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THE PITFALLS OF REPLIES

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Everybody likes having the last word in any argument. Lawyers in particular suffer from "last word disease." Consider how many appeals you've seen litigated *without* the filing of a reply brief: almost none.

On the surface, there seem to be good reasons for insisting on having the last word. For instance, it satisfies two purported elements of persuasion: the Rule of Repetition (the more often you repeat something, the more likely it will be believed) and the Rule of Recency (the last thing heard is more likely to be remembered).

But most appellate judges dislike the last word syndrome, especially in the form of reply briefs. This dislike springs in part from the fact that judges have lots to read—but their reading time is rationed, and they don't want to waste it on the unnecessary. As one judge explained, "The eager writer of briefs would do well to keep in mind that he is in competition with two dozen or so peers, each claiming precious minutes of reading time from three or more judges and an equal or larger number of law clerks."[1]

The dislike also springs from the fact that most replies simply should not have been filed in the first place. "Someone," United States Court of Appeals Senior Judge Ruggero J. Aldisert once complained, "somewhere at some time, who didn't know a thing about how appellate judges decide cases, had preached a gospel to many appellants' lawyers to file a reply brief in every case: 'Have the last word, kid. Always.'"[2] As a result, the judge noted, "[S]ince 1968, I have been reading reply briefs by the

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1. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 109 (1994).

2. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 254 (NITA rev. ed. 1996).

thousands in appellate courts all over the country, and maybe five hundred genuinely qualified as reply briefs."[3]

The function of a reply brief is simple and very limited: to respond *only* to the points made in the appellee's response brief.[4] But far too often replies do things they ought not to do. For instance, a favored use of the reply is just to rehash arguments made in the opening brief. But appellate judges don't like this, preferring "a reply brief that does not attempt to traverse terrain already covered."[5] A reply brief "is at its best when it addresses a point not raised in the appellant's opening brief, such as an argument or error in the appellee's brief, or a new decision handed down since the filing of the opening brief. It is at its worst when an appellant simply rewrites the opening brief and restates what was said before."[6] So using a reply to retrace old ground risks having the reply tossed in the pile unread. Any additional, significant points you raise may not reach the panel's attention.

Another major peeve of appellate judges is raising issues in the reply that were not raised in the opening brief. This is not allowed. The appellant must raise the issues on appeal "specifically and distinctly" in the opening brief.[7] If the appellant sneaks a new issue into the reply brief, ordinarily appellate courts ordinarily will not consider it: The issue is waived.[8]

Still, attorneys cannot resist using replies to bring in new contentions. Sometimes the impulse arises from afterthought. A point that seemed minor, upon reflection, assumes greater, even pivotal importance, such as in the case where the litigant briefly mentioned an issue in a footnote in the opening brief and then

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3. *Id.*

4. *See, e.g.*, Enercon GmbH v. International Trade Comm'n, 151 F.3d 1376, 1385 (Fed. Cir. 1998) (quoting Amhil Enters. Ltd. v. Wawa, Inc., 81 F.3d 1554, 1563 (Fed. Cir. 1996)); ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS 199 (1983).

5. COFFIN, *supra* note 1, at 120.

6. ALDISERT, *supra* note 2, at 254-55.

7. *See* Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994) (citing Miller v. Fairchild Indus., Inc., 797 F.2d 727, 738 (9th Cir. 1986)); *see also* MARTINEAU, *supra* note 4, at 199.

8. *See, e.g.*, Stern v. Halligan, 158 F.3d 729, 732 n.3 (3d Cir. 1998); United States v. Drennen, 121 F.3d 701 (unpublished table decision), 1997 WL 543379 (full text) (4th Cir. Sept. 5, 1997) (per curiam); Herman v. NationsBank Trust Co., 126 F.3d 1354, 1364 (11th Cir. 1997).

expanded on it at length in the reply, to the appellate court's displeasure.[9] Then there are those instances when the lawyer wants to cheat on the size limitations of opening briefs, such as the appellant who hoarded an issue for the reply deliberately to circumvent the former fifty-page limit on opening briefs.[10]

You get no points—credibility or otherwise—for reserving issues until the reply. The reason for the "no new issues" rule should catch no one by surprise. It is unfair to allow an appellant to ambush an appellee in a reply; moreover, to do otherwise would risk a bad decision because that issue would not be fully briefed by each side.[11]

The court departs from the "no new issues" rule only in limited circumstances. In one case, for instance, the court entertained an issue first raised in a reply because the matter came up at oral argument, where the appellant contested the point and failed to object to its waiver.[12] In another case, the court of appeals considered a late-raised issue because it was "closely tied" to the issues raised in the opening brief.[13] Don't count on your case falling within such limited exceptions.

