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PRACTICE NOTE

THE ART OF THE EFFECTIVE REPLY

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A well-crafted reply can be devastatingly effective. Witness the plight of George Costanza, tormented in an episode of *Seinfeld* by his inability to deliver a witty comeback to a snarky co-worker.[1] Or, consider the more recent pop-cultural phenomenon of dropping the mic, which emphatically punctuates a performance so brilliant, at least in the mind of the speaker, that no one dare follow.[2] Drafting an effective reply

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1. *Seinfeld: The Comeback* (NBC television broadcast Jan. 30, 1997) (featuring Costanza's struggle to come up with and deliver what he thinks is a perfect retort); *see also George and the Jerk Store*, YOUTUBE (posted June 10, 2014), https://www.youtube.com/watch?v=LOetkFopHK0 (highlighting Costanza's parts of the episode).

2. *See, e.g.*, Tre'vell Anderson, *Kanye West Ends Sacramento Show After Three Songs and a Tirade Against Jay Z and Beyoncé*, LATIMES.COM (Nov. 20, 2016, 11:30 PM), https://www.latimes.com/entertainment/music/la-et-ms-kanye-sacramento-20161120-html story.html (reporting that West finished his show "with a mic drop after performing only three songs and going on a rant about Beyoncé and Jay Z").

brief,[3] however, is one of the most difficult tasks in appellate practice. Replying counsel often face tight deadlines,[4] stingy page or word-count limitations,[5] concerned clients and co-counsel, and opposition briefs as imposing as they are deflating.

Rules of court seldom mandate replies. So, whether motivated by these factors or, perhaps, the lack of a cogent opposition argument to reply to, some may elect to forego the option of filing a reply. This, however, is a mistake—one that could cost you your case. Several reasons support a strong presumption in favor of a reply in every contested appeal.

First, based on the declining frequency of oral argument in federal courts,[6] it is highly likely that a written reply will be the final word the court considers before reaching its conclusion and writing its opinion.[7] Why knowingly forfeit the final word to your opponent?[8] And, if your case is ultimately set for argument, an effective reply is a valuable aid in identifying and refining the most important issues and arguments as you construct an outline for oral argument.

Second, some judges have expressed a preference for retro-reading briefs, that is, starting with the reply, then working backwards to the opposition, and finishing with the opening

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3. While this article is geared towards written advocacy, some general principles outlined in it also pertain to crafting effective rebuttal oral argument.

4. *See* FED. R. APP. P. 31(a) (setting a deadline of 30 days to oppose appellant's opening brief, but just 21 days to reply to appellee's opposition brief).

5. *See* FED. R. APP. P. 32(a)(7)(A)–(B) (limiting reply briefs to half of the pages and word-count permissible for principal briefs).

6. *See*, *e.g.*, David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 120 (2012) (referring to a "drastic reduction in the frequency of oral argument" in the federal courts of appeals); *cf.* Jay Tidmarsh, *The Future of Oral Argument*, 48 LOY. U. CHI. L.J. 475, 479 & n.18 (2016) (addressing decline of oral argument in trial courts).

7. *See, e.g.*, Thomas D. Hird, *No Reply?* CERTWORTHY 40, 40 (Summer 2005) (noting that "the reply is typically the last document read before a judicial decision is made" and that "a persuasive reply can make all the difference"), *available at* http://raymondpward.typepad.com/files/hird.pdf.

8. In full disclosure, this view isn't universally shared. *See*, *e.g.*, Jason Vail, *The Pitfalls of Replies*, 2 J. APP. PRAC. & PROCESS 213, 213–14 (2000) (recognizing that "[m]ost appellate judges dislike the last word syndrome, especially in the form of reply briefs," that this "dislike also springs from the fact that most replies simply should not have been filed in the first place," and that only a few reply briefs filed "genuinely qualif[y] as reply briefs" (citing RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 254 (NITA rev. ed. 1996))).

brief.[9] Under this paradigm, the failure to file a reply forfeits not the final word, but, even worse, deprives counsel of the invaluable first opportunity to identify the issues and define the parameters of the appeal to their clients' benefit.

