Responding or replying to defendant's post-trial motions

Practical ideas and techniques for responding to opposing counsel's briefs

By Norman Pine & Janet Gusdorff

The trial is over. Then opposing counsel's brief arrives in the mail. You vainly skim through defendants' table of contents and introduction wondering what case they are talking about.

Apparently, defendants unearthed many cases that appear to hold that everything your trial judge did was reversible error. As your sweat begins rolling, you wonder where to begin. This article offers some perspective and concrete suggestions.

How to read your opponent's brief

Put on your appellate justice robes. Pretend that the only thing you know about the case is what was discussed in defendant's opening brief (if you're the plaintiff-respondent), or what was discussed in your opening brief and defendant's respondent's brief. Assume that the justice has not read your 13-volume trial transcript, or sifted through the volumes of motions and exhibits included in the appendix. The justice has no idea that defendant's key witness kept fidgeting in his seat during your cross-examination. Things like that – which are so important in shaping the trial – are lost to justices reading the cold record.

Ask yourself, what are the two or three major points defendants raised that the justices would want plaintiff to answer? For example, your internal justice may ponder: "The trial judge did refuse to instruct the jury on causation. How is that not prejudicial error?" Or perhaps, "Why aren't these emotional distress damages excessive, given that there was no evidence that plaintiff ever sought psychological care?"

Do not assume away the answer. It may seem obvious to you that a plaintiff does not need to seek professional psychological care to justify non-economic damages – especially given the powerful testimony from the plaintiff's wife and parents. But the justices (with their ever-narrowing resources and exploding caseloads) may not be as familiar with those points as you are. You need to answer these questions that have been percolating in the justices' brains since they began reading your opponent's arguments. And the more important the point, the earlier you should address it. When you've identified the weaker points of your case, or the strongest points of defendants' brief, you should address them head-on in your introduction. The sooner the justices know you have a persuasive response, the better.

Likewise, you can also craft your factual discussion to lead your audience to the inferences you choose, and you can organize your arguments around the points of most interest to the justices.

If you're not sure what these points actually are, start by looking at the arguments defendants' Introduction highlighted. Also, focus on any arguments they raise more than once, or cross-reference/incorporate throughout their briefs. Additionally, pay attention to the length of treatment your opponent gives an issue. Appellate briefs are given limited word restrictions. How did your opponent "budget" its words?

A common trap

One common trap respondents fall into is wasting too much space responding to terse conclusory arguments or citations that defendants slip into their brief without really developing. You think: "I need more than two sentences to show how really bogus defendant's claim is, because I need to distinguish their case and cite all these additional facts." Do not fall into that trap. Instead, cite the caselaw that says conclusory or undeveloped points should be disregarded and add a quick fact or cite to undercut defendant's conclusory argument. If you do much more, e.g., attempt a fuller discussion and rebuttal, you run the risk of "opening the door" for your opponent to really flesh out and develop their conclusory argument in the Reply Brief – one which you will not get to answer.

Another way to identify, focus, and hone your key rebuttal points is to outline your opponent's arguments, and intersperse your responses. When you do this, you may find that you keep repeating certain points. That's a good indication that those points are your key rebuttal points – worthy of being highlighted in your introduction, not merely in the argument portion of your brief.

Conversely, you may find that there are a few issues or case holdings for which you have no response. By figuring out how to answer those questions, you can plan and organize your response before you begin writing and can pinpoint where your finite response time should be expended.

How does your opponent organize its brief? Usually parties order their arguments in some logical sequence. Often parties lead with what they perceive is their strongest argument. But sometimes they organize the brief by category, e.g., separately discussing errors that could affect the jury's determination of liability versus damages. Do not assume just because an argument is made mid-way through the brief, that it will not persuade the justices.

However, paying attention to how your opponent organizes its brief can help you identify what issues your opponent feels are most favorable to it (and consequently, which issues you probably must answer).

Similarly, consider how best to organize your own brief. Do not automatically respond to the arguments in the same order they're presented. Of course, sometimes doing so is a good idea. The court can more easily put the briefs side-by-side and compare arguments (appellant says X, respondent addresses X and explains Y.)

But sometimes, you improve your persuasiveness if you don't parrot your opponent's order. For instance, assume your opponent identifies a defective jury instruction. You may be able in good faith to advance a weak argument that the instruction was not defective. But you may have a much stronger argument that the alleged defect could not have amounted to reversible error. Under these circumstances, you may best preserve your credibility by assuming arguendo there *was* a defective instruction, but then showing why it could not have been prejudicial.

There is another obvious case in which you will not want to follow your opponent's order. Assume your opponent failed to preserve an issue by properly objecting at trial. You will probably want to ignore defendant's organization and lead with your waiver/forfeiture argument.

