

## David Mills



### Tips for Writing a Powerful Reply Brief

#### “You Lie!”

- Rep. Joe Wilson to President Obama During a 2009 Speech to Congress
- Every Litigator Since the Dawn of Civilization When Reading the Opposition’s Brief

We’ve just read the opposition brief in our big case. Now we are considering drafting our reply brief without including the four-letter words that recently echoed from our office walls.

How do we start? We need to envision the readers — the judge and the judge’s law clerk.

As a threshold matter, this reveals that the reply is effectively mandatory (even if the rules say it is optional). I recall numerous times as a law clerk when the opening brief had persuasive value and had me thinking perhaps its position should prevail. Then I would read the opposition brief, which would swing me back the other way. Frequently, upon finishing the opposition brief, I was sitting at my desk thinking along these lines: “Well, if that’s all true, it certainly negates much or all of what was said in the opening brief; so, *unless the reply can explain this*, it’s hard to see how the opening brief’s position can prevail.” And then I would eagerly reach for the reply brief in the file (this is in the “B.I. era” — Before iPad). In some cases, it wasn’t even there — because it was never written. The silence in these situations is deafening. (And even if the opposition brief appears so poor that no reply would be needed, imagine how strong it would be to submit reply brief that is just a few sentences long, stating why that is so.)

So we are definitely going to submit a reply brief. Here are a few tips to make this critical brief as effective as possible, keeping the reader’s perspective constantly at the forefront:

**Emphasize key concessions, but also look at what the opposition did not say.**

This is a basic point that is easily overlooked. We

tend to be good at noticing where the opposition has conceded a point helpful to us, but sometimes we don’t realize that the opposition has side-stepped one of our strong points without mentioning it. This often occurs because we are focusing solely on the opposition brief that is hot off the presses. Stop yourself and read your own brief again in full (as if you are the judge or law clerk) and then read the opposition. Focus like a hawk on places where it fails to respond to your points — this silence will be the basis for some of your most powerful points in your reply.

**Quote the other side’s overstatement or hyperbole.**

Sometimes the other side will take the “You Lie!” approach and spend a lot of time writing about how “ludicrous” or “ridiculous” or “offensive” your points are. Now, assuming your points are actually based in fact and sound argument, you have a chance to take the calmer high road here. One effective way to do this is to simply collect all of these exaggerated phrases and terms and place them into your reply, revealing that the other side is going off of emotion while you are going off of facts and law.

An example: “The other side appears very upset, remarking that our arguments are ‘lies,’ ‘ridiculous,’ and ‘not worthy of this honorable court.’ But this overblown rhetoric simply masks the reality that our arguments are based in undisputed facts and governing case law...”

See how one side starts to sound a little bit like they are just yelling while the other is calmly yet forcefully making the logical points? Always remember: The reply is not written for the other side; it’s written for the court.

**Take out the straw man or confusion that the other side has created.**

Sometimes we run into an opposition brief that doesn’t prompt the “You Lie!” response — in-

stead, it causes the “What the??? What are they even talking about?” response. These are the briefs where you think to yourself, as *Daily Show* regular Lewis Black would say, there is not enough deodorant for the conversation. These briefs typically distort a fundamental legal premise underlying your entire case and take it so far off its moorings that it can be hard to figure out how to respond point by point, as a standard reply would. In these situations, I recommend starting with a preliminary section that explains how this fundamental point is being misrepresented or misunderstood. This might be written somewhat in the style of a legal treatise — to educate the reader on the proper legal framework and get everyone on the same page (minus your perspiration-inducing opposition, perhaps). Once you have set out the proper framework, you can easily reveal how the other side has distorted it, and *then* you can quickly show point-by-point how the opponent’s mistaken framework actually has no impact on your points (or even bolsters them).

**Use these techniques for a powerful but short introduction.**

The reader is likely first opening the reply brief with one or two main questions in mind that need answering. Do not disappoint: Give them the answers in an introduction on the first page. And consider the tips above to see if there is a particularly strong way to do so. Finally, see if you can do this introduction in less than one page — the reader won’t need much deodorant for that conversation.

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