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Or Forever Hold Your Peace: Reply Briefs

Gerald Lebovits
I Don’t Need Your Authority

The Use of Learned Treatises in New York State Courts

by Eric Dinnocenzo

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Or Forever Hold Your Peace: Reply Briefs

Few lawyers can resist having the last word. Nor should they. Reply briefs are optional, but lawyers should always reply unless they’ve nothing important to add, they’re certain of victory, they don’t want to tip their hand for oral argument, or they can’t do so because of timing or financial constraints. True: “Reply briefs are not the favorite children of appellate judges.” But that’s mostly because they’re often done so poorly that they’re a waste of time, money, and paper. If done right, reply briefs are “very useful” and “an integral and indispensable part of the courts’ record.” The problem is that many replies “fail to promote their proper, limited objective.” If they’re done well, replies can determine a motion on an appeal.

The Usefulness of Replying

Lawyers should address weaknesses preemptively — and grasp the nettle — by rebutting their opponent’s arguments in their opening papers. Grasping the nettle assures that judges who might not read a reply will nonetheless consider the counterarguments. Counterarguments in the opening brief will also define in advance how the judges will frame the issues and compel the opponent to respond or concede. Counterarguments in the opening brief will make the lawyer writing the opening brief anticipate contrary arguments and thus improve the opening arguments. And the opposing side might consider a more favorable settlement if the cards are on the table. As one authority explained, “An appellant should never deliberately save for the reply its response to an argument.”

Show Confidence

Lawyers who’ve grasped the nettle should still reply. It’s poor advocacy to leave the opposing side’s analysis of an argument as the last word. Not replying implies that the lawyer’s case is weak. It shows a lack of confidence, not an abundance of confidence. Even if the lawyer believes that the opposing brief is weak, the judges might disagree. Judges might see a lack of a reply brief as a concession to the opposition’s argument. As one judge put it, “Why in the world . . . would you ever want to give your opponent the last word before oral argument?”

Narrow the Issues

Replies help lawyers and judges narrow issues and refine arguments. Issues might be conceded and arguments changed as the parties write their briefs. Reply briefs “confront the true strength” of the opponent’s argument and are where a party often “attempt[s] to answer, for the first time, the most difficult arguments against her position.”

There’s no reason for judges to devote “time struggling with something in [an] appellant’s brief, only to find [that the] respondent concedes it or attacks it on a completely different basis than the one anticipated by the appellant.” That’s why some judges review cases by reading the reply brief first and working backward — a practice called retro-reading. By reading in reverse, retro-reading judges immediately assess the heart of the controversy and avoid considering irrelevant, academic, conceded, or unopposed issues. To retro-readers, the reply brief is the instrument that forms the first perception of the case, a perception against which they weigh everything they read and hear afterward. It’s no surprise, then, that some call reply briefs “the mother’s milk of appellate advocacy.”

A reply brief is equally important when it’s read last, as it most often is. An opposition brief might “have muddied the waters with extraneous material” and diverted the judges’ attention from the strongest parts of the opening brief’s argument. The reply brief becomes the lawyer’s opportunity to refocus the judges on the lawyer’s theory of the case.

Lawyers should address weaknesses preemptively — and grasp the nettle.

Strategy

A good reply is especially important when no oral argument is heard. Given the ever-increasing caseloads of both lawyers and judges, fewer oral arguments are heard today than in the past. Replying is “the appellant’s last attempt to show why — notwithstanding what the respondent says — the appellant should win.” Even when oral argument on a motion or an appeal takes place, it’s limited in time.

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Lawyers might not have enough time to argue their position as adequately as they’d like. A reply brief allows the lawyer to present the oral argument in depth, use the allotted time to respond to as many of the judges’ questions as possible, and, for complicated points and citations, to tell the judges, “It’s in my reply brief.”

Sometimes it’s advantageous not to file a reply brief, even when a lawyer can present a strong one. This involves making a judgment call. If the opposing side has failed to respond to the lawyer’s strongest argument or, worse, if the opposing brief includes a gross misstatement of law, it might be smart “to save this for oral argument so you do not tip your hand.”16 Good lawyers prepare for oral argument by reading the other side’s reply brief.17 By not replying, the lawyer who wrote the opening brief can maintain an element of surprise. This tactical decision might backfire, though. A judge might not like a purposeful delay in presenting a strong rebuttal or “may forget or fail to listen to your oral argument, or may give the motion papers to a law clerk not present at oral argument.”18

Lawyers’ Common Mistakes
Judges who bemoan reply briefs are annoyed “that too many attorneys commit the sins of either simply regurgitating what they said in an opening brief or attempt to raise new issues for the first time.”19 Because a reply brief is a final submission to a court, “the proper purpose of a reply brief is to reply.”20

Repetition
Reply briefs should not repeat statements of fact, reargue the case, or raise arguments not made in the opening brief.21 Most rules governing reply briefs dictate non-repetition,22 and repeating arguments from the opening brief serves no purpose. Rehashed reply briefs have an effect opposite from the one their authors intended. Lawyers submit rehashed replies thinking that judges are influenced by what they read last. Not so. Rereading the same thing annoys judges, makes them believe that the lawyer doesn’t appreciate it.”23

Replies shouldn’t strike back at the opposition’s Rambo-like mudslinging.

