

**“REPLY! DON’T REPEAT”
THE ART OF THE REPLY BRIEF**

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Mike Hatchell has experience as lead counsel in over one hundred appeals. He has argued more than 30 appeals in the Supreme Court of Texas, en banc to the federal Fifth Circuit Court of Appeals twice, and in all fourteen courts of appeals in Texas.

Mike began his interest in appellate advocacy in 1964 while serving as briefing attorney for the senior associate justice of the Supreme Court of Texas. Since 1965, he has specialized in civil appeals from state and federal courts in Texas. He is board-certified in civil appellate law, is a founding member and past president of the state bar's Appellate Practice and Advocacy Section, and has served several terms on the board that approves candidates for the civil appeals specialization exam.

Mike employs a very hands-on approach to his cases. Following a personal review of each appellate record, he devotes considerable effort to strategic analysis of the case to develop legal issues with the highest probability of success. Known for his persuasive writing, Mike devotes extra effort to making each brief readable and entertaining, yet logical and forceful.

The Supreme Court of Texas has recognized Mike's interest in appellate procedure by asking him to serve three terms on the permanent committee that advises the Court on rules for trial and appellate practice, and he has also been appointed by that Court to special task forces on the jury charge and judicial campaigning. Because of his continuing interest in the evolution of Texas law and his involvement in precedent-setting Texas cases, Mike is a frequent lecturer at legal seminars and his opinion and commentary on Texas legal issues have often been sought by The Wall Street Journal, The Texas Lawyer, and The Houston Chronicle.

Molly Hatchell has experience on more than fifty state and federal appeals. She has argued cases before the Tyler, Texarkana, Corpus Christi, and Eastland Court of Appeals, as well as the federal Fifth Circuit Court of Appeals. She is board-certified in civil appellate law by the Texas Board of Legal Specialization.

Molly specialized in appellate practice immediately upon graduation from South Texas College of Law, where she was on the Editorial Board of the school's law review. She served two years as briefing attorney for the chief justice of the Corpus Christi Court of Appeals and one year as a briefing attorney with the Tyler Court of Appeals.

Molly contributes to the legal profession by her involvement in academic writing and professional activities. She previously served on the State Bar's Court Rules Committee, and the Appellate Section's Rules Committee. She currently serves as a Director for the Smith County Bar Association. She also authored independently (and with Mike) several papers on appellate advocacy and the rules of appellate procedure. She recently authored (with Prof. William V. Dorsaneo) the "Class Action" chapter of The Texas Litigation Guide.

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Reply briefs are different than opening briefs. They give the litigant the opportunity to answer questions the reviewing court has after reading the opponent’s argument. They also give the appealing party the best opportunity to dismantle the opposing party’s legal position, to set the record straight, or to highlight absurdities and adverse consequences sponsored by the competing position. Effective reply briefs consolidate and refine arguments in the opening brief; they do not expand them.

In my experience, reply briefs too often tend to fall into one of two categories: (i) “In case you didn’t hear me the first time” – a brief that replies mainly for the purpose of getting in the last word. Or (ii) “Hear no evil” – briefs that refuse to recognize any jeopardy from the opposing argument and ignore any questions that might be raised in the reviewing court’s mind as a result of the opponent’s brief. Both types of briefs tend – not to refine and advance the proponent’s argument -- but to repeat what has already been said. Thus, the title for this paper.

Often the syllogism underlying a reply brief goes something like this: (i) They say ... (ii) We say ... (iii) They are wrong because of what we’ve already said – which, as we say again, is... This approach, which emphasizes repetition rather than analysis of the competing position, may be effective in some ways but fosters many missed opportunities.

Following are suggestions for analyzing and writing an effective reply brief that significantly advances the proponent’s position and seriously jeopardizes the opponent’s case, thereby putting the case in the very best posture for a favorable ruling by the appellate court:

I. WHAT IS A REPLY BRIEF?

Texas appellate practice provides several formal opportunities for a reply brief and a given case may present other informal opportunities for a reply.

The *formal* reply briefs codified in the rules of appellate procedure are: (i) the Appellee’s Reply Brief, limited to 25 pages, (ii) a petitioner’s reply to a response to a petition for review, limited to 8 pages and (iii) a petitioner’s reply to a response on the merits, limited to 25 pages. *See Rule 38.3, 53.5, and 55.4, Tex. R. App. P.*

An *informal* opportunity to reply may arise, for example, when invited by the court prior to argument, in response to questions from the bench at oral argument, in reply to a brief of *amicus curiae*, or in reply to an

opponent’s post-submission brief. The practices suggested herein apply equally to all such briefs.

