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The Reply Brief: Turning "Getting the Last Word" into "Getting the Win"

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When you are the appellant, you always have the burden of persuasion in seeking a reversal. Even on a de novo review, you are starting at least a step behind, psychologically. A reply brief may be the last word and the last chance at persuasion in the appeal if, as increasingly occurs, no oral argument is granted. It certainly is the last word while initial conclusions are being developed by the judges before they hear oral argument, and the literature suggests it is the rare occasion that oral argument changes those initial conclusions. So never pass up a chance to file a reply brief. Not only will it give you the last word at the briefing stage; it will force you to focus on the true core issues in the appeal and determine your best arguments on those issues for any oral argument that may be held. Here are a few tips on how to nail the reply. First, just as important as knowing what *to* do is knowing what *not* to do. Many attorneys appear to view the reply brief as nothing more than a vehicle to repeat their arguments from the initial brief. Do not squander this opportunity to refute your opponent's points, and thereby bring the court to your point of view, by falling into this all-too-common trap. Beyond just a waste of your client's money and the court's time, a reply brief that merely reprises your initial brief telegraphs to the court either that you do not understand the purpose of the reply brief or, worse, that you do not have any meritorious responses to the arguments raised in your opponent's answer brief. And much like pure repetition of arguments already made in your initial brief, needless bloat can water down your reply. As is always the case in brief writing, be brief. Short sentences. Short paragraphs. Shorter always is better. The more straightforward your presentation, the better your chances at persuasion. Consider lumping some of the other side's arguments or cases into a category you can dismiss in its entirety, allowing you to focus on the points that carry you across the finish line. Begin by reviewing your opening brief, which you may not have seen in months, and collecting the themes in it. You want that theme to flavor your reply brief as well. In addition, see what (if any) arguments, cases, or evidence the other side failed to address. That absence may be an effective way to start your reply:

> In our initial brief, we demonstrated 1, 2, and 3. Appellee is unable to respond to the third point at all, and its response to the other points is unavailing. . . . . In its

> answer brief, appellee fails to address our points 1, 2, and 3.

Although you do not want your reply brief to be a mere reiteration of your initial brief arguments, you almost always will want to start with a quick recap of the arguments advanced in your initial brief—preferably a single opening paragraph before you begin your reply. Some judges say they read the reply brief first, as it frames the issues to be decided. Although your recap should be short and sweet, be sure there is enough context for that judge to understand your comeback to the appellee's response to your argument. If the other side made a significant concession, you almost certainly want to include that concession at the outset, perhaps in a brief "Introduction." This can be especially effective if you would not reach the concession until late in your reply if you followed the same organization of issues that was in your initial brief or if the opponent has responded in a different order of the issues. In all events, concession or no, you do not need to adhere to the same order as either of the preceding briefs, especially if your reply is short. Start with the decisive point on which you win. Succinctly restate the point you advanced and then explain why the response to it fails. It goes without saying that you do so in a professional way, without personal attacks or slurs on the other side or counsel. Avoid a brief composed of "he said, she said" paragraphs. It becomes boring to read a brief in which every paragraph begins "Appellee argues. . . ." Mix up your opening sentences. Is the other side raising an argument that is not preserved in the record below? Consider making that a separate section of your reply—perhaps the opening section, if the argument comes too little, too late. Even if the court is not precluded from affirming on that ground as right-for-any-reason, it may be helpful to show that the appellee's position has changed from trial to appeal. Do not be afraid to change your headings to be advocacy pieces in rebuttal. Make your headings—which will, of course, be set forth in the table of contents, where they will be read as a whole at the very beginning—read as a persuasive reply in themselves. An article that discusses this in more detail is Bryan A. Garner's "Pointed Advice on Point Headings: Good Headings Show You've Thought Out Your Arguments Well in Advance, and They Help Make Your Case," *A.B.A. J.*, Sept. 2015. If the other side demonstrated a conflict in the case law, present principled reasons why your cases should be followed. You obviously want to win the appeal, but the court is interested in the rule of law, the jurisprudence of the jurisdiction, and the future cases to which the rule adopted in your appeal will be applied. Give the court solid reasons why it should follow the rule that, incidentally, allows you to win. Is there some extraordinary fact in your case that, in order for the court to do justice and reach the right result under the facts of your case, requires application of a different rule than the rule in the appellee's cases? Has the rule in those cases been criticized in scholarly writings? Are there powerful dissents you can embrace? It is not enough to say the other side is wrong; you must persuade the judges that this is the case. This can only be done with logic and principled reasoning, not hyperbole. On occasion, the appellee will fail to advance an argument in an effective way. Or even in an understandable way. The concern then arises that you will be framing the argument in a better manner for the appellee when you respond to it in your reply. There is no one-size-fits-all answer to this conundrum. As a general matter, however, err on the side of caution and address the point the appellee is trying to make. The judges will work to figure it out anyway, and better you respond to it head-on, rather than provide no response to it and hope they miss it in the weeds. What if the

