

No Reply?

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I love replies. Maybe it's just about having the last word in an argument. But having worked for several judges, I also know the reply is typically the last document read before a judicial decision is made, and that a persuasive reply can make all the difference. I think the only time a reply should not be written is when victory or defeat is so certain a reply could not possibly make a difference. It should be noted, though, I have thought more than once I was on one side of that equation when in fact I was on the other.

Judgment calls often have to be made about a reply brief even before the motion it supports has been written. Sometimes a motion says too much. Should you address a weakness or likely response argument in your

motion, or wait to address it in your reply? Will opposing counsel (or the judge) even think of it? Will you be unnecessarily spotlighting problem areas and making arguments for the other side, or tactically beating them to the punch and phrasing the matter in terms most favorable for your client? These are all reply-related questions that must be considered at the motion-writing stage.

Such judgment calls are even more complicated in courts where replies may be filed only upon leave of court. Much will depend upon the proclivity of the particular judge to allow replies, and whether you can present cogent reasons why a reply brief should be allowed. Even a well-reasoned motion for leave to reply does not assure that leave will be granted. This uncertainty can make a difference in strategy, and in the length of your motion. Normally I like to see how (and if) the other side attacks a

problem area, and then counter in my reply. But in courts where replies may be filed only upon leave of the court, the possibility that no reply will be allowed must be considered in determining the scope of the motion. The enactment of local rules allowing replies only upon leave of court appears to be a growing trend. I question the efficacy of such rules, as they result in lengthier motions and responses, as well as added paperwork and procedure.

Style-wise, a reply should be short. While conciseness is a virtue in all legal writing, in the context of a reply brief, it is particularly appropriate. Judges understandably are not impressed with an extended rehashing of what has already been presented. Your last words to the court should be short, punchy, and powerful. Having the last word in an argument can make a difference. Take advantage of it if you can.