
HAVING THE LAST WORD: THE APPELLATE REPLY BRIEF

by Paul J. Killion

Is there an art to having the last word? Appellate practice guides typically spend a great deal of time explaining appellant's opening brief and respondent's or appellee's answer brief, but little time is devoted to appellant's reply. While this oversight is understandable given the importance of the opening and answer briefs, it is of little comfort to the lawyer facing the task of preparing a reply, particularly for the first time. This article provides a brief refresher on what a reply brief is supposed to do.

SHOULD YOU REPLY?

Under the federal appellate rules and those of most states, appellant's reply brief is optional. *See, e.g.*, FRAP 28(c); Calif. Rules of Court 14(a). So, when should an appellant file a reply? Always. There is never a legitimate reason not to reply, because no matter how weak you consider the respondent's brief, there is no assurance the court will agree with your assessment. In fact, the court may view the lack of a reply as a concession on one or more of the points raised in respondent's brief. More importantly, why pass up the opportunity for the last word on your appeal?

WHAT ARE THE OBJECTIVES OF A REPLY BRIEF?

There are four primary objectives of a reply brief, and a fifth purpose for cases involving a cross-appeal:

1. To Counter Respondent's Statement of Facts.

The reply provides the appellant with a last opportunity to set matters straight re-

garding the facts. The appellant should take full advantage of this opportunity to correct factual misstatements made by respondent and explain the immateriality of any legitimate factual disputes. But only the most important factual misstatements and disputes should be addressed.

2. To Counter Respondent's Legal Arguments.

The reply also provides the appellant with an opportunity to correct or refute respondent's legal points. Are respondent's cases reliable authority? Has respondent's analysis ignored any important steps or cases? While it is neither necessary nor desirable to rebut every case on which respondent relied, it is essential to distinguish or explain any cases central to respondent's arguments. It is also good practice to immediately cite check appellee's entire table of authorities as soon as the answer brief arrives.

3. To Restore the Focus Back onto Appellant's Opening Brief.

The reply also provides the appellant with an important opportunity to refocus the court on the issues raised in the opening brief. If the respondent's brief has created unnecessary complexity or confusion, the reply must dispel it and put the appeal back on the right track. One method to achieve this is to counter respondent's arguments using the same organizational structure of the issues used in appellant's opening brief. Avoid the temptation to address appellee's arguments in the sequence set forth in the answer brief. Another method to help restore focus on your issues is to start writing the reply brief before the respondent's brief arrives. It is usually possible to anticipate some of respondent's arguments in advance; if you take the time to start the reply before the answer brief arrives, you will be in a position to simply recraft it to meet the respondent's actual arguments, while still maintaining your original structure. You also will not feel defensive when you first start writing.

4. To Supplement Appellant's Authorities.

The reply brief also provides appellant with the opportunity to cite both previously uncited cases responsive to respondent's legal arguments and cases that were decided after appellant's opening brief was filed.

5. To Answer Respondent's Cross-Appeal.

If respondent has cross-appealed, the appellant's reply brief also constitutes appellant's answer to respondent's opening cross-appeal brief. *See, e.g.*, FRAP 28(h); Calif. Rules of Court 14(d). Typically, a combined brief is used in this situation, containing both appellant's reply to the appellee's answer and the answer to the appellee's cross-appeal. When faced with this situation, it is sometimes necessary to request additional pages for the combined reply answer brief.

WHAT TO DO IN YOUR REPLY

1. Be Selective.

To be effective, a reply must be selective. The focus should be only on the important issues. It is not necessary to rebut every point raised in the answer brief—only those points that appear to undermine appellant's positions. If making the selection of issues is difficult, consider asking an attorney not involved in the case to read the opening and answer briefs and then identify those issues on which the respondent appears to have scored points—and focus on those. The court and its research attorneys may see the "score" in the same way.

2. Be Brief.

When it comes to a reply brief, less is more. Think how disheartening it must be for an appellate justice or law clerk to read two weighty briefs, only to pick up a third of equal length. In fact, many courts place tighter restrictions on the length of reply briefs. But even where this is not a rule, a reply should be short. As

PAUL J. KILLION is a partner with Hancock Rothert & Bunshoft, LLP, in San Francisco. He practices in the areas of insurance coverage and appellate advocacy. He is a member of the Defense Research Institute and the Appellate Advocacy Committee of DRI.

Eleventh Circuit Judge Carnes observed: "Effective writing is concise writing. Attorneys who cannot discipline themselves to write concisely are not effective advocates, and they do a disservice not only to the courts but also to their clients." *Spaziano v. Singletary*, 36 F.3d 1028, 1031 n.2 (11th Cir. 1994).

