

Preparing Appellant's Reply Brief

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The opening brief is your opportunity to define the scope of your client's appeal and to present the Court of Appeal with comprehensive argumentation in support of your client's legal and factual challenges to the judgment below. When it comes to appellate briefs, the primacy of the opening brief's importance - and the first impression it makes - is beyond dispute.

We know from experience that the process of putting together a persuasive opening brief can be very satisfying and rewarding. It can also be exhausting and leave you feeling as if you cannot possibly have anything more to say on the issues you have raised. Sometimes, our immediate reaction to reading the respondent's brief almost reflexively reinforces that impression, which can temporarily deceive us into thinking that devoting any more time and energy to a reply brief is pointless. But you are not finished. The strongest counter-arguments made in the respondent's brief are not as airtight as they may seem after your initial reading and rarely, if ever, should go unanswered.

For the limited purpose of conceptualizing the reply brief, it may help to think of the opening brief like an opening statement in a jury trial. Very few trial lawyers would want to rest on their opening statements after the close of evidence. What follows the opening statements - the trial - will often have a substantial impact on how a trial lawyer structures his or her closing argument to the jury. On appeal, your closing argument is your reply brief. The reply brief, and not your opening brief, should be your closing argument. In most appeals, the reply brief is your last word (in writing, at least). Having the last word is a luxury we, as appellants, are lucky to have. Some of us probably became lawyers for the unique pleasure of being paid to have the last word in an argument. Take advantage of this opportunity.

These materials are designed to assist you in the preparation of an effective reply brief. It may be useful to treat the subsequent bold paragraph headers as checklist items to keep in mind when you draft your appellate closing argument.

A good reply brief begins with the opening brief. There are a number of reasons why you should be thinking about the reply brief when you are writing the opening brief. First, you must decide whether certain arguments should be included in the opening brief or set aside for possible future use in the reply brief. The most common example of this approach is whether to address potential waiver/forfeiture problems upfront in the opening brief or wait to see if the Attorney General raises any such procedural bars in the respondent's brief. Similar considerations arise with respect to questions of appealability, mootness, ripeness, or, in a guilty/no contest plea appeal, the necessity of obtaining a certificate of probable cause. You will also need to decide whether or how much you want to discuss certain substantive issues in the opening brief or save them for the reply brief. For example, in a Fourth Amendment case, you will always allege the exclusionary rule applies, but, in some cases, you may choose to save a more detailed analysis of the exclusionary rule for the reply brief in case the Attorney General does not argue there were any intervening circumstances that would defeat its application. The same can be true for case authorities. You may, for instance, identify several cases that are relevant to a claim raised in your opening brief but elect to save an in-depth discussion of one or more of them for the reply brief. Sub-arguments and cases intentionally omitted from the opening brief may turn out to be centerpieces of your reply brief depending on the arguments raised in the respondent's brief. Therefore, it is a good idea to create a digital or physical file for potential reply brief materials containing ideas and case authorities considered at the time of the opening brief but reserved for possible use at the reply brief stage. Easy access to the ideas and cases saved in this file can really pay off when you are ready to prepare your reply brief.

Keep track of relevant new authorities after you file your opening brief. If relevant new cases are decided after you have filed your opening brief, you will want to add those to your file of potential reply brief materials as well. The same holds true for new legislative enactments. Note: if a new case or statute is a game-changer, you may want to consider filing a supplemental opening brief rather than wait to bring the new development to the Court of Appeal's attention in the reply brief.

Take note of the reply brief's due date. The reply brief is due twenty days after the filing of the respondent's brief (not twenty days after you receive the respondent's brief). Calendar the due date for the reply brief as soon as you receive the respondent's brief.

Reread your opening brief. By the time you receive the respondent's brief, you may not remember all the nuances of the argument(s) you raised in the opening brief. It is, therefore, a good idea to reread your opening brief prior to reading the respondent's brief. If you cannot wait to read the respondent's brief, then reread your opening brief just after

reading the respondent's brief. Doing so may help calm you down should you find any of the counter-arguments in the respondent's brief outrageous or seemingly insurmountable.

Mark up the respondent's brief. As you read the respondent's brief, take notes. The simple act of underlining passages or making notations in the margin are vital early steps to formulating your reply.

