



To Enhance Credibility and Persuasion

## The Art of the Reply Brief

By Michael A. Pollard

**R**eply briefs present an advocate with the valuable opportunity to advance an un rebutted argument to a court on legal or factual issues that have been fully refined through an earlier round of the parties' briefing. For this reason, a well-respected appellate attorney confided that he would typically begin preparation for oral argument by first reading the appellant's reply brief. Improperly prepared, however, reply briefs can be a vehicle for needless repetition and misstatement. Perhaps because of the frequency with which reply briefs fail to promote their proper, limited objective, they are among the most disfavored of court pleadings—second only perhaps to the dreaded surreply brief. Indeed, the local rules of some trial courts do not contemplate the filing of reply briefs absent a court order. When court rules anticipate the filing of reply briefs, their length is almost universally restricted by tight page or word limits.

Lawyers often recoil at the tight limitations on reply briefs, and reflexively seek court approval to file an over-length brief. These motions, even when granted, seldom serve their movant's purpose. Lawyers seeking summary judgment, for example, should advocate for the simplicity of the legal issue at the heart of a request for entry of judgment, but instead paradoxically invoke "the complexity of the legal issues" or the "detailed nature of the factual record" in order to obtain a few extra pages for their reply brief. In most situations, an advocate can be more, or at least equally, effective working within a reply brief's space constraints.

Writing an effective reply brief, especially within tight page limits, requires an advocate to articulate a theme and to state it immediately. The theme should both follow the parties' previous exchange of arguments and offer the court an additional perspective on them. This objective typically exposes the *principal* inadequacies of an opponent's argument, while reinforcing the correctness of your client's original position. Effective reply briefs, for example, highlight important concessions or omissions by a litigation opponent. As any seasoned defense lawyer knows, defendants in civil litigation obtain summary judgment more frequently on the basis

of a plaintiff's testimony, or a plaintiff's expert witness' testimony, rather than on the basis of exculpatory testimony offered by a defendant. A reply brief can effectively highlight the legal significance of an opponent's factual concessions or omissions by tying deficiencies to the legal standard governing the disposition of the motion, without repeating that standard in its entirety. On a summary judgment motion in federal court, for example, a reply can cogently articulate the outcome determinative impact of a plaintiff's failure to adduce evidence on an essential element of his or her claim without restating all of the cases cited in the opening brief that establish that standard. Indeed, a reply brief is more persuasive without that repetition.

Although requiring more subtlety, the same process used to highlight omissions and concessions in factual statements can apply to an opponent's use of precedent. An opponent may ignore important, or perhaps controlling, precedents cited in an opening brief, instead invoking a different line of cases entirely. Before addressing the new cases, a reply brief should comment on the legal significance of an opponent's failure to address the dispositive case authority cited in that opening brief. In addressing an opponent's new authorities, when possible the writer of an effective reply brief will appropriate for a client's use an opponent's case law. This opportunity is often presented in a quote from a decision that seemingly aids an opponent's contention, yet the case holding supports the movant's argument instead. Reply briefs can illuminate the unsound policy implications of an opponent's position, or expose an underlying rhetorical fallacy on which it rests.

As the few examples of reply brief themes listed above demonstrate, a reply brief permits, at least in part, an advocate to pass judgment on the quality of the arguments previously advanced by all parties. This opportunity is accompanied by the responsibility to comment fairly. Indeed, given that reply briefs are largely not rebutted, their persuasive force often depends on their fairness.

Lawyers often lose credibility in reply briefs by mischaracterizing an opponent's argument. In other instances, some lawyers, in an effort to "set up" the logic of their reply arguments, state an opponent's argument more effectively than it was originally presented. A simple technique to avoid both pitfalls is to quote directly

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from that portion of an opponent's argument—whether legal or factual—that is most susceptible to attack and will serve as the reply brief's focus. The writer should take pains, however, to quote from an opponent only to advance a reply brief's theme, and sparingly, lest the movant dignifies the opponent's argument by repetition.

Lawyers also lose credibility when a reply brief addresses peripheral matters, rather than the gravamen of an opponent's argument. Writing within a word limitation requires a lawyer to select from available arguments. If an argument is properly preserved in an opening brief, it is not waived if not repeated in the reply brief. Conversely, an argument is not raised in an opening brief, it is not raisable in a reply brief. A per-

suasive writer should forego the temptation to pick nits, even if in response to an opponent's misstatement. Unless a misstatement affects a motion outcome or undermines the credibility of an opponent's entire presentation, a writer is best served by focusing the reply on more important matters. The most easily available reply points are sometimes not the most effective.

Reply briefs also too often become a vehicle for *ad hominem* attacks, or, more likely, *ad hominem* responses to attacks by an adversary, which rarely serves an advocate's purpose, especially in a reply brief. As indicated previously, a reply brief writer is afforded the opportunity to provide fair commentary on a highly refined disputed issue without rebuttal. To use that occasion to cast aspersions on an opponent or his or

her client undermines the purpose and effectiveness of the reply. If an attorney or his or her client was unfairly attacked in an opponent's response brief, a client is usually best served if the improper *ad hominem* argument is merely touched upon. It is best to elevate the discourse by addressing the deficiencies of an opponent's argument. A lawyer will appear "above the fray," and he or she will be heard with greater receptivity.

Advocates should use every persuasive tool at their disposal to exploit the limited opportunity afforded by reply briefs to comment to a court fairly on the highly refined legal issues identified by the parties. If properly presented, a reply brief enhances both a lawyer's credibility and the persuasive force of a client's arguments. 