

**ARIZONA SUPREME COURT**

Supreme Court No. R-22-

**PETITION TO AMEND ARIZONA RULES OF CIVIL APPELLATE  
PROCEDURE 15 AND 21, ARIZONA RULE OF CRIMINAL  
PROCEDURE 31, AND THE RULES OF THE SUPREME COURT**

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Pursuant to Rule 28 of the Arizona Supreme Court Rules, the undersigned attorneys petition the Court to amend the Arizona appellate rules in three independent ways:

1) to clarify when a party may respond to amicus briefs filed in favor of that party (through amendments to Rule 15(a)(7) of the Rules of Civil Appellate Procedure (ARCAP) and Rule 31.13(a)(7) of the Rules of Criminal Procedure;

2) to address appeals that are decided on a factual or legal basis not raised by the parties (through an additional rule in the Rules of the Supreme Court); and

3) to clarify the procedure for contesting an opposing party's entitlement to appellate attorneys' fees (through an amendment to ARCAP 21(b)(4)).

The specific language of these proposals is set forth in the accompanying Appendix.

### **Background**

The Petitioners all have substantial experience in the Arizona appellate courts. Each is a member of the American Academy of Appellate Lawyers. We bring this Petition in our individual capacities to improve the quality of the appellate rules.

This Petition addresses three unrelated topics. We group them in this Petition only because they all involve the appellate rules. We are not aware of a similar petition that has been filed on these topics within the last five years.

## **Reasons for Proposed Amendments**

### **1. Responses to Amicus Briefs**

We propose that ARCAP 15(a)(7) and its criminal counterpart, Ariz. R. Crim. P. 31.13(a)(7), be amended to provide that a party may respond to an amicus brief only to address points of disagreement with the amicus brief. We make this proposal because, in our Arizona appellate experience, we have seen parties respond to amicus briefs filed *in support of that party*. These responses did not disagree with factual or legal points made by the friendly amicus, but instead elaborated on the responders' appellate arguments.

The appellate rules do not explicitly address this issue. ARCAP 15(a)(7) merely says: "A party may respond to an amicus brief." Rule 31.13(a)(7) of the criminal rules says the same thing. On their faces, these rules do not limit responses to parties who are adversely affected by the amicus brief. But without any limitation on such a response, parties may and do use the guise of a "response" to get additional pages for their own arguments. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs").

Presumably, the rule-drafters never intended “responses” to be used for this purpose. For example, the original (1977) version of ARCAP 16 said: “If a party desires to respond to an amicus curiae brief, he shall file a motion with the appellate court, stating his reasons therefor and the time requested.” The first Arizona Appellate Handbook assumed that, under Rule 16, only parties adversely affected by an amicus brief would have grounds to file a motion to respond. Section 3.6 of the Handbook explained: “Since amicus curiae briefs generally support either the appellant or the appellee, *an adversely affected party* may move for leave to file an answering brief to the amicus, stating his reasons for doing so and the time requested. ARCAP 16.” (Emphasis added). The same comment appeared in Susan Freeman and Paul Ulrich’s 1977 article about the then new appellate rules. *See* 1977 Ariz. St. L.J. 715, 739 (“A party *adversely affected* by an amicus curiae brief may move for leave to file an answering brief, stating his reasons for doing so.”) (emphasis added).

The motion requirement for responses to amicus briefs was eliminated as part of the 1998 amendments to ARCAP 16. We have not found an explicit explanation for that change. We presume, though, that the motion requirement was dropped to parallel another change made in the 1988 amendments--namely, to permit amicus briefs to be filed without leave of court (when all parties consent). Perhaps the rule-drafters thought it unfair to allow amicus briefs to be filed without leave of court, but to require leave of court to respond to an amicus brief. In any event, we are

unaware of any intent by the rule-drafters to permit parties to respond to amicus briefs that do not adversely affect them, let alone to use such responses merely to elaborate on their own arguments. To the contrary, the Comment to the 1998 amendments cautioned that, “[i]deally,” amicus briefs should not “merely extend the length of a litigant’s brief.” That concern would seem to apply with added force to responses to amicus briefs.

Our proposal recognizes that responses to otherwise friendly amicus briefs may be appropriate when a party disagrees with some aspect of the brief, such as to correct factual mistakes or disavow certain arguments or issues that are not properly before the court. But short of that, parties should be forbidden from using the response to get another bite at the proverbial apple.

Arguably, the problem addressed in this proposal could be avoided by leaving it to the opposing party to file a motion to strike the offensive response. But appellate counsel may be reluctant to file such a motion to avoid burdening the court with procedural motion practice.

