THE SCRIVENER

To "Sur" With Love

By Scott Moïse

What is it about lawyers that makes them want to have the last word, always? To curb this habit in litigation writing, many courts have placed limits on the documents they will accept and the number of words in those documents. The courts did not count on surresponses and surreplies, though. As much as lawyers love to keep on filing briefs to infinity, courts seriously dislike the practice. As one federal district court stated when faced with a sur-sur-surreply: "Eventually we reach a point where all this metapleading must stop, and this is that point." *United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 36 (D.D.C. 2007).

However, with many courts deciding motions on the briefs, sometimes a surresponse or surreply is needed to complete the record. *See, e.g.*, *Ennin v. CHN Indus. Am., LLC*, 878 F.3d 590 (7th Cir. 2017) (holding that failure to file a surreply brief waived any challenges on appeal to the admissibility of evidence) (note that the Seventh Circuit rules specifically allow surreplies). The trick is thinking ahead to avoid the need for additional responses and knowing the proper scope and procedure for submitting them when needed.

What are surresponses and surreplies?

"Surresponse" (no hyphen) is defined as "a second response by someone who opposes a motion." *Surresponse*, Black's Law Dictionary (10th ed. 2014). "Surreply" is defined as "a movant's second supplemental response to another party's opposition to a motion, usu. in answer to a surresponse." *Surreply*, *id.*; *see also* @BryanAGarner, TWITTER (May 5, 2017, 8:44 AM). https://twitter.com/bryanagarner/status/860520702755123200?lang=en.

Combining these definitions, the chronology of filed motions is as follows:

- Motion and Supporting Memorandum (movant)
- Response to the motion (opposing party)
- Reply to the response (movant)
- Surresponse to the reply (opposing party)
- Surreply to the surresponse (movant).

Therefore, technically, a surreply is filed only by the movant, after the opposition files a surresponse. *See, e.g., Lunn v. Flower*, No. 1:15-CV-04454-JMC, 2016 WL 5073928, at *1 (D.S.C. Sept. 20, 2016) (addressing the plaintiff's surresponse and the defendant's surreply); *Washington v. Folin*, No. 4:14-CV-00416-RBH-KDW, 2015 WL 1298509, at *4 (D.S.C. Mar. 23, 2015) (referencing the defendant's second opposing document as a surresponse). As someone who has previously called every brief filed after the movant's reply a "surreply," I believe that the term is sometimes used in the same way "Coke" is used generically to describe every soft drink whether it is a Pepsi, Mountain Dew, or any other soft drink on the market. And I am in good company because many courts across the country label all responses and replies after the first reply as "surreplies."

What are the courts' rules concerning surresponses and surreplies?

No South Carolina state or federal court specifically allows or disallows surreplies or surresponses.

(a) State trial courts

In state court, the South Carolina Rules of Civil Procedure allow motions under Rule 7(b), but do not require—or even mention—a supporting memorandum or any responses, much less anything beyond that.

(b) State appellate courts

For state appellate courts, the South Carolina Appellate Court Rules allow motions, returns to motions, and replies. *See* S.C. App. Ct. R. 240 (d), (e), (f). The rules also require a Brief of Appellant, Brief of Respondent, and the Appellant's Reply Brief. *See id.* at R. 208(a). Surresponses and surreplies are not mentioned in the appellate rules.

(c) Federal district courts

The South Carolina federal district court's local rules require supporting memoranda to be filed with virtually all motions. *See* Local Civ. Rule 7.04 (D.S.C.). The court also allows opponents to file responses (Rule 7.06) and reluctantly allows movants to file replies (Rule 7.07: "Replies to Responses are discouraged."). The local rules do not contemplate any filings beyond that. However, an individual court's scheduling order may allow surresponses and surreplies, and courts may allow them otherwise. *See,*

e.g., *Palmer v. Santanna*, No. 2:16-cv-03350-PMD-MGB, 2018 WL 3120648, at *1 (D.S.C. Jan. 30, 2018); *Mitchell v. Conseco Life Ins. Co.*, No. CA 8:12-548-TMC, 2013 WL 2407129, at *3 (D.S.C. June 3, 2013); *see also F.D.I.C. v. Cashion*, 720 F.3d 169, 175–76 (4th Cir. 2013) (stating that the court's briefing schedule had not allowed surreplies).

