply state that the appellee's counterstatement fails to comply with the requirements for an accurate, unbiased and supported recitation. The reply should avoid a litany of "she said, he said" statements. A few key examples of the appellee's misstatements of fact will demonstrate that the court should rely on the statement of facts in the appellant's opening brief.

At times, the appellee's response will point out facts that undermine or weaken the appellant's position. A reply is necessary in those cases, especially when the facts should have been acknowledged and dealt with in opening brief. The reply should demonstrate why the facts are immaterial or the appellee's statement is wrong. If the appellee has fairly identified factual errors in the opening brief, the reply should acknowledge the mistake. A forthright admission is less painful than being skewered at oral argument or in the court's opinion.

Respecting the rule against new arguments

The rule against raising new arguments in a reply brief is easy to state. Judges do not appreciate sandbagging and understandably take a jaundiced view of any new arguments presented in a reply brief and of the appellant's counsel who raises them.

The line between a new argument and a restated argument is not always well-defined. If the response to an appellee's argument requires an extensive revision to the original argument, it is important to explain why the reply argument is still a restatement. The link between the original and reply arguments should be evident.

Courts understand the difference between raising a new argument and dealing with an unanticipated one. Most appellees understandably rely on the same arguments that were successful in persuading the trial court. While a good appellant's brief will anticipate and address those arguments, there are times when an appellee offers new twists, *e.g.*, when an appellee retains new counsel on appeal, especially an appellate specialist, who realizes that the trial court's reasoning is weak and relies on the "erroneous ruling but right result" principle.

When an appellee presents an issue that does require a new argument in reply, the appellant should acknowledge it and explain why the issue was not discussed in the opening brief. In some cases, the best explanation is the appellee's failure to raise the issue in the trial court. With reply space at a premium, appellants can characterize the appellee's approach as conceding that the trial court erred in its rulings. The reply can point out that experienced trial counsel did not feel the arguments had sufficient merit to raise them in the trial court. Treating the appellee's arguments as "fall backs" or "last resorts" that can be easily discarded can be effective.

An appellant's counsel should be very reluctant to move for permission to file a reply brief exceeding the page limits. Explaining the need for additional space gives the clear message that the appellee's argument may have sufficient merit to warrant affirmance.

Replying to the attack brief

When an appeal is handled by experienced appellate counsel, the "attack brief" is blessedly infrequent. At times however, the response attacks the appellant and appellant's counsel. In almost every case, the reply should ignore the attacks. At most, a brief footnote indicating counsel's unwillingness to take the bait may be justified. In *all* cases, the appellee must refrain from adopting the tone of the response. Appellate judges are not impressed, and in most

cases, turned off by incivility. Courts welcome a reply brief that maintains the same professional tone as the opening brief.

Footnotes

Due to page limits, there is a natural inclination to use footnotes for replying to important but non-essential responsive arguments. Although the approach does not work when a court has word limits, the space saved by single-spaced footnotes in page-limit courts is tempting. Generally, counsel should resist the temptation. Judges know why counsel use footnotes. The risk that some judges will not read footnotes is unacceptable, especially in courts where briefs are read on tablets and footnotes are not easily viewed. The space used for footnotes is better devoted to cogent arguments in the text. In some cases, however, it may be worthwhile to employ a sparing number of footnotes to signal that an appellee's argument is immaterial and can be summarily dismissed.

Conclusion and relief requested

As a way to save space, appellants sometimes choose to omit a statement of the relief requested. Unless there is no alternative, a reply brief should close by telling the court what the appellant wants. After all, that is the most important question in any appeal.

Final thoughts

An appellant's opening brief should provide the court with all of the legal and factual grounds for reversing the trial court. The reply brief should emphasize why those reasons are still compelling after a fair consideration of the appellee's response. The reply should confidently and credibly refocus the court's attention on the appellant's arguments.

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