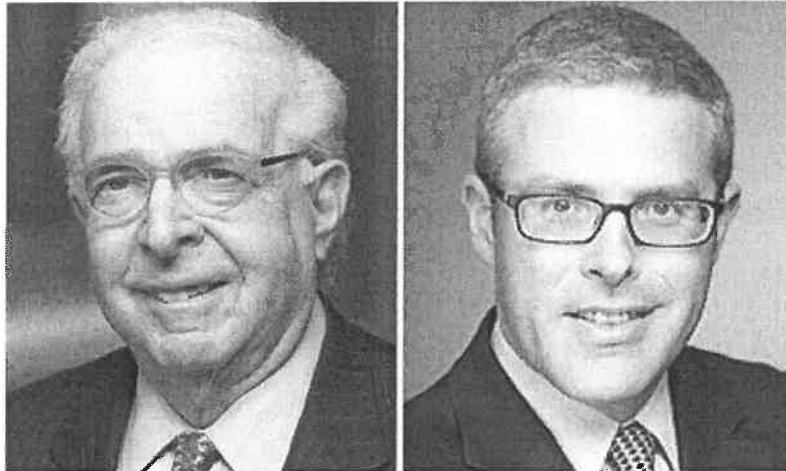


# The Appellant's End Game: Some Thoughts on the Reply Brief and the Rebuttal Argument

We go as far as saying that in all but the most unusual situations, the failure to file a reply brief would constitute attorney dereliction.

David B. Saxe and Y. David Scharf, *New York Law Journal* – July 27, 2018



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The senior writer of this essay, while an associate justice of the Appellate Division, First Department, had one overriding habit when it came to reply briefs: he always read them first and worked backward. More than a few judges have the same habit.

We believe that the reply brief is an important document that should be prepared carefully and thoughtfully by appellate counsel and certainly not treated as an afterthought. The initial brief and the reply brief are unquestionably the most important part of your appeal – certainly more important than oral argument.

Much has been written over the years providing advice to practitioners on how to craft appellate submissions, in particular, the reply brief. New ideas are not especially common but nevertheless, from time-to-time, it seems like a good idea to recalibrate what passes for time-honored textbook advice in this area.

A reply brief is an appellant's last chance of persuasion, especially if no oral argument is permitted; for those appeals where oral argument is permitted, it is the last word that judges will probably read before they hear argument. It is also the last word that staff attorneys assigned the job of preparing a bench memo will take note of. So, without question, appellate counsel should never give up the opportunity to file a reply brief and it should never be a slap-dash affair simply refuting line-by-line points raised in the respondent's brief.

We emphasize the importance of not foregoing the filing of a reply brief because a prominent federal jurist in a highly successful treatise, Ruggero J. Aldisert, "Winning on Appeal; Better Briefs and Oral Argument." (NITA rev. ed. 1996) argued strongly against the need for appellate lawyers to file a reply brief in every case. With due respect to Judge Aldisert, we strongly disagree and believe at virtually *no time* should appellants forego the opportunity to file a reply brief. We go as far as saying that in all but the most unusual situations, the failure to file a reply brief would constitute attorney dereliction.

But that being said, we believe that effective appellate advocacy requires that the reply brief comport with certain guidelines, some of which follow:

1. First, a reply brief should not be a condensed version or re-hash of the opening brief. You must be careful and selective and focus on the important points in opposing the respondent's submission – not merely refuting in a line-by-line fashion every argument made in that brief.
2. The structure of the reply brief is important. It is not uncommon for a respondent's brief to follow the order its author believes presents its strongest point initially, rather than subscribing to the organization presented in your opening brief. Don't fall prey to adopting the respondent's approach. (Jay O'Keefe, "Tips on Drafting an Effective Reply Brief from Richard Kraus," De Novo: Virginia Appellate Law Blog, Aug. 26, 2012.) That will often happen if you persist in trying to refute point-by-point the arguments put forward by the respondent. We recommend that you stick to the structure that you set out in the appellant's brief. (Thomas R. Newman and Steven J. Ahmuty Jr., "Reply Briefs: Getting The Last Word Has Its Limits; APPELLATE PRACTICE," NYLJ, Nov. 2, 2011, at 3, Col. 1; Vol. 246, No. 86.)
3. It is not necessary to try to distinguish every case that your adversary cites. (*Id.*) There is nothing more boring and less persuasive than to read page after page of attempts at distinguishing cases the respondent cited. Select the most important cases that the respondent cited and go after them; look at the respondent's table of cases for multiple citations of the same case – that will be the best clue of all as to what cases you need to reflect on.
4. Maintain your theme. The theme is especially important in this last read. It should advance your cause in a simple, direct fashion; it should be woven throughout your reply brief from the preliminary statement until the very end. (Richard C. Kraus, "Crafting An Influential And Effective Reply Brief," Appellate Issues: Council of Appellate Lawyers, August 2012, [ambar.org/ajccal](http://ambar.org/ajccal))
5. Be especially mindful of using short, declarative, punchy sentences – short paragraphs as well. Shorter, more direct writing is more persuasive, and this is the time to be persuasive! Be careful about using acronyms and abbreviations in the reply brief without setting out what they stand for. You don't want to make the judges jump back and forth to your initial brief in order to get an understanding. Others have warned against the use

of complicated jargon that can detract from the principal theme as set out in your reply brief.

6. Seize the opportunity to call attention to respondent's failure to address an issue raised in your opening brief and consider whether such failure may be the basis for a waiver argument. (Damon Thayer, "How to Write An Effective Reply Brief," ABA Sec. of Lit., Feb. 6, 2012.)
7. Finally, the reply brief, however short, should be a stand-alone document. (Paul J. Killion, "Having The Last Word: The Appellate Reply Brief," *Certworthy* (Fall 1998), at 9.) As we noted at the outset, many appellate judges have the habit of reading a reply brief first. If that is the case and there is abundant anecdotal information that this is so, the reply brief should state, clearly and succinctly, the factual points and legal arguments that support your position and entitle your client to relief.

### **Reflections on Rebuttal**

This is really your last word. While the reply brief is written probably months before you get to argue your appeal, the rebuttal argument is made in real time – right after the respondent finishes. A few words of advice. Always reserve some of your time for rebuttal – five (5) minutes should be enough. Rebuttal is time to rebut, not to restate arguments already made.

Try to isolate a few points made by opposing counsel and go after them. If you saw a judge on the panel go after your opponent on a certain point – use your rebuttal to hammer away at this problem area. Don't try to rebut every point your adversary made; that is a huge mistake too many appellate counsels make. It tends to swallow the important with the marginal. Pick out one or two of the most compelling points and go for the win with them. Once you have done that, offer a clear exit for yourself – a well-rehearsed, brief statement, highlighting the disposition of the appeal you are requesting.

Of course, there may come the day when your initial argument is sparkling and your adversary's position is skewered by the panel. In that unusual situation, akin to a hole-in-one in golf, we advise the prescient appellant to simply rise and say: "Your Honors, appellant waives rebuttal." The lawyer who knows when it's time to back off is a seasoned advocate.

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