

The Ten Commandments of Writing an Effective Reply Brief

By Damon Thayer

Having the last word on an issue is valuable. This is especially true in a close case. So why do lawyers often treat reply briefs like an afterthought? Lawyers may paint a masterpiece in their opening brief—whether it is in support of summary judgment, an appeal, or a simple discovery issue—but when it comes time to compose a reply brief, they use broken paintbrushes and leftover paint. By following 10 simple commandments you can master the art of writing an effective reply brief and in the process increase your chances of prevailing in any given case.

1. File a reply brief unless there are strategic reasons not to. Given that reply briefs are optional, the threshold consideration is always whether to file one at all. Most judges and lawyers agree that the opportunity to have the last word on an issue should not be squandered absent extraordinary circumstances. So, unless the answering brief suffers from serious deficiencies or is simply incomprehensible—meaning that responding to it might give opposing counsel’s arguments more credit than they deserve—you should almost always file a reply brief.

2. Focus on responding to opposing counsel’s arguments. Believe it or not, lawyers sometimes forget the basic purpose of a reply brief. A reply brief is not a condensed version or executive summary of the opening brief. The focus of any reply brief should be to respond to opposing counsel’s arguments. You should get to the heart of the matter as quickly as possible. The overarching goal of an effective reply brief is to boil the factual and legal issues down to their bare essentials, fairly present both side’s positions, and—in an ideal world—leave the court wondering why opposing counsel is fighting you over such an obvious issue.

If opposing counsel conceded any significant issues in the answering brief, point that out for the court. If opposing counsel did not address an issue raised in the opening brief, highlight that fact and consider arguing waiver. If the circumstances warrant such a discussion, unmask the misguided policy underlying opposing counsel’s arguments and explain to the court why your position is sounder.

But always remember the difference between attacking opposing counsel’s arguments and attacking opposing counsel. Having the last word on an issue does not give you free rein to take a cheap shot at opposing counsel. In most instances, this will hurt your cause more than it will help it.

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3. Leave out weak arguments. Your reply brief should highlight the strength of your case. Focus on the important, winnable issues. Recite only the crucial facts and leading authority supporting your position. Weak arguments undermine your credibility. In the immortal words of U.S. Supreme Court Justice Oliver Wendell Holmes, “Strike for the jugular, and let the rest go.” Oliver Wendell Holmes, *Speeches* 77 (1934).

Sometimes a misguided lawyer will throw every conceivable issue and argument into an opening brief and hope that something sticks. That is bad enough, but do not make matters worse by revisiting one of your flimsy arguments in the reply brief. Some judges, such as Judge W. Eugene Davis of the U.S. Court of Appeals for the Fifth Circuit, may interpret this as a signal that your entire case is weak. Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 Scribes J. Legal Writing 1, 7 (2001–2002) (interview with Judge W. Eugene Davis). Or, as cautioned by U.S. Supreme Court Justice Ruth Bader Ginsburg, because busy judges “work under the pressure of a relentless clock,” a “kitchen-sink presentation may confound and annoy the reader more than it enlightens her.” *Id.* at 10 (interview with Justice Ruth Bader Ginsburg).

4. Maintain credibility. Having the last word on an issue imposes a heightened duty of candor. While you should always strive to maintain credibility with the court by being fair with the facts and the law, this is a particularly momentous duty in reply briefs. Expect close scrutiny of what you say, as courts are usually extra-cautious about believing what is asserted in a reply brief. Simply put, aggressively represent your client’s interests, but if one of your contentions does not pass the straight-face test, leave it out of your reply brief.

5. Embrace a theme. Although this is important in all legal writing, it is critical for a reply brief to have a theme, otherwise known as a theory of the case. The theme should take center stage in the beginning of the reply brief and should be woven throughout the brief in your presentation of arguments and facts. The theme should present the court with your client’s fundamental view of the motion or appeal. It should be a simple, commonsense, and, if possible, emotive message that radiates the righteousness of your position. At the end of the day, a busy court might not remember anything else about your case except your theme. Make it count.

