ESSAY

SOME THOUGHTS ON REPLY BRIEFS

Brian Wolfman*

I. INTRODUCTION

Legal-writing expert (and my former colleague) Sue McMahon asked recently for advice on writing reply briefs. Sue was planning to teach the subject to her legal-writing students and wanted input, so I emailed her a few thoughts.

I'm glad Sue is teaching about reply briefs because, though reply briefs are important litigation tools, most law students are not formally taught about them. I direct the Georgetown Law Appellate Courts Immersion Clinic—where law students litigate public-interest appeals—and we write reply briefs frequently. When my students arrive in clinic in their second or third years of law school, none has had instruction about writing replies. That's understandable. Teaching time is limited, and it's hard to fit in everything. I cover replies only about half the time in my Appellate Courts & Advocacy Workshop,[1] a doctrinal class on the law of appellate courts that also touches on brief writing. The bottom line is that most new lawyers haven't given much thought to

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1. Brian Wolfman, Syllabus: Appellate Courts and Advocacy Workshop Spring 2023 (Apr. 2, 2023) (on file with author).

reply briefs, but they should. For that reason, and urged on by Sue's inquiry, I wrote this essay aimed at new litigators and law students as well as legal-writing instructors, who may want to incorporate the ideas here into their teaching or even ask their students to read this essay.

Four preliminary thoughts:

First, and perhaps counterintuitively, the reply brief is often the appeal's fulcrum—the place where the case crystallizes. The appellant's lawyer wants to do everything possible to understand the law and the record, and to anticipate all the case's strengths, weaknesses, and traps when writing the opening brief. So I hope to have a comprehensive understanding of the case and bring it to bear from the start. As time has gone on, I've gotten better at that. But even the best appellant's lawyer will agree, I think, that it's not until you've seen the answering brief—in which your arguments have been subjected to the crucible of real (not hypothetical or imagined) dispute—that the appeal in all its beauty (or ugliness) is fully realized. That means that the reply brief—no matter its length or complexity—often is a critical tool in the appellant's overall presentation.

Second, and relatedly, reply briefs should not be overlooked because they are filed near or at the end of the litigation process. Quite the contrary. The reply brief is important to appellate practice in large part because it is typically the last significant written advocacy in the appeal—and, generally, the last major submission that the judges and law clerks will read. If recency matters, then reply briefs matter.

Third, reply briefs are especially important for some practitioners. They've been important to my practice—and thus my clinical teaching—because I tend to represent appellants, the parties entitled to file replies. Public-interest appellate lawyers represent appellants (as opposed to appellees) disproportionately, including especially appellate public defenders. Typically, it's not great to have lost in the lower court, but a silver lining is

that appellants get the last word, and they should try to make the most of it.

Fourth, this essay focuses on reply briefs in typical three-brief *appellate* litigation, though much of what I say here applies to reply briefs in trial practice (such as a reply in support of a motion for summary judgment). So, when I refer to a reply brief in this essay, I mean what is typically the third and last brief filed in standard appellate practice—the brief filed by the appellant in response to the appellee's (answering) brief. There are other types of replies, such as answering briefs and responses filed in simultaneous-briefing scenarios and in cross appeals. Some of what I discuss here applies in those other contexts, but, again, in general, I'm referring to the reply brief filed by the appellant in the standard three-brief setting.

And now, on to what I view as key attributes of a good reply brief. I welcome comment and criticism.

II. BASIC PREPARATION FOR WRITING A REPLY

Preparation for writing a good reply brief is simple and well understood, so much so that what follows in this section may seem obvious. But here's the minimum that I do and ask my students to do.

First, consider your opponent's arguments comprehensively. List each of your opponent's points, no matter how small or seemingly unimportant. This technique may be enhanced by creating a so-called reverse outline of your opening brief. Look back carefully at that brief, succinctly summarize its arguments in bullet point or outline format, then map each of your opponent's points on to your initial arguments by adding them to that outline. This may help you determine what, in particular, your opponent has responded to and how, and it will identify your opponent's omissions—that is, what your opponent has not responded to at all. This approach may also help ensure that the review of your opponent's answering brief is comprehensive. And, in drafting the reply brief itself, using this technique may

facilitate in assembling thematically related arguments in one place, as discussed in more detail in part IV below.

Experienced practitioners may feel comfortable not listing minor or irrelevant points raised by the appellee. But err on the side of inclusion. Comprehensive identification of your opponent's plausible arguments is critical for advocates who are new to this game. And, besides, covering the waterfront can't hurt.

