THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

FOREWORD

A NATIONAL ORGANIZATION FOR APPELLATE LAWYERS

Many readers are undoubtedly aware of the creation of a new entity within the American Bar Association representing the interests of appellate practitioners. The Council of Appellate Lawyers, organized within the ABA Appellate Judges Conference, was created through the energy of lawyers and judges committed to the recognition of appellate practice as an important point of emphasis, distinct from other aspects of litigation, warranting a national organization. The Council is unique in its goal of offering a national focus and open membership within the ABA. Other outstanding organizations of appellate practitioners exist, of course, but most are limited by jurisdiction—various sections within state bar associations, for example—or do not offer open admission, such as the American Academy of Appellate Lawyers. Moreover, the Council deliberately seeks to bring appellate lawyers together with appellate judges in a forum which will facilitate exchange on the wide range of issues on which lawyers and judges share interests but often diverge in positions.

The Council's affiliation with the ABA or the attempt to include judges and practitioners may pose problems for some attorneys on ideological or policy grounds, of course. But the effort is likely to serve the interests of appellate lawyers due to its inherent ability to afford us a corporate voice in appellate policymaking that has perhaps been unavailable in the past. At a

time when appellate practice rules are reshaping the briefwriting process, often compromising completeness for brevity's sake, practitioners need a strong vehicle for input on the framework under which we represent our clients and earn our fees. Membership in the Council of Appellate Lawyers is open to any lawyer who practices, teaches, or has an interest in appellate law and procedure. Dues are $35 plus ABA dues. To become a member, contact Melissa Sehstedt at sehstedm@staff.abanet.org or call 800/238-2667 ext. 5704.

MORE ON REPLIES

It is often difficult to resist the opportunity to respond to an opponent's arguments by filing a reply brief, as Jason Vail observed in his Practice Note in *The Journal* last year.[1] To the extent that the rules of appellate procedure in any given jurisdiction expressly permit reply briefs, counsel are often predisposed to file because of various pressures which do not bear at all on the virtue of filing a formal reply brief. The client may demand a reply brief and may be able to pay a substantial fee for the additional work. Counsel may be concerned about how the client, or another attorney, or a court, may view a decision not to reply should a case be ultimately lost. Often, counsel will file a reply brief expecting that an ineffective assistance writ will be directed at the decision not to reply. The filing of a reply brief becomes another acceptable option in the appellate lawyer's arsenal of vehicles for argument, resorted to even when unnecessary.

On the other hand, the reply brief may be counsel's way of continuing to argue vigorously on behalf of a client whose case has already been fully explored and whose claims have been clearly set forth. But the fear that a point will be ignored or misunderstood—and the case lost as a consequence—itself creates an important pressure to reply, even though reasoned judgment might well dictate that the reply brief is unnecessary to a proper resolution of the claims raised on appeal.

One way to address counsel's anguish in the decision concerning whether to file the reply brief would be for appellate

1. Jason Vail, *The Pitfalls of Replies*, 2 J. App. Prac. & Process 213 (2000).

courts to limit—by rule—the option of replying. Clearly, counsel should be afforded an opportunity to reply in certain circumstances—such as when new authority is available, particularly if the authority is controlling; when opposing counsel has asserted a procedural bar, a theory for affirmance, or authority not previously addressed in the opening brief; or when opposing counsel has misstated an important fact or misrepresented the holding in a significant case.[2] Any limiting rule should probably reflect the need to permit a formal reply in these circumstances, but the rule might require a motion for leave to file the reply brief, setting forth precisely the basis on which additional argument is necessary.

But one other innovation might be valuable. That would be to expressly preclude reply briefs which only reargue points previously argued, as well as barring new issues from being raised on appeal, unless the court itself directs additional briefing. Just as Judge Myron Bright has suggested the potential value of having the appellate court alert counsel as to those issues on which oral argument would be most valuable to the court,[3] the court's preliminary review of the written briefs might also suggest matters warranting additional briefing, or answer, in the form of a reply brief. The rule could be drafted to permit sufficient time for review before a reply brief is filed, and the court would itself designate the scope of reply.

> Rule of Appellate Procedure XX: Reply briefs.
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> No reply brief shall be filed by the appellant except as provided in this rule or by order of the court.
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> > (a) A reply brief may be filed by the appellant as a matter of right in the following circumstances:
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> > > (1) to alert the court to a decision or other authority not announced prior to the filing of the brief in chief which provides mandatory or persuasive authority with respect to the disposition of any issue briefed by the parties;

2. One guide for the scope of replies has been provided by Senior Judge Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 254 (NITA rev. ed. 1996). The five circumstances Judge Aldisert finds warranting reply are essentially reflected here.

3. Myron H. Bright, *Focus on the Crucial Issue*, 1 J. App. Prac. & Process 31 (1999).

(2) to correct a misstatement of fact by appellee in the answer brief;

(3) to correct a misstatement of a holding of a court or other authority made by appellee in the answer brief;

(4) to reply to any assertion of a procedural bar or other theory for denial of relief urged by appellee which has not previously been raised in the court below and which has not been addressed in the opening brief.

(b) Appellant's reply brief must be accompanied by a motion for leave to reply tendered to the clerk contemporaneously with the reply brief which sets forth the ground(s) under which a reply brief may be filed under this rule.

(c) On its own motion, the Court may order the appellant to file a reply brief on any ground, issue, claim or argument before the Court in the briefs previously filed by the parties.

JTS, Editor
Little Rock
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