6. Do not be afraid to give your reply brief some flavor. If adding a touch of personal flavor to your case is a must, as it is for many lawyers and clients, then the reply brief presents a perfect vehicle for it. The opening brief is the time to gain credibility with the court through rock-solid reasoning and careful analysis. Make no mistake, the reply brief still needs to show lucid analysis of opposing counsel’s arguments. But with your credibility already established, you can use your reply brief as an opportunity to inject a punchy phrase, colloquialism, or metaphor into the case that supports your view. To get the most bang for your buck, the best place to add this flavor is generally in the reply brief’s introduction or conclusion.

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Of course, you should always take heed of your audience and determine whether the risk of using such a tactic is worth the possible reward. Sometimes rhetoric will drive a point home, but other times it may do more harm than good.

7. Make the reply brief a stand-alone document. An effective reply brief will make your case comprehensible to the court as a stand-alone document. A little-known fact about the judicial process is that a number of judges and law clerks read reply briefs before reading any other brief to get a sense of what the case is about and what issues are paramount. Even when the briefs are read sequentially, your reply brief may be read days or weeks after the other briefs have been read, meaning that the court may not remember much about your case.

Always keep in mind that judges are generalists who deal with a diverse array of legal issues. Law clerks may have no experience whatsoever in your case's subject area. With that audience in mind, your reply brief needs to convey the legal principles necessary to adjudicate the dispute. However, your reply brief should discard any superfluous legal principles. Knowing exactly what information to put into the reply brief and what to keep out can be a delicate balancing act.

As an example of what not to do, Ninth Circuit Chief Judge Alex Kozinski has cautioned practitioners to avoid using acronyms and abbreviations in a reply brief without first reintroducing what those space savers stand for. Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. Rev. 325, 328 (1992). A judge should not have to jump back to your opening brief to figure out what you are talking about.

Almost as bad as inundating the court with acronyms and abbreviations is using unnecessarily complicated jargon. The court should not have to refer to your opening brief or look up the words you use to understand your case. As astutely noted by Seventh Circuit Judge Richard Posner, "Lawyers should understand the judges' limited knowledge of specialized fields and choose their vocabulary accordingly." *Ind. Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc.*, 513 F. 3d 652, 658 (7th Cir. 2008).

8. Write a reply brief that is no longer than necessary. Just like knowing that the sky is blue and the grass is green, many lawyers seem to believe that every reply brief needs to fill the maximum number of pages allowed. Do not accept this as your mantra. A reply brief should be only as long as it needs to be to persuade the court that your side should prevail.

Court rules generally prescribe a maximum length of 10–20 pages for reply briefs. In addition, a judge's "local local" rules may impose even stricter page limits, so be sure to read them. Sometimes the maximum number of pages is necessary. Other times four pages will suffice. On rare occasions, such as with a very complex case, you may correctly decide to request to file an oversized brief. And, once in a blue moon, a pithy one-paragraph reply brief will strike a nail

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into the coffin of opposing counsel's case. Do not shy away from filing a short reply brief if it will get the job done. A short reply brief tells the court that you are confident about your position, and the points that you do make will likely receive greater attention than these arguments would receive if they were contained in a brief overloaded with unnecessary text.

9. Pay attention to details. When drafting a reply brief, it is common for lawyers to paraphrase arguments or facts from their opening brief. There is nothing wrong with this practice, assuming that you reexamine the cited authorities and record before filing. By paraphrasing, you may have subtly changed the meaning of your previous arguments or factual statements, thereby leaving your assertions unsupported, lacking in precision, too aggressive, or not aggressive enough.

Do not underestimate the harm that can befall your credibility and ultimately your case if you mess up a case or record citation or otherwise engage in sloppy cite checking. As an obvious example, the cases that you relied on in your opening brief may no longer be good law.

10. Tell the court exactly what you want. A surprising number of litigants conclude briefs without stating specifically what they want the court to do. Do not expect the court to read your mind. Should summary judgment be granted on all claims and as to all parties, or just some? Should the complaint be dismissed with or without prejudice? Is a straight reversal in order? Is a remand, perhaps with instructions to the lower court, necessary? Is any alternative relief requested?

If you have a decent case and follow these 10 guidelines when drafting your reply brief, the court should be prepared to give you what you want by the time it reads your conclusion. Do not forget to be specific about what exactly that is.

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