Standard of review

Before sifting through defendant's brief to glean the most important rebuttal points, you should first pay careful attention to defendant's articulation of the applicable standard of review. This is key because appellate justices review briefs through different lenses, depending on which standard(s) applies. Never rely on your opponent's discussion about which standard of review governs your case. Because the controlling standard will often make or break your chances of prevailing on appeal, you need to independently assess the correct standard, and then make sure your opponents accurately state it *and* – equally important – actually adhere to it.

Beware of defendants who correctly cite the substantial evidence standard, but nevertheless present their version of the conflicting evidence (rather than the version that favors the respondent) and draw inferences in their favor rather than the opposite. Defendants sometimes get away with such tactics, but their chances of succeeding will be reduced if you play the role of policeman as you should.

Is your opponent citing testimony that is different than you remember? For important points, always go back to the trial transcript and read not only the exact words, but also the context of the statement. Oftentimes, you'll find that your opponent did not cite the testimony that explains, clarifies or neutralizes the negative testimony. Or, that a few pages later, the witness said something that rebuts or undercuts the passage your opponent cited.

Watch your style

Do not feel trapped by your opposition's style. Do not automatically refer to the parties the same way your opponent does. Obviously, the Court of Appeal will not reverse or uphold a judgment based on the way the briefs label the parties. But as humans, subconsciously, we don't feel as connected to "plaintiff" or "appellant" as we do to Ms. Doe, Jane Doe, or even

Jane. And use of names, not legal labels, makes the brief more readable.

Defendants cite numerous cases. How do you figure out which ones are worthy of full analysis, brief rebuttal, or neither? These thoughts may help resolve those issues. Citations to cases usually fall within two categories:
(1) those that create a framework for analysis (e.g., citation for the elements of wrongful termination, standard of review) and (2) points of persuasion (e.g., authority that supports a party's argument). Unless defendants somehow mischaracterize the elements of a claim, or cite the wrong test to analyze your facts, etc., your rebuttal of their cases should focus on the second category. Check their table of authorities. If a case is mentioned "*passim*" or at least cited on many pages, odds are good that you'll want to read it in full and distinguish it. If their description of the holding or the case makes your heart skip a beat, you absolutely must address it head-on. But first, take a deep breath and keep reading.

Avoiding the impact of negative authority

As Inigo Montoya famously schools Vizzini in *The Princess Bride* (1987): "You keep using that word. I do not think it means what you think it means." Do not assume your opponents' case summary or citation means what they say it means, or stands for the proposition they claim. It often does not. We have lost track of the number of times we have read through a case defendant has cited, only to find that not only did our opponent ignore the unique context from which its selected passage came, but that the thrust of the opinion actually stood for the *opposite* proposition.

Whenever possible, use defendants' citations against them. Often, the key to distinguishing your opponent's case is *within* that very case. Once you have identified which cases defendants rely upon, it is not sufficient to merely check their citation and read a paragraph or two before and after the portion they quoted. Read the entire case. Or, at a minimum, read the introduction, factual statement, and the entire legal analysis on the given point. Hone into *how* the court reached its decision. What facts did it highlight in its analysis? What underlying principles did the court find persuasive? The more you understand how the court reached its decision, the easier it will be to argue that the unique circumstances of your case distinguish it.

Sometimes you'll find that the court did not engage in any analysis of the issue at all. Instead, it simply lifted a rule from another case, repeated it, and moved on to the pertinent issue in the case (one that might be totally irrelevant to your appeal). Make sure that you go back to the original case, evaluate how that court reached its decision, and explain why that reasoning or analysis does not apply to your case. Once you highlight the fallacies with the original case, or distinguish its applicability, you can quickly tell the court that the subsequent cases add no additional analysis and are, therefore, distinguishable for the same reasons.

This is most common when defendants cite case after case, alleging that each supports their claim. Use your judgment, but be wary of the laundry-list-of-cases technique. If there is a general, undisputable principle, like the elements of negligence, your opponent will probably not waste words citing numerous cases for that obvious point. If, on the other hand, your opponent cites numerous cases that purportedly hold that what your trial court ruled was error, be skeptical. The more cases defendants cite, the less likely *all* of those cases are to be on point. Even less likely is that the cases will have analyzed and considered the issue.

If the authority was fully analyzed and appears to apply, avoid the temptation to argue that the case was wrongly decided (unless it really was). It is easier to convince the court that your case is distinguishable from an existing case, than that the existing authority was wrongly decided. In part, this is a function of judicial comity. In law school, we discuss the famous decisions that pushed and expanded existing (or created new) law. We honor the courageous justices who stood up and said – "This is wrong and must be fixed." In real-world practice, however, such confrontation is something you ordinarily want to avoid like the plague in your briefs. Don't make your justices feel like they have to be activists to rule in your favor. Don't make them have to consider the potentially widespread impact that overturning an existing line of cases could have. So, for example, you can acknowledge that *Jones v. Smith* held X and that you do not disagree with that principle in theory, or as applied to the circumstances in *Jones*, but it has no application to your case. And then tell the court why that is. It is much easier for the court to choose not to extend the law to your case than it is to reject preexisting law or create new law. It happens, but only when truly necessary.