For each of your opponent's arguments that challenge points in your opening brief or that otherwise may require a response, research and write out a counterargument. This doesn't mean you are going to respond in your reply brief to everything—ordinarily you won't, as discussed in point V below. But often you cannot know whether an argument calls for a formal response unless you dig into it first.

Second, and relatedly, read the cases and other authorities cited by your opponent, and make sure you understand them. Read your opponent's assertions about the record. As to each authority and assertion about the record, determine whether your opponent is telling the truth, bending the truth, or flat-out lying, and be prepared to rebut each misstatement or falsehood in writing.

Third, as suggested above, carefully note all the ways in which your opponent *agrees* with you, either expressly or *tacitly*, because your opponent's express or tacit agreement can be used to narrow the issues or (of course) buttress your affirmative arguments. If your opponent's express or tacit agreement is widespread or on key topics, that is a potential theme for your reply brief (as discussed below).

What I've just said is not unimportant. But the tough nut in writing a reply brief is not how to research and otherwise acquire your counterarguments, but, rather, how (and whether) to deploy the counterarguments once you've assembled them. Now for that more nuanced stuff.

III. DON'T GO TIT-FOR-TAT

Generally speaking, a reply brief should not simply go tit-for-tat. That is, a good reply brief does not just set up each argument made by the appellee and respond one after the other. Try to avoid significant stretches that go in the form of "the bad guy said X and the answer is not X or Y." This approach is usually boring and ponderous. At best, a tit-for-tat approach provides some useful responses for the judge or law clerk. That's not a bad thing, but that alone generally is not ideal. You're likely to lose the reader's interest and miss opportunities for true persuasion, while arguing the case on your opponent's terms—which is a serious no-no. At worst, a mindless tit-for-tat approach can leave the impression that you're just repeating your opponent's basic points or entire thesis statement. So, you could be helping the other side!

IV. FRAME THE REPLY ON *YOUR* TERMS

Rather than going tit-for-tat, the appellant should try to respond to the appellee's points within the framework of the basic thesis statement(s) or theme(s) established in the opening brief—while keeping repetition to a minimum.

If you do this well, you can gain back some or all of the terrain lost after the reader digests the appellee's brief, so that, once again, you are arguing the case on *your* terms. This is tricky, but important. You'll find some examples of this approach on the Georgetown Law Appellate Courts Immersion Clinic's website (@ImmersionClinic), or by following the URLs in the footnote.[2]

2. See Reply Brief for Plaintiff-Appellant at 1–2, 7–8, Harrison v. Brookhaven Sch. Dist., No. 21-60771 (5th Cir. Feb. 8, 2022), https://www.law.georgetown.edu/wp-content/uploads/2022/03/Harrison-Reply-Brief-2.8.2022.pdf; Reply Brief for Appellant at 2–3, 19–22, Balbed v. Eden Park Guest House, LLC, 881 F.3d 285 (4th Cir. 2018) (No. 17-1187), https://www.law.georgetown.edu/wp-content/uploads/2018/12/Balbed-reply-

Or consider a reply brief the Immersion Clinic filed last year in a Title VI racial-harassment case. Our Introduction and Summary of Argument (at pages 1–2) seeks to strike our client's basic themes and then use them to provide high-level responses to our opponent's brief.[3] This case involved evidence of egregious and persistent racist taunting of our client, a member of a university tennis team, by teammates and a coach. Our brief seeks to show, as the case law demands, that the university was deliberately indifferent to the harassment and took inadequate corrective action, thereby depriving our client of educational benefits on the prohibited basis of race.

The appeal concerned both the merits of the claims and their alleged tardiness—the latter being the basis for the district court's summary judgment in favor of the university. At the outset of the reply, we describe the university's statute-of-limitations arguments broadly, noting that they all serve the university's efforts to avoid the horror (and embarrassment) of the merits, which, in significant part, the university's answering brief had expressly or tacitly conceded. Not wanting to be accused of evasion ourselves, and confident that our clients' claims were timely, we also noted both that the university had chosen the wrong statute of limitations and that our claims would largely survive even if the university had chosen correctly. But we did this on our terms, coming back to the governing motif that our client had lived through a racial nightmare and that a knowing university effectively looked the other way.