Meanwhile, the federal appellate courts generally will consider challenges to subject matter jurisdiction when raised for the first time in a reply.[14] However, other major jurisdictional challenges may be waived if not raised by the opposing brief. For example, in a recent opinion, the First Circuit Court of Appeals held that an Eleventh Amendment defense was waived because counsel only raised the issue in the reply brief.[15]

Another thing you cannot do with a reply is to attack the district court's opinion or judgment. A cross-appeal is the only vehicle available for questioning the result below. As one court explained, "A 'litigant wanting to challenge the core of the

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9. *See* Falco Lime, Inc. v. Tide Towing Co., 29 F.3d 362, 367 n.7 (8th Cir. 1994).

10. *See* Conkling v. Turner, 18 F.3d 1285, 1299 (5th Cir. 1994).

11. *See* Fraternal Order of Police v. United States, 173 F.3d 898, 902 (D.C. Cir. 1999).

12. *See id.*

13. Trinity Indus., Inc. v. Herman, 173 F.3d 527, 531 (4th Cir. 1999).

14. *See* United States v. Biro, 143 F.3d 1421, 1431 (11th Cir. 1998); Prewitt v. City of Greenville, 161 F.3d 296, 298 n.4 (5th Cir. 1998) (citing 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2974.3 [sic] (2d ed. 1996) (the court probably meant to cite § 3974.3)).

15. Torres v. Puerto Rican Tourism Co., 175 F.3d 1, 4-5 (1st Cir. 1999); *but see* Texas v. Walker, 142 F.3d 813, 819 n.7 (5th Cir. 1998).

district court's holding must do so in its opening brief and not hold its fire until after the appellee has filed its only brief.'"[16]

The scope of a reply should be governed by the same considerations that regulate redirect examination of witnesses: "Redirect examination is limited to new matters brought out in cross-examination. The reply brief serves the same function on appeal, so it should be subject to the same limitation."[17]

Appellate lawyers should think hard before filing a reply. Judge Aldisert urges lawyers to yield to the impulse in only five situations:

If the appellee cites a case not covered in the opening brief and you are able to show that it is either not controlling or does not stand for the proposition asserted.

If the appellee advances an important argument not covered by your opening brief and you have a convincing rebuttal to it.

If the appellee has raised a question of jurisdiction not covered in your opening brief.

If relevant cases have been handed down since filing your opening brief.

If the appellee has made a misstatement of fact or an irrelevant argument.[18]

Furthermore, keep your reply short. Briefs—especially replies—are not like artillery shells: Size is not proportional to impact. For instance, a few years ago I knew of a case pending before the Eleventh Circuit Court of Appeals, in which the appellants filed a two-page reply to a point first raised in the appellees' brief. At oral argument, the panel grilled the appellees on the cases cited in the reply, and dismissed the appellees' position out of hand in the opinion—using the appellants' cases.[19]

These rules sometimes require the opening brief to carry extra freight. For instance, if you anticipate an argument, you should raise it in your initial brief. This requirement can be beneficial if the point is troublesome for your case, as it gives you the first word, helping you resist the temptation to wait to

16. Parrillo v. Commercial Union Ins. Co., 85 F.3d 1245, 1249-50 (7th Cir. 1996) (quoting Horn v. Transcon Lines, Inc., 7 F.3d 1305, 1308 (7th Cir. 1993)).

17. ALDISERT, *supra* note 2, at 254.

18. *Id.*

19. *See* Lawson v. Singletary, 85 F.3d 502, 507 n.6 (11th Cir. 1996) (per curiam).

later rebut your opponent's treatment of the point in the disfavored reply brief. Similarly, if you expect the opponent to rely on a particular case, you should cite and distinguish it without waiting.

Altogether, the concerns raised above caution the appellant to resist the impulse to automatically file a reply brief. Given courts' instinctive aversion to reply briefs, too many of which are filed for the sake of filing, you need compelling reasons to justify their creation. By taking greater care and using strategic planning in planning the contents of your initial brief, you'll gain the respect—and perhaps even the closer attentiveness—of the judges who read it. Then, for those rare instances when you do have a sound basis for drafting the last word, the court will give you the audience you've shown you deserve.