How to successfully "borrow" law

Now that you are comfortable about distinguishing your opponent's law, you need to be able to advance your own. The problem is, however, you can't find any cases directly on point. You find a case that resonates with you, but it arises in some other context, or even in some other unrelated practice area (such as criminal law).

To successfully analogize a case, you must tell the court *why* your proposed authority is similar to your case. What you think may seem obvious may not be so clear to the court as *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 619 illustrates. ["Unilogic provides no explanation as to why these cases are analogous or useful here; we find them to be neither"]. The lesson to be drawn from this case is that it is not enough to call the appellate court's attention to "analogous"

cases and discuss them. Your analysis should also explain *why* those cases are similar to your case, and *why* the court should find them persuasive.

Unilogic also teaches another lesson – when possible, analogize to a broader, more general principle, and bolster your "authority" with secondary sources. Faced with "scant authority" on the specific subject before it (i.e., whether the equitable defense of unclean hands was available against plaintiff's legal claim for conversion), the *Unilogic* court looked at a case that stood for a more general principle (i.e., that the unclean hands doctrine is not confined to equitable actions, but is also available in legal actions). The court specifically noted that the general principle was cited with approval in other cases, as well as secondary sources, including Witkin and Cal. Jurisprudence 3d.

When possible, one should strive to tie the borrowed law to relevant and applicable public policy. After criticizing Unilogic for its failure to explain its citation to purportedly analogous cases, the court noted that Unilogic "has not provided us with any reason, based on *policy* or otherwise, for holding that the unclean hands defense is never available in a legal action for conversion." (10 Cal.App.4th at 620, our emphasis.)

Distinguishing your case

When analogizing to cases, your success is more likely based on similarity of underlying principles or policy than on specific facts. Conversely, distinguishing cases on their facts is almost always possible (and is a better approach than not distinguishing your opponent's authority), but distinguishing them on distinct public-policy issues will usually be more persuasive. Consider, as example, employment law. Comparing different cases is rarely helpful because "[r]etaliation cases are inherently fact specific, and the impact of an employer's action in a particular case must be evaluated in context." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052.)

Employment law jurisprudence also illustrates why policy considerations are more persuasive than facts. In *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, the California Supreme Court had to answer whether individuals (as distinguished from employers) could be held personally liable for retaliation. In large part, the Court's analysis adopted its reasoning from *Reno v. Baird* (1998) 18 Cal.4th 640, a case that had addressed individual liability for discrimination. The Court emphasized that *Reno*'s *rationale* applied to the retaliation issue, and it distinguished the public policy underlying individual liability for harassment. (*Torrey Pines*, 42 Cal.4th at 1164-1165.)

Occasionally, the Court of Appeal will adopt principles and law from other seemingly unrelated areas of law. The key to convincing the court to draw from other substantive law may depend upon tying the two areas together in their fundamentals. For a clear example, consider *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, a summary judgment appeal largely turning on the landlord's knowledge of the tenant's dogs' vicious propensities. The court borrowed the criminal law principle that a false exculpatory statement is evidence of a guilty conscience. In doing so, the court examined the "underlying principle," i.e., that a false statement is evidence of the declarant's state of mind and demonstrates his knowledge he has committed a wrong. (34 Cal.App.4th at 1841.) The court also focused on the underlying logic – that from this consciousness of guilt the jury is entitled to infer other facts bearing on the defendant's guilt – and concluded that the "logic of this principle applies as much in civil cases as it does in criminal prosecutions." (34 Cal.App.4th at 1841.)

Borrowing federal law

There are a variety of circumstances under which California courts borrow law from federal courts interpreting analogous statutes. One clear example of this is California employment cases under the Fair Employment Housing Act, borrowing from federal cases decided under Title VII when the statutory language is the same.

Borrowing federal law can also help dispel concerns that the courts may have in extending the existing law or creating new law. Where, for example, there is established federal authority on a point, and that authority has proved workable, the state court may take comfort in the knowledge that adopting the approach/law/rule will not create more problems or confusion than it solves. Justice Moreno's concurring opinion in *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1094-1095 makes this point when discussing the limited circumstances under which individuals may be held liable under the FLSA. In urging California's Legislature to modify Labor Code section 1194 to authorize such actions against individuals (as well as employers), he cited the federal counterpart to that statute and noted that it "is neither a novel nor an untested remedy." (36 Cal.4th at 1094 (conc. opn. of Moreno, J.).)

In these types of circumstances, where California does not have authority on-point, research whether a similar federal rule or test has proved workable. If you can show the court that, for instance, another jurisdiction or a federal court has proved to be a successful test market, you will more easily convince the California court to extend the law because there is a workable version upon which they may comfortably rely.

Conclusion

Responding to your opponent's brief does not have to be as complicated or scary as it may at first seem. Relax. Take a deep breath. Try following some of the suggestions contained herein. You may be pleasantly surprised with the results.

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