Outline, summarize, or otherwise synthesize the arguments contained in the respondent's brief. After you have read through both your opening brief and the respondent's brief, write up a short outline or summary of the arguments set forth in the respondent's brief. This small act will help you synthesize the Attorney General's contentions and jumpstart the process of rebutting them.

Research any new cases cited in the respondent's brief. Find all of the new cases cited in the respondent's brief. You will want to read them to understand them and determine whether they stand for the propositions for which they have been cited. You will also want to check whether they are still good law.

Check the continuing validity of important cases you cited in your opening brief. It is not only the cases cited in the respondent's brief that must be checked for continuing validity. You must do the same for cases you cited in the opening brief that you intend to rely on again in the reply brief.

The facts are important, too. When reading the respondent's brief, do not forget to pay close attention to the Attorney General's recitation of the facts as well as the legal arguments. If there are material errors in the facts set forth in the respondent's brief, you will want to make this known to the Court of Appeal in the reply brief. On the other hand, if there are minor, immaterial factual inconsistencies in the respondent's brief, you do not need to devote time and space in the reply brief to highlighting them. Let materiality be your guide in determining which factual errors to bring to the Court of Appeal's attention and how you want to do it. If the factual errors in the respondent's are truly pervasive and germane to multiple arguments, you may want to include a separate section at the outset of the reply brief correcting the factual errors en masse. In most cases, however, you will want to address the factual errors in the body of the individual arguments to which they are relevant.

Open with a helpful introduction. It is recommended you start the reply brief with a short introduction summarizing the arguments you made in the opening brief, the arguments the Attorney General made in the respondent's brief, and why your arguments are more persuasive. Here is an example:

In his opening brief, appellant maintained the trial court abused its discretion in denying his request to modify the terms of his probation so as to permit him to use medical marijuana in accordance with the Compassionate Use Act (CUA). (Appellant's Opening Brief (AOB) 12-38.) Appellant argued that: (1) the *Lent*¹ test that governs the reasonableness of probation conditions imposed at sentencing should not be strictly applied to his post-sentencing motion to modify the terms of his probation; (2) the trial court's refusal to modify the medical marijuana probation condition conflicted with the CUA and Health and Safety Code² section 11362.795; and (3) construing section 11362.795 to authorize the trial court's actions in this case would result in an unconstitutional amendment of a voter initiative. (AOB 12-38.)

The Attorney General does not directly address appellant's first contention but, applying the traditional *Lent* test, insists the trial court's denial of appellant's motion was a proper exercise of discretion made in full compliance with the CUA and section 11362.795. (Respondent's Brief (RB) 6-13.) Respondent rejects appellant's constitutional challenge to section 11362.795 as waived on appeal by appellant's failure to raise it in the trial court. (RB 13, fn. 6.)

Given the procedural posture of appellant's case, the purpose and scope of the CUA, and the provisions of section 11362.795, the trial court's refusal to modify the terms of appellant's probation to allow the use of medical marijuana was not a proper exercise of discretion. Moreover, the constitutionality of section 11362.795 - which presents a pure question of law - is properly before this Court. Therefore, the order denying appellant's request to modify the terms of his probation should be reversed and a new order issued authorizing the possession and use of medical marijuana in accordance with the CUA.

The above example is comprised of three short paragraphs. Often one paragraph for a simple argument will suffice.

¹*People v. Lent* (1975) 15 Cal.3d 481.

²All future statutory references are to the Health and Safety Code, unless otherwise indicated.

Consider including an introductory disclaimer on the scope of the reply brief. Out of an abundance of caution, you may want to include language along the following lines at the beginning of the reply brief:

This reply brief is intended solely to respond to the Attorney General's contentions that require further discussion for proper determination of the issues raised on appeal. This brief does not respond to issues that appellant believes were adequately discussed in the opening brief, and appellant intends no waiver of these issues by not expressly reiterating them herein.

It is unlikely the Court of Appeal would construe the failure to renew or reiterate an opening brief issue in the reply brief as waived or conceded, but such a disclaimer is common practice.

Include record citations. Always cite to the appellate record when discussing facts, even for facts already discussed in the opening brief.

