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Preparing an Effective Reply Brief

An effective reply brief can be the key to winning an appeal. Reply briefs help to refine the parties' legal arguments and factual assertions. I have often heard from appellate court staff attorneys and law clerks that they like to review reply briefs first because they may narrow down the issues on appeal, focusing on the most critical ones. Moreover, reply briefs give appellants the valuable opportunity to have the last word in the case. Yet many appellants do not take full advantage of these benefits. Even worse, an ineffective reply may do more harm than good for an appellant.

The first thing to consider is whether to file a reply brief at all. Reply briefs are optional. Most lawyers agree, however, that it is a rare occasion when a party should forego the opportunity to submit a reply brief. The only occasions, in my view, when a party might not want to file a reply are where the party's position is so strong that no reply is needed, or where the brief filed by the respondent or appellee is so incomprehensible or seriously lacking in some way that to reply would add undeserved credence to that side's position. Both of these situations are extremely rare. Counsel are advised to use caution before deciding to waive the right to file a reply brief.

When considering what to include in a reply brief, consider the nature and purpose of the reply. Reply briefs can serve a number of different purposes, and the focus of the brief will depend on which ones you decide to utilize. Replies serve to refine the legal and factual issues, to respond to key arguments raised by the respondent or appellee, and to reinforce the correctness of the appellant's position. Reply briefs also present an opportunity to highlight any concessions or admissions by the other party, or their failure to address critical issues raised in the opening brief. Another effective technique is to use the case law cited in the other side's brief to the appellant's advantage; in other words, show how the respondent's or appellee's case law in fact, supports the appellant's legal position. The reply may also be used to expose the other side's flawed policy arguments or faulty logic. The key is to keep the brief focused, using a theme, which should be stated right up front in the introduction and woven throughout the reply brief.

There are several other things to keep in mind, however. First, be brief. There are often tighter limitations on the length of reply briefs; even where the length limitations are the same, the reply brief should be significantly shorter than the opening brief.

Second, do not simply repeat the arguments in the opening brief. Judges have large case loads and understandably, they are not impressed with reply briefs that merely rehash the same arguments in the opening brief. Remember, an appellant does not waive arguments that are not included in the reply if those arguments are stated in the opening brief. A good reply should counter each of the factual assertions and legal arguments of the other side, while at the same time emphasizing the correctness of the appellant's position.

Third, maintain credibility with the court by fairly addressing the other side's arguments. Be absolutely accurate with respect to the record and avoid ad hominem attacks on the other side. While a reply provides an opportunity present unrebutted arguments, there is a responsibility to maintain accuracy and fairness that comes with this opportunity. Failure to do so can be devastating to one's credibility with the court.

Finally, do not give in to the temptation to ask the court for permission to file an over-sized reply brief. If you cannot fit your arguments within the page limitations, your brief is probably too long and you need to keep editing. Unless you are dealing with extremely complicated issues or facts, there is absolutely no reason to file an over-sized brief in any appellate court.

Having the last word is a valuable opportunity for appellants, who always face an uphill battle on appeal. A good reply brief can be the difference in a case. Appellants should take advantage of this opportunity to present a concise and focused reply brief.

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