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brief-ECF-as-filed-7.10.2017-1.pdf; Reply Brief for Plaintiffs-Appellants at 1–2, 5–6, Threat v. City of Cleveland, Ohio, 6 F.4th 672 (6th Cir. 2021) (No. 20-4165), https://www.law.georgetown.edu/wp-content/uploads/2021/05/35-Reply-brief.pdf; Reply Brief for Plaintiff-Appellant at 2–4, Creech v Ohio Dep't of Rehab. & Corr., No. 21-3722 (6th Cir. Apr. 29, 2022), https://www.law.georgetown.edu/wp-content/uploads/2022/05/Dkt-30-Reply-Brief.pdf.

3. See Reply Brief for Plaintiff-Appellant at 1–2, Stafford v. George Washington Univ., No. 22-7012 (D.C. Cir. Aug. 23, 2022), https://perma. cc /CEV3-BFGU.

Finally, look at the beginning of this Supreme Court cert-stage reply[4] in an employment-discrimination case. We first explain that our opponent—the Solicitor General—agreed with us, expressly or impliedly, on most of the traditional pillars of cert-worthiness. For instance, the Government largely did not contest our showing that the circuits were split and did not even defend the decision on the merits in its favor in the court of appeals below.[5] This approach of narrowing the issues can itself be effective because by leaving only a couple points on the table for further discussion, you may be able to suggest that your opponent's position is insubstantial. More importantly, in this cert-state reply, this deck-clearing tactic allowed us immediately to situate the brief on our terms—that is, while saying otherwise, the Solicitor General had effectively agreed that the case was cert-worthy(!)—without undue repetition.

I've found that to succeed in striking the balance between restating the themes of the opening brief and responding to the appellee's plausible arguments, the advocate must think as broadly as possible—at as high a level of generality as the case materials and the appellee's arguments allow—about what the appellee is doing as a general proposition. Is your opponent agreeing, expressly or impliedly, with some of your basic points? Does the appellee's brief illustrate a misunderstanding of the governing law or the record in the case, or both? Does it make a basic category error or errors? Does it simply ignore one or more things unfavorable to your opponent? Or is it a combination of flaws, misstatements, and the like—all of which allow you to weave your responses to your opponent's arguments into *your* basic thesis or theme? The idea here is that, when possible, before rebutting the particulars of your opponent's positions, try to place the flaws in those positions in a small number of broad categories—each of which can be countered by your overall understanding of

4. Reply Brief for Petitioner at 1, Green v. Donahoe, 575 U.S. 983 (2015) (No. 14-613), https://perma.cc/28YG-MH63.

5. *Id.*

the case. If you do this fairly and accurately, you have juxtaposed your opponent's arguments against the law and the facts as you have presented them to the court and as you believe them to be.

This technique needs to be executed with care because, again, you cannot use the reply to repeat your opening arguments at length. Judges and law clerks will (rightly) tune out if that's what you're doing. Rather, you need to *identify* your opening arguments with sufficient clarity and precision to call them back for your reader—again, without undue repetition—using them as framing devices for rebutting your opponent's positions.

Take a look, for instance, at this Immersion Clinic reply brief[6]—in the Title VI racial-harassment appeal discussed earlier—where we employ this approach in replying to our opponent's statute-of-limitations arguments. The first question addressed in the reply is which state-law statute of limitations should be "borrowed" to govern our client's federal claim given that federal law contains no express limitations period. On a key point, we start by describing our position on the general principles governing that question, observing that because the "Title VI claims reveal[] that [the claims] are 'best characterized as personal injury actions,'"[7] our client was entitled to borrow from a statute of a limitations governing personal-injury suits. We proceed in broad strokes to reestablish our basic themes and to put the conversation back on our terms, citing the applicable Supreme Court precedent, but without repeating the details of what we had already said in our opening brief. Then, on the following pages, we respond to the particulars of our opponent's arguments against the backdrop of the (now-reestablished) governing principles.

In all events, the objective, as I've said, is to get the argument back on your terms while ensuring that your opponent's key points are thoroughly and efficiently

6. Reply Brief for Plaintiff-Appellant at 2–7, Stafford v. George Washington Univ., No. 22-7012 (D.C. Cir. Aug. 23, 2022), https://perma.cc/CEV3-BFGU.

7. *Id.* at 3 (quoting Wilson v. Garcia, 471 U.S. 261, 280 (1985)).

rebutted. (Efficiency is key to a reply brief both because the word limit for a reply brief is generally only half that of a principal brief and because the reader is often a bit fatigued when the reply rolls around, so you want to get in and out economically.)