(d) Fourth Circuit Court of Appeals

The Federal Rules of Appellate Procedure require the appellant's brief, the appellee's brief, and an appellant's reply brief. *See* Fed. R. App. P. 27(d).

For motions, a party need not file a response unless the court asks for one (Fourth Circuit Local R. 27(d)(1)). The court will not wait for a reply, so if a movant intends to file a reply, she must immediately notify the clerk in writing and request that the court not act on the motion (*id.* at Fourth Cir. Local R. 27(d)(2)). However, no party may file a separate brief supporting or responding to a motion. *See* Fed. R. App. P. 27(a)(C)(i).

If South Carolina courts do not specifically allow or disallow surresponses and surreplies, may a litigant file one anyway?

Because the rules do not specifically allow any responses past a response and reply, parties should first ask the court for permission to file any supplemental documents. *See, e.g.*, *Perez v. S.C. Dep't of Labor, Licensing & Regulation*, No. CV 3:17-3187-JFA, 2018 WL 2455093, at *4 (D.S.C. June 1, 2018) ("[I]f a party asks the court for permission, the court may allow a party to file an additional response or "sur-reply."); *Mitchell v. Conseco Life Ins. Co.*, No. CA 8:12-548-TMC, 2013 WL 2407129, at *3 (D.S.C. June 3, 2013) ("With the court's permission, Conseco also filed a sur-reply opposing the motion to certify class.").

Courts, however, may strike any supplemental filings beyond those allowed under the rules. This is especially true when parties do not ask for permission before filing. *See Z.G. ex rel. C.G. v. Pamlico Cty. Pub. Sch. Bd. of Educ.*, No. 17-1290, 2018 WL 3428696, at *1 (4th Cir. July 16, 2018) (upholding a district court's decision to strike a surreply that was filed without leave of court); *Stanfield v. Charleston Cty. Ct.*, No. 2:15-CV-0756-PMD-MGB, 2015 WL 4929186, at *4 n.2 (D.S.C. Aug. 18, 2015) (holding that surreply was not properly before the court since it was filed without leave of court); *Sierra v. LaManna*, No. C/A 0:08-3222-CMC-PJG, 2009 WL 1884492, at *3 (D.S.C. June 30, 2009) (refusing to accept a surreply filed without the court's permission). *Cf. Cunningham v. Anderson Cty.*, 402 S.C. 434, 447 n.17, 741 S.E.2d 545, 552 n.17 (Ct. App. 2013) (mentioning, in dicta, that the court had not allowed a "surreply Brief of Amicus").

Courts have discretion whether to accept surresponses or surreplies, and appellate courts will overturn a trial court's decision only upon a finding of an abuse of discretion. *See Cashion*, 720 F.3d at 176 (finding no abuse of discretion for striking a surreply because surreplies were generally not permitted under the local rules of the Western District of

North Carolina, and the parties' briefing schedule did not authorize filing one).

What is the timing for asking the court's permission to file surresponses and surreplies?

Since they are not expected, lawyers should request permission to file surresponses and surreplies as soon as possible. One district court applied Local Rule 7.07—which currently requires reply briefs to be filed within seven days after a response—and held that a motion to file a surreply brief was untimely. *Sierra*, 2009 WL 1884492, at *3.

For the most part, South Carolina federal courts seem to follow the seven-day requirement under Local Rule 7.07. *See, e.g.*, *Carroll v. Eaton Corp. Long Term Disability Plan*, No. 8:16-2608-HMH, 2017 WL 5635450, at *1 (D.S.C. June 19, 2017) (allowing surreply filed six days after reply); *Levy v. Lexington Cty., S.C.*, No. 3:03–3093–MBS, 2012 WL 6675051, at *2 (D.S.C. Dec. 20, 2012) (allowing surreply filed seven days after reply); *Phillips v. DolgenCorp LLC*, No. 5:10–1016–MBS–JRM, 2011 WL 2214754, at *1 (D.S.C. June 7, 2011) (allowing surreply filed seven days after reply); *Curtis v. Norfolk S. Ry. Co.*, No. 1:05–115–MBS, 2010 WL 2662269, at *2 (D.S.C. June 21, 2010) (allowing surreply filed four days after reply).