Organize the reply brief your way. Structure your reply brief in the way that you believe best presents the strengths of your arguments. In other words, avoid falling into the trap of organizing your reply brief by default according to the organizational structure of the respondent's brief. Not surprisingly, the Attorney General organizes respondent's briefs in a manner aimed at most effectively highlighting their arguments. In most cases, that structure will not do you any favors. While you of course need to reply to the key points raised in the respondent's brief, you are free dictate the terms of how you present your arguments. Just as you do not necessarily want to structure your Statement of Facts in your opening brief in the order the prosecution called its witnesses to testify, you are not stuck with the sequence of arguments and sub-arguments the Attorney General chose for the respondent's brief. Generally, you will want to order the arguments in your reply brief in the same sequence you chose for the opening brief. Similarly, do not change the main argument headers so much that the Court of Appeal will not be able to tell to which opening brief arguments the reply brief arguments correspond. You have more flexibility with sub-headers in the reply brief. The Attorney General's counter-arguments (or concessions!) may necessitate the use of new argument sub-headers.

You do not need to reply to every contention the Attorney General makes in the respondent's brief. Not every point raised by the Attorney General requires a response. Be sure to address all material contentions made in the respondent's brief, but you do not have to discuss every case the Attorney General cites or every proposition offered in the respondent's brief. When necessary, identify red herrings or straw men for the Court of

Appeal in the reply brief, but the respondent's brief often contains one or more irrelevant assertions that merit no response from you.

The reply brief is not a vehicle for simply repeating your opening brief. The reply brief is a responsive pleading. Although the reply brief, by its very nature, will involve repeating aspects of your opening brief, that is not its ultimate purpose. The Court of Appeal expects to read your answers to the counter-arguments raised in the respondent's brief. If the Attorney General argues that you failed to address something that you did, in fact, mention in the opening brief, it is entirely appropriate to point that out and to include a citation to the relevant page(s) of the opening brief. In most instances, however, you will not need to quote from your own opening brief. Use your reply brief as an opportunity to build on the foundation you constructed in your opening brief, rebut the Attorney General's arguments, reformulate or refocus issues to strengthen them, narrow the issues to the key points in dispute, highlight omissions in the respondent's brief, and remind the Court of Appeal of the central themes of your case.

Adopt a confident but measured tone. While substantive and stylistic aspects of the respondent's brief may engender a sense of outrage, try to adopt a more measured tone when you actually write the reply brief. Channel your passion more effectively by focusing on the righteousness of your argument. Melodramatic rhetoric may come across as self-righteous and detract from the persuasiveness of your argumentation. This is not to say that you must err on the side of dry, entirely dispassionate prose. A confident tone is important when it comes to selling your argument.

Challenge the authorities cited in the respondent's brief. There are many ways to attack case authorities cited by the Attorney General. A case, for example, may not stand for the proposition for which the Attorney General has cited it. A case may not be relevant. A case may be distinguishable. There may be contradictory case law that you can argue is better reasoned. Even in the absence of additional favorable case law, you may be able to argue the cited authority was wrongly decided. Authorities from other jurisdictions may be useful as well when it comes to challenging case law cited by the Attorney General.

When in doubt, file a reply brief. As noted above, it is common for appellate counsel to read the respondent's brief and immediately conclude the appeal is doomed. Take a deep breath. Perhaps even set the respondent's brief aside for a day or two. The cooling off period may help control issues of tone as well. Then come back to the respondent's brief and start writing the reply brief. Often writing the introduction (summarizing the primary contentions set forth in both the opening and respondent's briefs) jumpstarts the process of poking holes in the Attorney General's arguments. More often than not, that initial

daunting feeling will subside, and you will come up with non-trivial replies to substantive aspects of the respondent's brief. Sometimes, upon second review, it becomes clear that the Attorney General's seemingly strongest argument is a response to an argument you never actually made in the first place. Other times the respondent's brief misstates the standard of review, advocates for the wrong (or, at least, an unfavorable) standard of prejudice, or mischaracterizes material facts. Even if, in the end, you conclude you have nothing more to write on the substantive legal issues, you must address any claims by the Attorney General that an argument you raised in the opening brief is non-appealable, non-justiciable, waived, forfeited, or subject to an estoppel doctrine. Still think you have nothing to write? Consider using the reply brief as a vehicle for advancing policy arguments in support of your position. Just make sure the policy arguments are structured so that they reply to assertions found in the respondent's brief (and are consistent with the theory of the arguments made in your opening brief). While the Court of Appeal does not want to read a reply brief that simply rehashes the opening brief, declining the opportunity to file a reply brief speaks volumes in its silence. Remember, you get to have the last word. Take advantage.