II. SHOULD A REPLY BRIEF BE FILED?

Not every brief by an opponent needs a reply. Here is a simple test: If the opponent’s argument is fully dealt with in your opening brief, all the court’s questions are fully answered therein, and all you can do is repeat what has been said, a reply brief is not indicated -- and probably not welcome by a busy appellate court.

One word of caution: Before the 1997 rules of appellate procedure, there was no formal practice for filing reply briefs in an appellate court. Many practitioners never filed reply briefs. Many routinely filed such briefs, and replies to replies, and so on. Often the briefing would not stop until the court issued an opinion – perhaps in self defense. The parameters of the former practice were determined on a court by court basis. Some courts had a “no holds barred” policy and would receive any brief filed. Some courts required leave to file any such brief. Now that a reply brief is a rule-given right, clients are inclined to believe that a reply brief is essential, even when not called for. Formalizing the reply brief procedure is a significant improvement over the former practice, but it does foster the belief with some clients that failure to file a reply can lead to an adverse result. It is not universal that an opponent’s brief – particularly post-submission briefs – always require a response. Candid and full discussions with the client about the need for filing a reply thus are called for, so the client can make an informed choice.

III. WHEN SHOULD A REPLY BRIEF BE FILED?

The rules of appellate procedure set time limits for the traditional reply briefs, and, as we all know, those time limits are liberally extended. *See Rules 38.6, 53.7(f), and 55.7, Tex. R. App. P.*

Mention should be made, however, that Rules 38.3, 53.5, and 55.4 each contains the proviso: “the court may consider and decide the case before a reply brief is filed.” That rule notwithstanding, I firmly believe that haste to get a reply on file should never take precedence over careful analysis, research, and an orderly presentation. Some of the biggest mistakes I’ve seen have been in reply briefs where haste, not quality, was the driving force. Having a bad brief on file early never improves an appellate case.

As a practical matter, court of appeals’ dockets are such that normally one would not expect a case to be decided before a reply brief could be filed, except perhaps in original proceedings where time is of the

essence. At the petition-for-review stage in the Supreme Court, however, I have noticed that the Court often decides to grant or deny a petition very shortly after the due date for a reply brief. That counsels that the better practice in that court is to file a reply brief sooner rather than later. That advice is particularly pertinent to reply briefs where an extension of time for the reply is sought and the court sends a form letter giving an open-ended deadline, stating that a reply will be received at any time before the court rules on the matter.

IV. HOW SHOULD A REPLY BRIEF BE ANALYZED AND STRUCTURED?

Even though the time for filing a reply brief may be shorter than other briefs, that does not mean that pen should be put to paper any more quickly and with less thought and study. In fact, just the opposite. Effective reply briefing requires a period of analysis to decide (i) the focus that will best influence the reviewing court and (ii) the critical point of attack upon the opponent’s argument. If the time for filing a reply brief in the rules is not sufficient, get an extension. These are routinely granted, and, in the long run, your client and the court will be better served.

An effective reply brief does not necessarily respond to everything in an opponent’s brief or respond in the same order that the opponent has briefed the issues. The effective reply brief begins by asking two important questions:

- What questions will the court have when it puts down my opponent’s brief?
- What is the point of greatest vulnerability in the legal syllogism underlying my opponent’s brief?

How those questions are answered determines what the reply brief says, how it is said, and the order in which it is said.

A. A reply brief should meet the court’s needs:

In crafting a persuasive reply brief, one must avoid the temptation

- (i) to respond to every statement in the opponent’s brief,
- (ii) to waste time discussing issues of law or fact that are not relevant, are not dispositive, or are just too simplistic to merit response, or
- (iii) to lash out at particularly galling

misrepresentations of the record or indefensible legal positions, which – although wrong – may not be the point on which the appeal will ultimately turn.

It is what the reviewing court needs or wants to know that shapes the reply brief. An attorney very close to the case may not be in the best position to answer the question: What does the court want to know? A recommended approach is to assemble a team of lawyers, some of whom know the case well and some who don’t. Retired appellate judges can also be a useful part of the team. (I recognize that not all cases can afford a horde of lawyers for this process, but it can still be accomplished in a less formal way by using partners, associates, or close colleagues in the profession.)