3. Build Credibility.

A reply provides the appellant with a powerful opportunity to build credibility. First, the reply permits the appellant to point out the respondent's misstatements of the record, which allows the appellant to take on the role of "guardian of the truth." Second, the reply permits the appellant to dispel any confusion created in the answer brief and to take on the role of "guide" for the court. Finally, the reply provides the opportunity to recapture the tone of the appeal and to raise the level of discussion back to the issues. On this latter point, Bryan Garner in *The Winning Brief* (3d ed. 1998) suggests a powerful technique for replying to the "Rambo Respondent": the "deflating opener." As Garner explains, "you simply collect the worst rhetorical outbursts from your opponent, recite them in summary form—not characterizing them too much, but quoting them word for word—and then move above and beyond." *Id.* at 72-2. Concede defeat in the ranting contest—and then get back to the issues.

WHAT NOT TO DO IN YOUR REPLY

1. Don't Raise New Affirmative Issues.

It is a universal rule of appellate procedure that a reply brief should not raise new affirmative issues. *See, e.g., Cross v. State*, 911 F.2d 341, 345 (9th Cir. 1990); *American Drug Stores, Inc. v. Stroh*, 10 Cal. App. 4th 1446, 1453, 13 Cal. Rptr. 2d 432, 436 (1992). The reason for the rule is basic: if an issue is raised for the first time in the reply, the appellee has no opportunity to respond. Nonetheless, it is not uncommon for an appellant to discover a new issue after the opening brief is filed. If the new issue is truly crucial, the appellant has two alternatives.

One alternative is to go ahead and raise the new issue in the reply brief, with a showing of good cause as to why it was

not raised earlier, and then prepare for a likely letter brief from the indignant appellee objecting to the new matter. While it is improper for a new issue to be raised in a reply, appellate courts often have the discretion to hear the new issue anyway. *See, e.g., In Re Tiffany Y.*, 223 Cal. App. 3d 298, 302-03, 272 Cal. Rptr. 733, 736 (1990).

But it is dangerous to count on the discretion of the appellate court to hear a new issue raised for the first time in a reply. Consequently, another alternative—and probably the better alternative—is for appellant to formally request leave to file a supplemental brief on the new issue, with a showing of good cause. This procedure permits the respondent an opportunity to answer the new issue. It also provides the appellant with an opportunity to reply and avoids the wrath of the court and the respondent.

2. Don't Hold Back Issues from the Opening Brief for the Reply.

A corollary to the rule against not raising new issues in the reply is the rule that an appellant should never hold back an affirmative issue from the opening brief. Not only is this tactic unprofessional, it also risks waiver of the issue. *See, e.g., Reichardt v. Hoffman*, 52 Cal. App. 4th 754, 763, 60 Cal. Rptr. 2d 770 (1997) (finding that appellant waived 20 new issues raised in the reply. "Taken as a whole, defendant's reply brief reads like an entirely new opening brief rather than as a response to plaintiffs' brief.").

3. Don't Reargue Points Already Discussed in the Opening Brief.

The purpose of a reply is to rebut the respondent's arguments, not to reargue points made in the opening brief. Avoid the temptation to simply "cut and paste" sections of the opening brief into the reply. Instead, use respondent's arguments as a foil to make the same points made in the opening brief, but in a new way. Of course, while wholesale reargument should be avoided, it is usually necessary and desirable to include a short (two to three paragraph) summary of the main points from the opening brief in the reply. An effective reply should be able to stand alone as a self-contained document; some repetition is therefore necessary and often helpful to the court. Many judges

and research attorneys read the reply brief first as a quick way to understand the issues—help them by making your arguments understandable without referring back to the opening brief.

4. Don't Rehash the Statement of Facts or Statement of the Case.

For the same reasons that reargument should be avoided in a reply, it is also important to avoid rehashing the statement of facts and statement of the case. Under the federal rules and the rules of most (if not all) state courts, a reply brief is not required to follow the format of the opening brief, except as to the table of contents and table of authorities. *See FRAP 28(c)*; Calif. Rules of Court 14(a). Separate sections for "Statement of Issues," "Statement of Facts," and "Statement of the Case" are not necessary. Instead, respond to appellee's statement of facts or statement of the case by weaving the rebuttal into the reply's legal argument and explain the factual misstatements or omissions in context. If you find yourself unable to discuss the misstatements in context, then they probably are not significant enough to warrant discussion in the reply. Nothing is more ineffective than quibbling over immaterial points.

A SUGGESTED FORMAT

The time-tested format for a reply brief consists of three sections:

1. The Introduction.

The introduction should immediately refocus the court onto the issues raised in the opening brief. Briefly recap the main points of appellant's argument, then summarize the main points of respondent's answer, and finally preview appellant's rebuttal.

2. The Argument.

The argument section should parallel the analytical structure of the opening brief, and thereby refocus the court back onto appellant's issues. Each sub-section of the argument should begin with a very brief synopsis of the appellant's major premise, then a synopsis of the respondent's answer, then an explanation as to why respondent's answer is incorrect or inadequate. This dialectic approach of thesis-antithesis-resolution is usually the most

effective argument structure for a reply (and most other briefs as well).