It's particularly useful to *end* a reply brief in a way that both discredits one of your opponent's arguments and affirmatively emphasizes a basic attribute of your appeal. That is, end a reply brief on your terms, not your opponent's. I believe that the concluding arguments in these Immersion Clinic briefs[8] accomplish that objective.

For instance, our reply brief in *Creech v. Ohio Department of Rehabilitation and Correction*[9]—involving whether Congress properly used its constitutional powers to abrogate the states' sovereign immunity to damages suits by prisoners under the Americans with Disabilities Act—ends by emphasizing the appellee's misunderstandings of the governing Supreme Court precedent that guided our affirmative arguments. And, in *Hamilton v. Dallas County*,[10] we conclude by highlighting our thesis statement while underscoring the harmful (and, we say, outrageous) consequences of the appellee's position. In that case, Dallas County maintains that prohibiting female detention officers from taking consecutive weekend days off, while allowing male detention officers to do so, does not violate Title VII of the Civil Rights Act of 1964, the most important federal prohibition on employment

8. *See* Reply Brief for Plaintiffs-Appellants at 9–10, Hamilton v. Dallas County, No. 21-10133 (5th Cir. July 6, 2021), https://www.law.georgetown.edu/wp-content/uploads/2021/09/Reply-brief.pdf; Reply Brief for Plaintiff-Appellant at 15–16, Creech v. Ohio Dep't of Rehab. & Corr., No. 21-3722 (6th Cir. Apr. 29, 2022), https://www.law.georgetown.edu/wp-content/uploads/2022/05/Dkt-30-Reply-Brief.pdf; Reply Brief for Plaintiff-Appellant at 27–28, Wallace v. Performance Contractors, Inc., No. 21-30482 (5th Cir. Feb. 2, 2022), https://www.law.georgetown.edu/wp-content/uploads/2022/02/2022.02.02-Wallace-reply-brief.pdf; Reply Brief for Plaintiff-Appellant at 10, Harrison v. Brookhaven Sch. Dist., City of Brookhaven, No. 21-60771 (5th Cir. Feb. 8, 2022), https://www.law.georgetown.edu/wp-content/uploads/2022/03/Harrison-Reply-Brief-2.8.2022.pdf.

9. *See supra* note 8.

10. *See supra* note 8.

discrimination. Our reply brief's penultimate sentence observes that if the County were right, it could hang a workplace sign saying that it makes work assignments on the basis of sex (with the clear implication arising from elsewhere in our briefs that the County could do the same on the basis of race, religion, and national origin). That allowed us, in the reply brief's final sentence, to return to high principle and our overall theme: "Decades after Title VII was enacted to eliminate sex-based workplace discrimination that cannot be right, and this Court should say so."[11]

Keeping these principles in mind should help you end your reply brief on your terms. Doing this is particularly important in multi-issue appeals because the last issue addressed is often the weakest argument or the point least important to your client. That raises the concern that your reply brief will conclude on a downer. And you're at a critical juncture because the end of a reply brief is often the last thing the judges and clerks will read from the parties. By striking an overarching principle at the end of a reply brief and explaining why the appellee has failed to heed that principle, you can avoid this endemic problem in briefing multi-issue appeals. To read more on this topic, see my essay titled *How to Conclude a Brief*.[12]

V. DON'T RESPOND TO EVERYTHING

A good reply brief does not respond to all the appellee's points, even all those that the appellee got wrong. Only respond to things that matter. Responding to everything will often undermine the structure and/or rigor of your reply brief and your effort to get the case back on your terrain. Responding to only things that matter will (a) reduce clutter and streamline your

11. Reply Brief for Plaintiffs-Appellants at 10, Hamilton v. Dallas County, No. 21-10133 (5th Cir. July 6, 2021), https://www.law.georgetown.edu/wp-content/uploads/2021/09/Reply-brief.pdf.

12. *See* Brian Wolfman, How to Conclude a Brief (Feb. 28, 2023) (unpublished essay), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3992861.

presentation, (b) help with brevity (which, as already noted, is important), and (c) increase your credibility and stature as an advocate, making *you* the adult in the room.

Recently, our opponent included in its answering brief a meandering discourse on background principles of employment-discrimination law. Some of it was incomplete and misleading. But we just let it lie because it had nothing to do with the issue on appeal, and we were confident that the reader would know what was truly at stake after reading our briefs. Sure, it can be difficult to determine what does and does not matter, but the point here is that you shouldn't go into a reply with the presumption that you need to respond to every misstatement or error, even when it is annoying or downright maddening. In particular, ignoring your opponent's irrelevant personal invective or otherwise nasty argument is generally preferable. Your stature as an on-point, mature advocate will be elevated, and your opponent's stature will suffer by comparison.

