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TO: THE HONORABLE MICHAEL CHAGARES, CHAIR
FEDERAL ADVISORY COMMITTEE ON APPELLATE
RULES

FROM: AMERICAN ACADEMY OF APPELLATE LAWYERS

DATE: APRIL 26, 2019

RE: PROPOSED RULE REGARDING DECISIONS BASED ON
UNBRIEFED GROUNDS

The American Academy of Appellate Lawyers proposes that the Federal Rules of Appellate Procedure be amended to address appeals that are decided on legal issues or theories not raised by the parties.¹ The proposed rule provides that, before a court decides an appeal on a ground not raised by parties, the court shall give notice that it is considering a previously unaddressed ground and provide an opportunity to brief it.

The proposed amendment addresses a practice that harms the integrity of the appellate process. To avoid limiting what appellate courts may consider in deciding cases, the proposed amendment merely requires that, before an appeal is decided on a ground the parties framing the appeal have not raised or addressed, the court must give parties notice and an opportunity to be heard on the unbriefed issue or theory.

Proposed Rule 32.2

Rule 32.2 Decisions on Unbriefed Grounds

Before a decision is issued based on a ground not briefed or argued by any party, the court shall provide a notice to the parties that describes the ground, and the court shall give the parties the opportunity to submit supplemental briefing on that ground.

¹ Positions taken in this recommendation state views determined by the Academy's internal process and should not be attributed to individual Fellows, their places of work, or their clients.

The problem addressed by the proposed rule

An appellate decision based on a ground not raised by the parties may not be a common occurrence, but it happens.² The vast majority of members attending the Academy's Fall 2017 meeting indicated they have received decisions based on issues not presented in the briefs.

Many appellate courts invite supplemental briefs when a court's own research indicates potential grounds for decision other than those raised by the parties.³ But the consequences are severe when courts decide appeals based upon grounds the parties did not have an opportunity to brief. Issues and theories considered without notice and briefing may deprive the appellate court of the reasons those matters were not developed at trial or on appeal.

In addition to being necessary for integrity and quality in appellate decision-making, the opportunity to be heard before decisions are made is fundamental to the American adversary system of justice and due process of law. Notice and opportunity to be heard are also critical to the public perception of justice under law.

Established procedure is necessary

Rule-making provides the procedural mechanism to ensure that litigants can be heard before the court renders decisions in their cases based upon grounds the parties did not have an opportunity to develop or contest. Court rules set forth explicit procedures for providing notice to parties before courts determine facts relevant to the legal issues that determine the outcome of their cases. For example, the Federal Rules of Civil Procedure explicitly require notice and a reasonable time to respond before the court may grant summary judgment either *sua sponte* or on grounds not raised by a party.⁴ A court is required to give notice to the parties before appointment of a special master,⁵ and also must give notice and an opportunity to respond before

² See E. King Poor & James E. Goldschmidt, *Sua Sponte Decisions on Appeal*, FOR THE DEFENSE, Oct. 2015, at 62.

³ See, e.g. *In re Woolsey*, 696 F.3d 1266, 1279 (10th Cir. 2012) (Gorsuch, J.) (discussing supplemental briefing by the parties in response to the court's request in light of authority discussing a different statutory basis for the relief sought by the appellant).

⁴ Fed. R. Civ. P. 56(f): *Judgment Independent of the Motion*. After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or

⁵ Fed. R. Civ. P. 53(b)(1): *Notice*. Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

imposing sanctions for a violation of Federal Rule of Civil Procedure 11.⁶

The Academy's proposed Rule of Appellate Procedure is thus consistent with other rules designed to ensure due process.

⁶ Fed. R. Civ. P. 11(c)(1): *In General*. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on recommendation.