In one or more sessions, the group should carefully consider the points at issue, the opponent’s response, and the questions or concerns an objective appellate court will have after reading the opponent’s brief. The group will probably find that

- the court may need to know the facts in greater depth, or
- the court may need further explanation about existing case or statutory law, or
- the court may need to know the policy rationale for the position sponsored by the appealing party and the adverse consequences wrought by the opponent’s position, or
- the court may need some combination of all the above.

Defining the critical questions in the court’s mind involves

- an in-depth knowledge of the record,
- a thorough knowledge of the legal issues in the case,
- an understanding of the policy implications at stake,
- well-honed instincts about how appellate courts think, and
- a sophisticated decision-maker who is willing to take some risks in deciding where the appealing party’s appellate burden now lies and what the emphasis should be.

When this process is carefully and thoughtfully done, it results in a brief that puts the court’s mind at ease about your position, thus boosting your credibility and potential for success. When the process is not done at all, or not done carefully, the resulting brief may try to be all things to all men and wander aimlessly and half-heartedly through legal and fact issues of no concern to the court, while ignoring the court’s most pressing concerns or giving short shrift to the points on which the court’s decision will turn.

During this analytical process, an outline should be developed so that the overall structure of the reply can be seen in one short document. Only until the outlined approach is finalized and approved by the analysts should pen be put to paper.

B. The best reply argument strikes at the heart of the opponent’s case:

Once the shape and order of the response is determined, the first words in the response should strike at that aspect of the opponent’s argument that will cause the entire argument to fall, or, at a minimum, that will inflict the most legal damage. The best way to define the point of attack is to outline the opponent’s argument to uncover the point or points of greatest vulnerability.

Most legal arguments are supported by a fairly standard syllogism. Effective reply briefing starts with defining that syllogism and seeking its point of greatest weakness. Here’s an example. Assume your client is sued in a bill of review action to set aside a prior judgment. You defend, among other grounds, on the statute of limitations, but lose that argument and ultimately the entire case. On appeal, you open with an issue seeking rendition on limitations grounds. Your opponent’s argument in reply has a legal syllogism that goes like this:

- Although a bill of review is governed by the four-year statute of limitation, the discovery rule applies.
- The jury found (and some evidence shows) that appellee did not actually discover the cause of action until 12 months before suit was filed.
- *Ergo*, the case is not barred by the statute of limitations.

There are several potential replies to this argument:

- The statutory period is not subject to the discovery rule.
- Or, the application of the discovery rule is unclear and policy reasons suggest it should not apply to this case.
- Or, the opponent’s argument is premised on a mistake of law – i.e., that only “actual knowledge”, rather than constructive knowledge, can accrue the cause of action and start limitations.
- Or, a document conclusively shows discovery more than four years before suit was filed.

The strength of the potential responses dictates where to focus the attack. For example, if the record contains a letter from your opponent, dated seven years before the suit was filed, seeking to hire a lawyer to bring the very action in question, obviously, you would start the reply here, even though it is not the first premise of the syllogism, because – at the end of the day – this one, indisputable fact moots all other legal inquiry, however interesting that inquiry may be. There is no sense wearing the court out on other responses – especially weaker ones – before the court gets to the argument that solves the whole case with a glance at one piece of paper.

On the other hand, the facts may be murky and hotly contested, but the state of the law since *S.V. vs. R.V.* – while not clearly decided as to your case – makes for a solid argument that the discovery rule does not apply. Unquestionably, the reply starts here, because appellate courts are disinclined to weigh and sift evidence, but are comfortable in deciding what rules of law apply to a given case, particularly when important policies are at stake.

Simply put, the best point of attack is not the same in every case. It depends on the weakness and strength of the opponent’s syllogism. The goal of the reply is to cause the opponent’s syllogism to collapse entirely, or at least to appear so illogical that the appellate court is persuaded by the correctness and logic of your argument.

Other points of attack should be made thereafter in the order of their strength, while maintaining a logical progression – i.e., one that does not confusingly jump around from fact to law to policy and back again.

One word of caution: Argument should cease at the point where the response becomes too tenuous to be credible. The task of the reply briefer is not just to make an argument but to make a winning argument. Reply

briefs should not try to be all things to all men and embrace all arguments. As I said at the beginning, reply briefs should consolidate and strengthen, not try to expand, the opening arguments. Counsel thus must exercise judgment (and have the courage) in drawing a line and deciding that argument will cease at a given point. I go by the rule that a brief is as good as its worst argument. Ridding reply briefs of tenuous, illogical, insupportable, “even if”, and extreme arguments improves the overall quality of the brief, allows room to develop the best arguments, and makes the whole an aura of strength.