Third, a reply is necessary to complete the briefing volley in the dialectic method, which generally consists of a thesis (opening brief), antithesis (opposition), and synthesis/conclusion (reply). Legal-writing guru Bryan Garner recommends employing the dialectic paradigm on a micro-level, such as in a stand-alone piece of legal writing, or even in the discussion of a single issue.[10] Garner's sage advice is equally applicable on the macro level when considering the entirety of a case's adversarial back-and-forth briefing in the context of dialectic resolution.

Fourth and finally, counsel should always be on guard against false confidence in their likelihood of success absent a reply. As one appellate advocate noted: "[N]o matter how weak you consider the respondent's brief, there is no assurance the court will agree with your assessment."[11]

Assuming that you are now thoroughly convinced of the need to file a reply, there are a few tried-and-true principles to guide you through the writing process. One bright-line prohibition is obvious, yet evidently violated enough to bear repeating—do not introduce new issues in your reply that are

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9. *E.g.*, Gerald Lebovits, *Or Forever Hold Your Peace: Reply Briefs*, 82 N.Y. ST. BAR ASS'N J. 64, 64 & n.12 (June 2010); *see also* Damon Thayer, *How to Write an Effective Reply Brief*, AM. BAR ASS'N (2012), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/writing/how_write_effective_reply_brief/ (pointing out that "[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"); Richard C. Kraus, *Crafting an Influential and Effective Reply Brief*, APPELLATE ISSUES 1, 1 (Aug. 2012), *available at* https://www.fosterswift.com/media/publication/381_Crafting-an-Influential-and-Effective-Reply-Brief.pdf (referring to "[a]necdotal reports" indicating that "some judges and clerks read reply briefs first, assuming that appellants will have distilled the most critical and compelling arguments by then").

10. *See* BRYAN A. GARNER, THE WINNING BRIEF 409–13 (2d ed. 2004) (explaining and illustrating dialectical structure).

11. Paul J. Killion, *Having the Last Word: The Appellate Reply Brief*, CERTWORTHY 8, 8 (Fall 1998), *available at* http://raymondpward.typepad.com/files/killion.pdf; *see also* Hird, *supra* note 7, at 40 (opining that "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," but cautioning that the author "thought more than once" that he was "on one side of that equation when in fact [he] was on the other").

missing from your opening brief.[12] For instance, counsel may be tempted to save certain issues or arguments for a reply[13] in an effort to sandbag an appellee presumptively prohibited from filing a sur-reply or supplemental opposition brief.[14] Avoid this temptation not only as a matter of professionalism and common courtesy, but also because most courts refuse to consider new issues raised for the first time in reply.[15] Moreover, a failed attempt to introduce new material in a reply will likely cost you valuable credibility with the court.[16] By way of analogy, think of an effective reply as a rehabilitating re-direct of your key witness after cross-examination. Trial counsel should not raise entirely new topics in re-direct, but are typically limited to the scope of the cross-examination.[17] So too should you limit your reply to the scope of an opposition brief.[18]

A second bright-line prohibition is universally advised, but not always adhered to—don't respond in kind to personal attacks from opposing counsel.[19] This advice isn't always easy to follow in the heat of a briefing battle, especially since lawyers

12. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 74 (2008); Killion, *supra* note 11, at 9; Lebovits, *supra* note 9, at 58; Kraus, *supra* note 9, at 3; Vail, *supra* note 8, at 214.