Unfair Tactics
Reply briefs shouldn’t include arguments and facts not discussed by either side until that point. Judges look down on this practice, and with good reason. Because reply briefs are rarely rebutted, the fairness with which they’re written impacts their persuasiveness.24 As one court wrote in a decision striking a plaintiff’s reply brief, “[I]t is established beyond peradventure that it is improper to sandbag one’s opponent by raising new matter in reply.”25

Improper reply briefs are often the subject of litigation. The opposing party can object to an improper reply brief with a motion to strike.26 A court will not review documents attached to a reply brief that are not part of the record or new issues “to which the adversary side has no opportunity to respond.”27 It’s unfair to cite “cases or other authorities that were in existence when the appellant’s main brief was filed, but were not cited in either the appellant’s main brief or the respondent’s answering brief.”28 Even meritorious arguments improperly raised in a reply brief are deemed waived, and judges won’t consider them.29 Judges believe that to consider these arguments would reward unfair behavior, and they sometimes strike them with harsh words.30 Dismissing a meritorious argument, one judge wrote, “Having made their bed, defendants will not now be heard to complain of having to lie in it.”31 Another judge once remarked that “this tactic on the part of defendants’ counsel smacks of sharp practice and I do not appreciate it.”32

Some exceptions exist to the rule against raising new issues on reply. Litigating motions to strike often involves deciding “what constitutes a truly ‘new’ substantive [issue or] argument.”33 Nonwaivable issues like lack of subject-matter jurisdiction may be raised on reply.34 Citations to non-controlling, or persuasive, authorities are not new arguments and may be presented at any time.35 A controlling case may be brought to the court’s attention in a reply if it was decided after the opening brief was filed.36 Courts will also take judicial notice of new matters, such as matters of public record, injected into a reply brief.37 A court will sometimes permit in the interest of justice an issue to be raised on reply, although courts exercise this discretion rarely and only in unusual circumstances.

Another remedy is available for improper reply briefs: a sur-reply. Sur-replies are rarely permitted as a matter of right, however, and filing one requires leave of court on good cause.38

The Structure of an Effective Reply
One judge has characterized the role of the reply brief as follows: “Reply briefs should be used as a stiletto to skewer misstatements of fact, misquotations, miscitations, matters not in the record, or grossly erroneous propositions of law.”39

Brevity and Theme
A court might permit over-length briefs if asked, although lawyers should still make their replies short. Asking for more space “seldom serves its movant’s purpose”40 and can be counter-pro-
Professional Tone

Replies shouldn’t strike back at the opposition’s Rambo-like mudslinging. Judges decide cases on the real issues rather than on ad hominem persecution, which is uncivil and distracts from the real issues. Unless it’s necessary to correct “mischaracterizations, distortions, or baseless criticisms,” lawyers should disregard gratuitous rhetoric and personal attacks.50 Falling into the temptation to attack tit-for-tat will portray both sides as having an equally unprofessional “tone or tactics [that] have no place in written advocacy.”51 When a response to a personal attack is needed, sometimes a simple footnote will do.52 If a longer response is necessary, it might be “worthwhile to include a short, separate section . . . to address the topic.”53

The reply is most effective when it ignores mudslinging by “focus[ing] on the merits”54 “on a global rather than individual basis.”55 It should do this as directly as possible, using tables, charts, bullet points, and visuals to make the disagreement with the other side easy to understand. The idea is to “leave the [judges] feeling that both the law and the equities are on your side — that the law will make more sense if you prevail.”56

Conclusion

As one authority says, “Having the last word in an argument can make a difference.”57 Lawyers should use every tool available “to exploit the limited opportunity afforded by reply briefs” to advance or refine their argument.58 Lawyers should resist the urge to get the last word just for the sake of having the last word. But “[i]f properly presented, a reply brief enhances both a lawyer’s credibility and the persuasiveness of a client’s arguments.”59

3. Id.
6. Aldisert, supra note 1, at § 13.5.
7. McKee, supra note 2.
10. McKee, supra note 2.
11. Id.
12. See Antonin Scalia & Bryan A. Garmer, Making Your Case: The Art of Persuading Judges 73–74 (2008). Among the retro-readers is New York Appellate Division Justice Saxe. See David B. Saxe, Essay, How We Operate: An Inside Look at the Appellate Division, First Department, N.Y.L.J., May 13, 2009, at 4, col. 4 (“An idiosyncrasy I have, but one which I do not necessarily recommend, is after I read the bench memo and the decision of the lower court, I first read the appellant’s reply brief. I find that this procedure of working backwards helps me isolate the most central issues.”).
15. McKee, supra note 2.
17. Pollard, supra note 4, at 74.
18. Kallen, supra note 16.
19. McKee, supra note 2.
22. See, e.g., CPLR 5528(c) (New York).
23. McKee, supra note 2.

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47. Pollard, supra note 4, at 74, 80.
48. Id. at 80.
51. Id.
52. Id.
53. Id.
54. Id.
56. Johnson, supra note 14, at 29.
58. Pollard, supra note 4, at 80.
59. Id.

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at Columbia Law School and St. John’s University School of Law. He thanks New York Law School student Yevgeny Samokhleb for his research help. Judge Lebovits’s e-mail address is GLebovits@aol.com.

Looking Ahead
Under the leadership of my predecessor, Mike Getnick, the State Bar ramped up its resources to help our membership weather the economic downturn. As a result of these efforts, the State Bar — now over 77,000 members strong — grew both in number and strength. As Mike passes the baton, the State Bar is in a very strong position. This is a testament to his leadership and the tremendous value of State Bar membership. We are grateful to all of you for your continued support of the Association.

We have experienced difficult times, but we can see a turnaround on the horizon. As we look ahead and prepare for the next decade, we must recognize the great recession for what it is: a wake-up call for our profession. As a result, we must take a hard look at ourselves. And we must be prepared to make changes in how we practice law to keep it the satisfying profession we all sought in becoming lawyers.

There is a better way to practice law. We only need to figure it out — for the good of our profession, for our clients and for the next generation of lawyers.

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Albany, NY 12207
TEL 518.463.3200
FAX 518.487.5579
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