appellee has missed a controlling case—or at least one squarely on point to its argument? If it is truly controlling, then you need to bring it to the court's attention to satisfy your duty of candor. But nothing says you cannot also advance any good-faith argument you have that it is materially distinguishable or should not otherwise be followed in your case. The court (and your opponent) will respect you for your forthrightness. What if the appellee has caught you in some mistake, perhaps even a conclusive mistake, on one of the arguments in your initial brief? Consider confessing error in a straightforward way and moving on to your other arguments. *See* Sylvia H. Walbolt & Nick A. Brown, "Practical and Ethical Considerations in Confessing Error on Appeal," *Appellate Practice*, Spring 2015. Better to acknowledge the error, offer your apologies to the court and counsel in a civil way, and move on to show why you win anyway. How can you most effectively show that? Once you get your draft on paper, edit and edit again—until it crisply and clearly responds to the other side's arguments. Eliminate any hyperbole that has crept in as a result of your angst in reading the answer brief. It made you feel better at the time but now needs to disappear. John McPhee recently wrote an article in the *New Yorker* (Sept. 14, 2015) called "Omission: Choosing What to Leave Out." His advice on editing—which he calls "greening"—is not only funny; it is spot-on even for editing legal briefs. We were struck by this suggestion to his students that greening

> does not mean lop off four lines at the bottom, I tell them. The idea is to remove words in such a manner that no one would notice that anything has been removed. Easier with some writers than with others. It's as if you were removing freight cars here and there in order to shorten a train—or pruning bits and pieces of a plant for reasons of aesthetics or plant pathology, not to mention size.

Says easy but does hard! One favorite editing trick is to assume, at the very end of the writing process, that you must eliminate some specific number of words to comply with the court's rules, even if you do not really have to do so. Works every time to make a better final product. Once you have done all of your editing and think the brief is finally ready to file, have someone cold to the case read it. Then ask your reader if he or she has enough, just on this one compact document, to rule for you. Or does your reader have questions and want to know more about some argument or issue, either from your standpoint in reply or from the standpoint of the other side? The most effective reply brief is one that allows the reader to rule for you based on that brief alone. If something is not clear or persuasive to your cold reader, fix it before you file. What if you cannot come up with anything to say in response to the points set forth in the answer brief? The appellees really nailed you, perhaps with a new, dead-on, controlling case decided after you submitted your initial brief, and it destroys your appellate argument altogether. (Yes, we had that happen once, when the Florida Supreme Court disapproved the decision we had relied on in the initial brief, years after the decision had been rendered. It is still a painful memory.) You cannot, of course, present new arguments in a reply brief. Can you, however, create conflict for possible further appellate review? Does the decision rest on a ground not argued by the other side below? Put your best shot on paper, and if it doesn't pass the laughter test, consider dismissing your appeal. After all, you don't want to end up being sanctioned by the appellate court and having to pay your opponent's attorney fees. Nor do you want

to see your name in an appellate decision chastising you for advancing a frivolous appeal. Nor do you want to have to finally confess error at an oral argument in response to a direct question that cannot be dodged. But that is, happily, the extraordinary appeal, and most of the time, you should have plenty to say in reply. The rules give you, the appellant, the invaluable opportunity to have the last word—the trick is doing that succinctly and effectively. It is hoped these tips will help you do so.

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