However this requirement has not been strictly enforced in cases involving pro se parties. In *Ridley v. McGill*, No. CV 1:15-1612-MBS, 2017 WL 713915, at *2 (D.S.C. Feb. 23, 2017), Judge Margaret B. Seymour denied the defendants' motion to strike or quash a pro se plaintiff's surreply even though the surreply was filed eight days after the plaintiff's reply had been filed. *See also Kyles v. Chartier,* No. 6:12-CV-03421-JMC, 2014 WL 994608, at *6 (D.S.C. Mar. 13, 2014) (allowing two separate surreplies by pro se plaintiff filed 18 and then 32 days after defendant's replies).

Additionally, surreplies have been allowed more than seven days after a reply in a few cases not involving pro se parties. *See, e.g.*, *McNeil v. Sherman,* No. CIV.A. 209CV00979PMD, 2009 WL 3255240, at *2 (D.S.C. Oct. 7, 2009); *McWhite v. Ace Am. Ins. Co.*, No. 4:07-CV-01551-RBH, 2008 WL 11349982, at *2 (D.S.C. Oct. 1, 2008. However, such cases appear to be in the minority, suggesting Local Rule 7.07 should be your benchmark.

Also, the better idea is to notify the court immediately that you intend to file a surresponse or surreply—even before you take the time to draft it. This may avoid wasted work for both you and the court:

> [Plaintiff's] motion for leave to file a surreply is neither well received nor well founded. It is not well received because [Plaintiff] failed to promptly alert the court to her desire to file a surreply. The court routinely considers briefing closed upon receipt of a reply unless immediately notified that the opposing party desires to file a surreply. *See* Local Civil Rule 7.04–7.07 (addressing briefing of motions). Consequently, the court endeavors to begin work on motions as soon as the reply is received. In the present case, the court had substantially completed work on the present motion, including drafting an order, prior to receipt of a surreply. Douse's delay in filing the surreply has, therefore, resulted in a waste of judicial resources because the court had to reconsider the motion anew and redraft the order although the decision, ultimately, remained the same.

Douse v. Colonial Life & Accident Ins. Co., No. CV 3:08-1671-CMC, 2009 WL 10678302, at *5–6 (D.S.C. Feb. 3, 2009). I cannot say it enough: when the judge is unhappy, everyone is unhappy. Knowing that an unexpected surresponse or surreply is likely to cause trouble for the court, be quick in alerting the court that a motion for permission is on the way and file the motion just as soon as possible.

What is the proper scope of a surresponse or surreply?

Surresponses and surreplies should respond only to new legal theories or evidence that were raised for the first time in the brief filed immediately before the surreply or surresponse. If the reply does not raise new arguments and the surreply is merely responsive to prior issues, it may be denied. *See, e.g.*, *Cashion*, 720 F.3d at 176 ("That [the defendant] failed to anticipate how the [plaintiff] would respond to his reliance on the [evidence presented] does not automatically entitle him to file a surreply."); *see also* 2018 WL 3428696, at *1 n.3 (affirming district court's striking a surresponse); *Flood v. Univ. of Maryland Med. Sys. Corp.,* No. CIV.A. GLR-12-2100, 2014 WL 7363237, at *4 (D. Md. Dec. 23, 2014) ("[Plaintiff] has made no argument or showing that the information contained in her [surresponse] regarding the aforementioned evidentiary challenges was not available to her at the time she originally responded to UMMS's Motion for Summary Judgment. For these reasons, the Court concludes that Flood's proposed surreply is unwarranted."); *Douse*, 2009 WL 10678302, at *6 (finding that a plaintiff's proposed surreply was not well founded because it did not respond to any new arguments in the defendant's reply brief, but instead raised new arguments that could have been raised in plaintiff's initial response).

Why can't I have the last word?

Because the courts hate it. Try not to be the person who tries to break the world record for the brief with longest train of sur-sur-sur replies. Be the person who anticipates the arguments and addresses them in a motion, response, or reply. When surresponses and surreplies are necessary, ask the court for permission and keep your response within the scope of new material that has been raised in the immediately prior brief. Remember, when the court is happy, everybody is happy.