In all events, it's hard to overstate this point, so I'll repeat it: Do not argue about every little thing; argue about what matters.

VI. REPLY BRIEFS ARE RELATED TO OPENING BRIEFS

Reply briefs are connected to opening briefs. In one sense, that's obvious because the opening brief sets up in part what the answering brief will say and the reply, in turn, responds in large part to the answering brief. But what I am stressing here is that an opening brief can serve, in part, *as a reply brief*.

The writer of an opening brief usually will have a good idea what the appellee plans to argue. So, when I write an opening brief, I try to anticipate my opponent's serious points and weave my responses to them into my opening brief's affirmative arguments. This approach to opening briefs should help establish my honesty and credibility as an advocate, and it tends to dull (if not wholly preempt) the appellee's arguments because I've

already outed them (fully and fairly, but hopefully on my client's terms).

Here's an example: Last year, the Immersion Clinic urged the D.C. Circuit to hold that the key federal employment-discrimination law (Title VII of the Civil Rights Act of 1964) prohibits a wide range of discriminatory employer conduct, not only discriminatory hiring, firing, demoting, and other actions that impose immediate monetary consequences. We were confident that our opponent would argue that two Supreme Court Title VII precedents effectively rejected our position, and we suspected, in any event, that the court would be curious about those precedents. So, at pages 39–43 of our opening brief,[13] we explained why those precedents concern off-topic issues and why, if understood as our opponent viewed them, the result would run headlong into the statute's text and create serious and irrational anomalies in statutory coverage. The goals here were three-fold: to be forthright about what was lurking in the appeal (which judges like); to get the first word on something we knew would be before the court anyway; and, relatedly, to use our opponent's arguments to score affirmative points for our client at the earliest possible time. Waiting for the reply would have undermined those goals.

There are strategic reasons not to anticipate all of the appellee's arguments in an opening brief—such as genuine uncertainty about whether the appellee will raise the argument or good reason to see how the appellee puts the argument before responding to it. And, of course, not all arguments can be or will be anticipated. But the point here is that you should think hard about including potential counterarguments in your opening brief, rather than reflexively leaving all your responses for the reply brief.

Anticipating in the opening brief points the appellee is likely to raise comes with two potential bonuses. First,

13. En Banc Opening Brief for Appellant at 39–43, Chambers v. D.C., 35 F.4th 870 (D.C. Cir. 2022) (No. 19-7098).

as indicated, appellants are given more words for an opening brief than for a reply—in the federal courts of appeals, twice the words[14]—so anticipating an argument in an opening brief (if you have the space there) may save space for what may be a jam-packed reply. When it comes time to write the reply, you may not be able to completely disregard the argument you anticipated. But your reply can call back your opening brief and reply economically on the points you've already discussed.

Second, the earlier an appellant raises an argument the less likely the appellee can plausibly assert that the appellant's argument has been forfeited. I don't want to overstate this point. Many times, reply briefs contain counterarguments that do not raise genuine forfeiture concerns—that is, often there's nothing to worry about. But forfeiture doctrine—which is beyond the scope of this essay—is notoriously unpredictable and becoming more so with each passing year. So one reason to anticipate arguments in an opening brief is to avoid a later non-frivolous claim of forfeiture.

VII. AN ANSWERING BRIEF IS A TYPE OF REPLY BRIEF

Finally, though beyond the scope of this essay, note that an appellee's answering brief is a kind of reply, though a quite different one from the appellant's reply brief that I've been discussing. I have thoughts about them, which I'll save for another essay. For now, I'll say only that new lawyers will benefit from understanding that an appellee's brief, much more so than a standard reply, must ensure that the appeal is presented on the client's terms. It must describe the case from the ground up even though the opening brief is already on file. The appellee's lawyer must reorient the reader to every aspect of the case from the appellee's perspective—making sure, for instance, to include a comprehensive statement of the case so as not to accede to the

14. *See* FED. R. APP. P. 32(a)(7).

appellant's storytelling—while weaving in comprehensive answers to the appellant's arguments.

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I'll end where I began. Reply briefs are important, but they are not given much consideration in law-school instruction. I hope this essay helps a bit. And, again, I welcome comment and criticism.