13. Or, relatedly, counsel may save arguments from the reply in the hopes of springing them upon unsuspecting opponents at oral argument. *See* Lebovits, *supra* note 9, at 58. This is also a bad idea since the odds are against oral argument in most federal appellate courts, *see generally* Cleveland & Wisotsky, *supra* note 6, and, if the court grants oral argument, the panel is likely to react with displeasure to issues or arguments raised for the first time in oral argument. *See*, *e.g.*, United States v. Abdenbi, 361 F.3d 1282, 1289 (10th Cir. 2004) (pointing out that circuit precedent "holds that issues may not be raised for the first time at oral argument" (citation omitted)).

14. *See* FED. R. APP. P. 28(c) ("Unless the court permits, no further briefs may be filed [after the reply].").

15. *See*, *e.g.*, United States v. Prince, 868 F.2d 1379, 1386 (5th Cir. 1989) ("This Court will not consider a new claim raised for the first time in an appellate reply brief." (citation omitted)).

16. Vail, *supra* note 8, at 215 ("You get no points—credibility or otherwise—for reserving issues until the reply.").

17. *See* United States v. Riggi, 951 F.2d 1368, 1375 (3d Cir. 1991) (recognizing that "[t]he tradition in the federal courts has been to limit the scope of redirect examination to the subject matter brought out on cross-examination" (citations omitted)).

18. Vail, *supra* note 8, at 216 (quoting RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 254 (NITA rev. ed. 1996)).

19. SCALIA & GARNER, *supra* note 12, at 34–35; GARNER, *supra* note 10, at 337–40; Kraus, *supra* note 9, at 3–4; Lebovits, *supra* note 9, at 59.

tend to be a naturally aggressive and competitive group,[20] inclined to meet personal attacks head-on. Measured discretion in reply, however, is the better part of valor. Judges "heartily dislike" antagonism.[21] Dissecting arguments "calmly and dispassionately" is favored over indignation,[22] righteous or not. A tit-for-tat response to a personal attack is, at best, unnecessary and ineffective; at worst, it "suggest[s] to the seasoned reader that you're weak on the merits."[23] And to the extent you can't objectively ascertain the often-blurry line between a necessary correction of the record and an unnecessary response in kind to a personal attack, give the offending brief and your draft reply to a trusted colleague unfamiliar with the case or opposing counsel. The dispassionate reaction of uninvolved counsel is a likely harbinger of the court's own response, so heed the editorial advice you receive in return.

Replying counsel should also resist the conscious desire, or subconscious urge, to draft self-contained, stand-alone replies. Some commentators on the subject disagree with this advice[24] as, admittedly, the stand-alone reply could aid retro-reading judges and clerks.[25] Nonetheless, the stand-alone reply is an avoidable near occasion of a more serious sin—regurgitating the same material already stated fully in the opening brief.[26] Specifically, unless rules of court require

20. *See, e.g.*, Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1408 (1997).

21. SCALIA & GARNER, *supra* note 12, at 34.

22. *Id.*

23. GARNER, *supra* note 10, at 339.

24. Thayer, *supra* note 9 (asserting that "[a]n effective reply brief will make your case comprehensible to the court as a stand-alone document"); Killion, *supra* note 11, at 9 ("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."); Steffen N. Johnson, *The Anatomy of an Effective Reply Brief*, CERTWORTHY 29, 30 (Summer 2006), *available at* http://raymondpward.typepad.com/newlegalwriter/files/2006Summer.pdf (asserting that "the most effective reply briefs in some sense function as stand-alone documents"); SCALIA & GARNER, *supra* note 12, at 73 (describing the reply as "ideally a wholly self-contained document, comprehensible without any reference to earlier writings").

