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## Litigation Practice Tip - September 2020

### How to Write a Reply Brief

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This is a tip on how to write a reply brief. By "reply brief," I mean the closing brief where you have filed an opening brief, and the other side has filed a brief, in either a trial or appellate court. Here are some principles to keep in mind:

**You must respond to all of your opponents' arguments.** Pretending your opponents have not made any arguments is *not* a good idea. When I get the other side's brief, I write down, either as sentences or sentence fragments, each argument that is made and the page it's made. Then I think of a logical grouping of these arguments (usually following the outline of my opening brief, not the other side's outline), and begin a mental outline of where I will respond to each argument. There might be a possible exception where (1) the other side's arguments are not well organized; and (2) there's an argument made briefly for which you have no answer. In that very limited circumstance, you might hope the court will miss it. But usually you're much better off making the best counter-argument you have.

**Give the court enough context, but just enough context, to set up your reply argument.** This will vary from issue to issue. Usually, you can summarize what was said in the opening brief in a sentence or two and cite to that brief, then say what the other side has argued (or, in some cases, has failed to argue), with an appropriate citation. Then you reply. **Here is an example from a reply brief in support of an attorneys' fees motion:**

- The City fails to meet its burden in challenging the hourly rates claimed. Petitioner supported those rates with an expert declaration, a declaration from a CEQA specialist, declarations concerning the experience of counsel, survey data, and the actual, much higher rates normally charged for two of its private attorneys. Mot. at 17-18. The City's only responsive evidence is the hourly rate reportedly charged by one of its attorneys for this case. Opp. at 18. But the Court of Appeal has expressly rejected municipal defendants' "reliance on the rate they paid their own attorneys." *Bldg. a Better Redondo, Inc. v. City of Redondo Beach*, 203 Cal. App. 4th 852, 873 (2012).

**It has to look like a reply brief.** Some reply briefs essentially restate the argument from the opening brief — sometimes at greater length — without any reference to the opponent's brief. Since the author wrote the opening brief months earlier, this may seem logical. But consider matters from the standpoint of the research attorney or judge/justice who reads it. Logically, there are only two ways for judges to read briefs: (1) they read the opening brief, they read the opposition brief, then they read the reply brief; or (2) for each issue, they read what the opening brief says, they read what the opposition says, then they read what the reply brief says. In either case, the judge has just read the opening brief and opposition brief. If she then has to read a lengthy regurgitation of the opening brief, she's going to conclude that her time is being wasted. You don't want a judge to reach that conclusion about your brief.

For some issues, the set-up will be shorter or longer. In others, there was no need at all to cite to the opening brief because the opponent is making a new argument. In each case,

the object is to place the reply argument you're about to make in context in a concise and coherent manner.

Feel free to reach out to Western Center for help on a reply brief or any other aspect of litigation.



For questions or advice, please reach out to Richard Rothschild at [rrothschild@wclp.org](mailto:rrothschild@wclp.org).



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