## **2. Appellate Decisions on an Unbriefed Basis**

We propose that the Rules of the Supreme Court be amended to add procedural protection when an appeal (civil or criminal) is decided on an unbriefed basis. Our proposal provides that, before an appellate court decides an appeal on a factual or legal basis not briefed or argued by the parties, the court—absent unusual

circumstances—should notify the parties and give them an opportunity to submit supplemental briefs on the point.<sup>1</sup>

We do not know how often Arizona appellate decisions rest on a basis not briefed by the parties, but in our experience, we know that it happens. On a more national level, the American Academy of Appellate Lawyers has reported that “[t]he vast majority of members attending the Academy’s Fall 2017 meeting indicated that they have received decisions based on issues not presented in the briefs.”<sup>2</sup>

This problem warrants correction. On one hand, the opportunity to be heard before decisions are made is central to our adversary system and due process of law. On the other hand, giving the parties a chance to respond may aid the quality of appellate decision-making, and correct or clarify the court’s understanding of the record or law. Other rules recognize these advantages. For example, Rule 56(f) of the Arizona Rules of Civil Procedure explicitly require “notice and a reasonable time to respond” before the court may grant summary judgment “on grounds not raised by a party” or “on its own.”

In our view, motions for reconsideration are not an adequate solution when courts decide appeals on an unbriefed basis. Such motions are not commonly granted

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<sup>1</sup> The proposal would not apply to a court’s decision to dismiss an appeal due to a jurisdictional defect or non-compliance with court rules.

<sup>2</sup> Letter from American Academy of Appellate Lawyers to Michael Chagares, Chair Federal Advisory Committee on Appellate Rules at 2 (April 26, 2019).

and, of course, come after the panel has already deliberated and invested time in its written decision. Confirmation bias is a risk. In contrast, the supplemental briefs contemplated by our proposal would be filed while the court is still deliberating.

The American Academy of Appellate Lawyers made a very similar proposal about unbriefed issues to the Federal Advisory Committee on Appellate Rules. The Committee agreed that the concerns underlying the Academy’s proposal were legitimate. But rather than adopt a rule to address the problem, the Committee chose to circulate the Academy’s proposal to the chief judges of all federal circuits, with the hope that increased judicial sensitivity to the issue might address the problem. *See American Axle v. NEAPCO*, 966 F.3d 1347, 1365 (Fed. Cir. 2020) (O’Malley, J., dissenting from denial of rehearing en banc) (describing the Academy’s proposal and the Advisory Committee’s response). While such judicial encouragement is a step in the right direction, we believe that a rule change would have a more predictable and long-lasting effect.

### **3. Contesting Entitlement to Attorneys’ Fees**

We have heard that some practitioners are uncertain about the procedure for objecting to an opposing party’s entitlement to appellate attorneys’ fees. Our third proposal—an amendment to ARCAP 21(b)(4)—would provide more clarity on this issue.

ARCAP 21(a) specifies when a party *seeking* fees should request them—in their opening or answering brief (if the case is before the Court of Appeals) or in their petition/cross-petition or response (in the Supreme Court). But the rule doesn't say when to *object* to the opposing party's entitlement to fees. ARCAP 21(b)(4) doesn't explicitly answer the timing question. It sets a deadline for filing an objection to the prevailing party's statement of fees and costs, but that objection comes after the court, in its merits decision, has determined (at least initially) the issue of fee entitlement.<sup>3</sup> As a result, the opposing party may believe that any objection it files under (b)(4) may only address the amount of fees requested, and not the entitlement issue.

To clarify this issue, we propose two additional sentences to ARCAP 21(b)(4). The first sentence would state that an objection to a fee application may include a challenge to the requesting party's entitlement to fees. The second sentence would state that any objection on the entitlement issue will be considered by the court *de novo*--in other words, notwithstanding the court's initial determination, in its merits decision, to grant fees.

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<sup>3</sup> When granting a request for fees in the merits decision, the court of appeals will typically write that it “grants the request for reasonable fees upon compliance with ARCAP 21.”

## Conclusion

Petitioners request that the Court adopt the proposed amendments set forth in the Appendix.

11/9/2022

Respectfully submitted,

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## Appendix

[Proposed additions are underlined]

### 1. Proposed amendment to Rule 15(a)(7), Arizona Rules of Civil Appellate Procedure

(7) *Responses to Amicus Curiae Brief.* A party may respond to an amicus curiae brief. A response may address only points of disagreement with the amicus brief. [The rest of the rule is unchanged]

### 2. Proposed amendment to Rule 31.13(a)(7), Arizona Rules of Criminal Procedure

(7) *Responses to Amicus Curiae Brief.* A party may respond to an amicus curiae brief. A response may address only points of disagreement with the amicus brief. [The rest of the rule is unchanged]

### 3. Proposed addition to the rules of the Arizona Supreme Court

Before an appellate court decides an appeal on a factual or legal basis not briefed by or argued by the parties, the court, absent unusual circumstances, should provide a notice to the parties that describes the basis and give the parties the opportunity to submit supplemental briefing on the basis. This rule does not apply to a court's decision to dismiss an appeal due to a jurisdictional defect or non-compliance with court rules.

### 4. Proposed amendment to Rule 21(b)(4), Arizona Rules of Civil Appellate Procedure

(4) *Objections and Determination.* Objections to the statement of attorneys' fees and costs must be filed within 10 days after service of the statement. The objection may include a challenge to the requesting party's entitlement to fees. If any such objection is made, it must be considered by the court de novo. If no objections are timely filed, the appellate court may award attorneys' fees and costs. If objections are timely filed, the requesting party may reply within 5 days after service of the objections. The appellate court will then determine the amount of any attorneys' fees and costs without a hearing or additional filings.