25. SCALIA & GARNER, *supra* note 12, at 74.

26. *Id.* at 75 ("The court doesn't want to hear you repeat yourself."); Hird, *supra* note 7, at 40 ("Judges understandably are not impressed with an extended rehashing of what has already been presented.").

otherwise,[27] there is typically no need for reply briefs to restate a detailed factual background or statement of the case, re-urge the particulars of issues or arguments ignored in the opposition brief, or summarize each argument from the prior briefs. Nor must a reply brief in a typical case include jurisdictional statements or standards of review.[28]

Conceptualizing your reply not as a stand-alone, but as the final piece of an ongoing dialectic necessarily contextualized and informed by preceding briefs, will aid you in accomplishing a rule of reply all commentators agree upon: Be brief.[29] Really brief. Get to the point. Quickly. Take your page or word limit and cut it in half,[30] then ruthlessly cut unneeded words from your draft.[31] Scrutinize each argument, supporting point, and even sentence in your draft reply then compare them against the opening brief to find redundancies you can eliminate. "[J]udges have lots to read—but their reading time is rationed, and they don't want to waste it on the unnecessary."[32]

With these proscriptions and an overarching desire for brevity in mind, use the following techniques to draft an effective reply. First, intimately familiarize yourself with the essential counterarguments and supporting sub-points of the opposition brief you are responding to. A word of warning—the

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27. The only requirements for reply briefs found in the Federal Rules of Appellate Procedure are a table of contents and a table of authorities. *See* FED. R. APP. P. 28(c).

28. Unless, of course, the existence or absence of subject-matter or appellate jurisdiction, or the appropriate standard of review, is a disputed issue on appeal, in which case discussing the topic on reply is unavoidable.

29. Hird, *supra* note 7, at 40 (counseling that "[s]tyle-wise, a reply should be short"); Lebovits, *supra* note 9, at 59 ("Reply briefs are most effective when they are concise, direct, punchy, and selective."); Vail, *supra* note 8, at 216 ("[K]eep your reply short. Briefs—especially replies—are not like artillery shells: Size is not proportional to impact."); Killion, *supra* note 11, at 8 ("When it comes to a reply brief, less is more."); Thayer, *supra* note 9 (instructing lawyers not to "shy away from filing a short reply brief if it will get the job done," because "[a] short reply brief tells the court that you are confident about your position").

30. GARNER, *supra* note 10, at 433.

31. *Id.* at 212; Sylvia H. Walbolt and Nick A. Brown, *The Reply Brief: Turning "Getting the Last Word" into "Getting the Win,"* AM. BAR ASS'N SECTION OF LITIG.—APPELLATE PRACTICE (Dec. 16, 2015), http://apps.americanbar.org/litigation/committees/appellate/articles/fall2015-1215-reply-brief-turning-getting-last-word-into-getting-win.html ("One favorite editing trick is to assume, at the very end of the writing process, that you must eliminate some specific number of words to comply with the court's rules, even if you do not really have to do so. Works every time to make a better final product.").

32. Vail, *supra* note 8, at 213; *see also* GARNER, *supra* note 10, at 407–08.

initial read-through is often deflating. Your opponent has perhaps retained an appellate specialist whose advocacy and writing are marked improvements over the district-court briefing. Or, maybe your opponent makes a case for affirmance on appeal based on several unanticipated alternative bases appearing in the record. Or, worse yet, your opponent cites authority you failed to identify or exploits an unforeseen flaw in your argument.

After stepping back and re-grouping, re-read the opposition brief several times, dissect it with co-counsel or consulting colleagues, outline the content, and, most importantly, begin grouping the counterarguments into issue-bundles of law or fact. Don't feel rigidly bound to the opposition's sequencing or even its identification of the issues when bundling topics and drafting the reply.[33] Indeed, sometimes it's difficult to find cogent organization in poorly written opposition work.

In that regard, the primary tasks of replying counsel are to restore order to chaos, dispel confusion, and refocus the court on not only what it must resolve, but how it should resolve it in your favor. An introductory sentence or short paragraph should re-establish your theme and indispensable premise. Some commentators on the topic seem to envision a fairly lengthy introduction to the reply that carries a good bit of substantive freight.[34] Avoid this. If the introduction to your reply runs at or over a page, or cries out for clarifying paragraph breaks, it is

33. Kraus, *supra* note 9, at 2 ("In almost all cases, acceding to an appellee's reorganization is a mistake and forfeits the appellant's advantage of framing the arguments."); Killion, *supra* note 11, at 8 ("To be effective, a reply must be selective. . . . It is not necessary to rebut every point raised in the answer brief—only those points that appear to undermine appellant's positions.").