To sum up, no general formula can be applied to dictate how every reply brief should be written. Defining what the appellate court needs to know and how best to attack the opponent’s argument will point the way to a brief that truly responds to the opponent’s position, satisfies the appellate court’s questions about your case, and actually advances the argument for your client – rather than turning the court off by just repeating what’s already been said.

FREQUENTLY ASKED QUESTIONS

The general approach just discussed should guide the advocate in most situations, but here are suggestions in response to questions frequently encountered at the reply briefing stage:

1. *Should I use all the pages allowed for a reply brief? Should I ask for more pages?:* There’s always an exception to every rule – especially in “Mega” cases, but the general answer to both questions is “No”. The shorter, efficient, more-to-the-point reply brief makes it seem that a telling response to the opponent’s position is simple. The less convoluted and attenuated the response is, the greater its impact.

2. *How do I best respond when my opponent’s argument repeatedly misstates the record?* Show the court the real facts. A picture’s worth a thousand words, and a good response to this problem is to attach the document or the page of the record that conclusively refutes the factual misstatements in the opponent’s argument. Or, you can quote it within the text of the brief. The appendix demonstrates how Hatchell PC handled this issue in a recent case by copying the controlling testimony on a facing page of the brief in direct juxtaposition to the opponent’s offending argument, right at the point where the court was considering the argument in reply.

One word of caution: In making such a response, make dead sure you’re on solid legal ground – that you’re true to the standard of review. In other words, don’t accuse your opponent of misrepresenting the record if all you’re doing is citing the court to facts favorable to your position that are in dispute and cannot be considered under the standard of review. Such a tactic – which is all too common – is the quickest known way to lose valuable credibility with the court.

3. *What’s wrong with reminding the court of my opening argument and what my opponent said in rebuttal?* First off, it’s boring and trite. If the court has just read the prior briefs, this “he said / she said” form of argument signals the court that they’re about to hear again what they just read. The natural tendency of any busy judge is to tune out.

Second, it reemphasizes your opponent’s position. Giving emphasis to the opponent’s argument is not what a reply brief is supposed to do. Here is a suggestion for avoiding this rut:

The “he said / she said” approach:	The “immediate attack” approach:
Appellee argues that the discovery has to apply to this case because the bill of review is based on fraud which is inherently undiscoverable. We say that the discovery rule doesn’t apply because a bill of review is not a fraud action. We are right because [here repeat almost verbatim the argument in the appellant’s brief].	Three holdings in S.V. vs. R.V. defeat Appellee’s argument -- unsupported by any case -- that the discovery rule applies. They are: (i), (ii), and (iii). Moreover, appellee’s position flouts the fundamental policy wrought by the Court in that case, because

4. *Should I actually reply in my opening brief to arguments I know my opponent is going to make?*

No! Opening briefs are best used to define the procedural and legal framework, state the facts in an appealing but fair manner, and advance a well-organized and logical argument that applies the law to the facts.

Anticipating arguments has several downside risks and virtually no upside benefits. First, repeating anticipated arguments lets the opponent use your brief to advance the competing position. Your brief shouldn’t give “air time” to the opposition. Second, telling the court what you believe will be said in opposition just gives your opponent an opportunity to draft around your response or change the argument or not make it at all. Third, your opponent may not intend to make that argument, so you’ve basically wasted pages in your brief charging at an open door. All of this tends to make you look silly.

This is not to counsel against using the opening brief to channel the opponent’s argument down a course that you know is vulnerable and can be effectively rebutted in a good reply brief. In one sense, the beginning point of a good reply brief is a solid, well analyzed, tightly-written opening brief that leaves the opponent very little “wiggle room” and forces the opponent to make arguments for which there is a solid rebuttal. A skilled appellate practitioner will not fling out arguments in an opening to which there is an obvious answer and no plausible rebuttal to that answer.

5. *What should I do when my opponent cites facts or cases that really hurt my case?* First off, you shouldn’t be appealing a case that can be destroyed by the facts or legal authority.

Where “facts” are concerned, with proper analysis, your opening brief should set out a legal argument that evades adverse facts. When those facts are thrown up against you by the appellee or respondent, you should have a ready answer: “Those facts are irrelevant to the outcome, because ...”

Where “authority” is concerned, your opening argument should also have accommodated the bad case or the inconvenient statute. When seemingly contrary authority is cited against you, you should thus already have in hand salient points of distinction. If case authority cannot be distinguished, then you must resort to the fundamental policies underlying your position and demonstrate why the adverse cases are not worthy of being followed or why the statute cannot be interpreted as your opponent interprets it.