3. The Conclusion.

The conclusion is subject to many different styles. If the reply is brief (as it should be), it probably is not necessary to summarize the arguments in the conclusion. At minimum, however, the conclusion in

every reply should contain a clear statement of the exact relief the appellant seeks. "Tell us exactly what relief you think we should order. It is helpful if, in your summary, you frame the court's mandate as you would like to have it." *Preparing Your Appeal to the Fifth Circuit*, 2 Fifth Cir. Rptr. 431, 433 (1985).

CONCLUSION

Having the last word is one of the few advantages provided an appellant. It is well worth the effort to make that last word count. 🗨️

SUBCOMMITTEE REPORTS

1999 Annual Meeting Subcommittee

At the 1999 DRI Annual Meeting, the Appellate Advocacy Committee will present a joint program with the Insurance Law Committee, on the subject of *Attorney-Client Privilege Under the Microscope: How to Preserve it at Trial and Retain it on Appeal*. The program will explore cutting-edge issues in the attorney-client-privilege arena, at trial and on appeal, with a special focus on technology (e.g., e-mail; cell phones; the Internet) and insurer concerns (both in defense and coverage matters).

Michael B. King

Lane Powell Spears Lubersky, L.L.P.
Seattle, WA

Brief Bank Subcommittee

The Brief Bank Subcommittee continues to seek appellate briefs for submission to DRI's Brief Bank. Briefs addressing issues concerning appellate practice may be directed to the chair of the Brief Bank Subcommittee, R. Daniel Lindahl, Bullivant Houser Bailey, P.C., 888 S.W. Fifth Avenue, Suite 300, Portland, Oregon, 97204. The Brief Bank Subcommittee is currently studying a proposal to create a set of forms for federal and state appellate practice. Members interested in participating in this project should contact the subcommittee chair at (503) 499-4614.

R. Daniel Lindahl

Bullivant Houser Bailey, P.C.
Portland, OR

Liaison Subcommittee

The Appellate Advocacy Committee intends to appoint a liaison to each substantive law committee. We hope that our

liaisons will become active in their DRI substantive law committees. For example, we want our liaisons to write articles and give seminar presentations for their respective committees. This will help to promote the appellate specialty within the substantive law committees. Correspondingly, the liaisons can report to the Appellate Advocacy Committee on hot topics that affect appellate practitioners. We still have several liaison positions open. Please contact me if you have an interest in serving.

Robert W. Powell

Dickinson Wright, PLLC
Detroit, MI

Membership Subcommittee

As of late October, we have 156 members, a growth of 37 members since the last edition of *Certworthy*. Due to the departure of Louise Dovre Bjorkman, who was appointed to the trial court bench in Minnesota, the Committee is seeking an individual(s) interested in chairing this important subcommittee. If you are interested, please contact Kelly Freeman at (810) 469-2633 (phone) or (810) 469-0106 (fax).

Kelly A. Freeman

Freeman McKenzie, P.C.
Mount Clemens, MI

Publications Subcommittee

With this second issue of *Certworthy*, we have completed the newsletter cycle for our first year. And it's been a productive cycle. *Certworthy* has helped raise the profile of the Appellate Advocacy Committee, and we have received a number of com-

pliments from the DRI hierarchy. I want to thank everyone who has contributed to the success of *Certworthy*.

I particularly want to thank David Lewis, the vice chair of the Publications Subcommittee. He has been a great sounding board for me, and I really appreciate his taking on the time-consuming task of coordinating our Circuit Editors. Dave still needs Circuit Editors for the Eighth Circuit, the D.C. Circuit, and the U.S. Supreme Court. If you would like to volunteer, please contact Dave in Phoenix.

Finally, the Publications Subcommittee's other task this year was to produce an appellate-dedicated issue of *For The Defense*, which will appear in December 1998. I hope that you will find our issue of *For The Defense* to be both informative and interesting. We tried to include articles that will appeal to both trial lawyers and to appellate specialists. Above all, we wanted to demonstrate exceptional writing, which should come naturally to appellate lawyers anyway. Many trial lawyers are aware of the benefits that appellate counsel can provide, and we hope that our issue of *For The Defense* will persuade even more of them.

Scott Patrick Stolley

Thompson & Knight, P.C.
Dallas, TX

Seminar Subcommittee

The Seminar Subcommittee has regularly met by telephone conference over the last several months to complete plans for the January 28-29, 1999 seminar, to be held in Washington, D.C. Speakers include the Chief Clerk of the United States Supreme Court, William K. Suter, on tips for practicing in the Supreme Court; Judge Danny J. Boggs, of the Sixth Circuit Court of Appeals, on what impresses judges; and