Do not raise new issues in the reply brief. If, in the course of reading the respondent's brief, it becomes apparent that you need to raise an issue not presented in the opening brief, you cannot raise a new argument for the first time on appeal in a reply brief. The better practice is to seek leave of the Court of Appeal to file a supplemental opening brief. If the issue cannot be raised without the presentation of outside-the-record evidence, you will need to raise the new issue via a petition for writ of habeas corpus. The most common reasons for raising a new issue at the reply brief stage would be to add an ineffective assistance of counsel claim (perhaps to get around a forfeiture problem) or to address an intervening change in the state of the law. Even if an ineffective assistance of counsel claim directly relates to an issue raised in the opening brief, it may not be alleged for the first time in a reply brief.

Do not be afraid to agree with the Attorney General from time to time. Agreeing with the Attorney General on preliminary matters can be an effective rhetorical tool and help focus the Court of Appeal's attention on the true areas of dispute. For example:

The parties fundamentally agree on the constitutional principles that govern the admission of hearsay evidence at probation revocation hearings. The confrontation right embodied in the Due Process Clause of the Fourteenth Amendment is indeed more limited than the confrontation right found in the Sixth Amendment. (RB 3; AOB 7.) Therefore, hearsay evidence may be admitted at a probation revocation hearing when there are sufficient indicia of reliability that provide a substantial degree of trustworthiness. (RB 4;

AOB 7; *People v. Brown* (1989) 215 Cal.App.3d 452, 454.) Respondent also correctly points out that in determining the propriety of admitting hearsay evidence in lieu of live testimony, “the trial court must balance the defendant’s need for confrontation against the prosecution’s showing of good cause.” (RB 4, citing *People v. Arreola* (1994) 7 Cal.4th 1144, 1160.) It is on the question of whether this rule was satisfied in this case that appellant and respondent part company. As the prosecution made no showing of good cause, the admission of the program director’s hearsay testimony violated appellant’s due process right to confront adverse witnesses.

Concessions from the Attorney General do happen. If the Attorney General concedes all of your arguments in the respondent’s brief, do not file a reply brief. Instead, send a short letter addressed to the presiding justice or clerk of the court explaining that, in light of the concession, you do not intend to file a reply brief. Join in the concession or otherwise encourage the Court to accept it. Where the Attorney General concedes some but not all of your arguments, do not spend too much time explaining why the Court of Appeal should accept the concession (unless the parties disagree as to why the judgment should be reversed and the basis for reversal is relevant to the disposition of the case or how it might be handled on remand).

Sometimes, you have to make concessions as well. When appropriate, you must concede and/or withdraw issues you no longer believe are viable after reading the respondent’s brief. Do not continue to advance an argument when the respondent’s brief convinces you existing case law does not support it, the unfavorable case law was correctly decided, and there is no way to distinguish the case from yours. Similarly, if the respondent’s brief makes it apparent that the factual predicate on which you rested an argument was incorrect, acknowledge that you are no longer pushing that issue and move on. Concessions may buy you credibility when it comes to the other arguments in your briefs, and the failure to make obvious concessions will likely hurt the credibility of your remaining arguments.

Capitalize on omissions in the respondent’s brief. If the Attorney General fails to address a point that you raised in the opening brief, do not simply argue the Attorney General’s omission constitutes a concession and leave it at that. You have stronger rhetorical options available to you, and, considering the Court of Appeal is not bound to accept an express concession, the odds of the appellate court accepting an alleged implied concession are not great. You are usually better off highlighting the omission and explaining why it is revealing as to the overall weakness of the Attorney General’s

argument rather than hoping the Court of Appeal will accept your invitation to construe the omission as a concession.

Have the final say. Leave the reader with a strong, concise conclusion that summarizes why the requested relief should be granted and why, despite the Attorney General's arguments to the contrary, the arguments you advanced in your opening brief should carry the day.

Be familiar with the filing requirements. See California Rules of Court, rules 8.40, 8.44, 8.200, 8.204, 8.360. The project websites also contain summaries of the filing requirements.