34. *See* Kraus, *supra* note 9, at 2 ("A brief introduction allows the appellant to concentrate on the key legal issues and develop a statement of the critical arguments that counters the appellee's response."); Killion, *supra* note 11, at 9 (suggesting a method of organizing the introduction in the reply: "Briefly recap the main points of appellant's argument, then summarize the main points of respondent's answer, and finally preview appellant's rebuttal"); Johnson, *supra* note 24, at 29–30 ("The best introductions . . . will also include a short response to your opposing counsel's strongest arguments and point out where they have failed to answer your winning arguments. . . . And if your case is complicated and it takes two or three pages to do that, do not worry—these are the most important pages of your brief.").

probably too long. Save the heavy lifting for the body of your argument.[35]

Next, quickly identify in your reply, but don't reargue, the issues from your opening brief that the appellee has failed to contest.[36] Consider adding a short reference to your jurisdiction's law on forfeiture, waiver, or abandonment for inadequate briefing.[37] In doing so, you not only remind the court to address only adequately briefed opposition arguments, but also provide a convenient statement of authority to cut and paste into the opinion. Then, with equal brevity, correct any misrepresentations of fact or of the appellate record appearing in the opposition brief.[38]

Once those tasks are complete, this ought to leave an issue-bundle of legal matters that will likely occupy the bulk of your reply briefing. Shun lengthy restatements of your opponent's argument; no sense in donating precious real estate from your deliberately slim reply to your adversary.[39] But do consider the occasional, well-placed quotation from the opposition brief as part of your dialectic argument in reply. Often, for instance, an opponent's phrasing of an argument is superficially attractive only when planted within the cozy confines of its own brief, but withers when systematically deconstructed in reply. An effective reply boldly confronts the language of the antithesis, re-frames and attacks it, then compels, through strength of reasoning, a resolution consistent with the original thesis.[40]

In conclusion, don't forget to conclude.[41] Use the exact language from the applicable federal law or rule[42] that you want

35. *See* GARNER, *supra* note 10, at 407 ("[R]eject the idea that you should first tell the reader what you're going to say, then say it, then remind the reader of what you just said.").

36. Kraus, *supra* note 9, at 2.

37. *See*, *e.g.*, FED. R. APP. P. 28(a)(8)(A) (requiring an argument with "contentions and the reasons for them, with citations to the authorities and parts of the record").

38. Killion, *supra* note 11, at 8; Kraus, *supra* note 9, at 2–3.

39. Kraus, *supra* note 9, at 2.

40. Killion, *supra* note 11, at 9–10 (advocating for dialectic approach in reply briefing).

41. Kraus, *supra* note 9, at 4 (pointing out that "a reply brief should close by telling the court what the appellant wants" because "that is the most important question in any appeal"); Killion, *supra* note 11, at 10 (explaining that "the conclusion in every reply should contain a clear statement of the exact relief the appellant seeks"); *cf.* FED. R. APP. P. 28(a)(9) (requiring appellant's brief to contain "a short conclusion stating the precise relief sought").

to see in the court's opinion or mandate.[43] Ultimately, drafting an effective reply, as with all legal writing, is an art that gives counsel license to experiment with and develop their own preferences and style. Consider the guidance above a mere launching point in your own quest for a drop-the-mic-worthy last word on reply. May you fare better than George Costanza.

42. *See* 28 U.S.C. § 2106 (providing that "any . . . court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances").

43. Killion, *supra* note 11, at 10 (quoting *Preparing Your Appeal to the Fifth Circuit*, 2 FIFTH CIR. RPTR. 431, 433 (1985) ("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.")).