

Should the Arizona Supreme Court Adopt Sequential Briefing?

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Give the Arizona Supreme Court the Benefit of Sequential Briefing

Motion, response, reply. Opening brief, answering brief, reply. Lawyers and judges know this cadence by heart. And for good reason: Our adversarial system rests on the premise that each side can answer the other. That's why sequential briefing is the norm in Arizona's superior courts, in our court of appeals, in nearly every other state's highest court, in the federal courts of appeals, and in the U.S. Supreme Court.

But not in the Arizona Supreme Court. After the Court grants a petition for review, the current process does not allow an opening brief, answering brief or reply. Instead, the Court sets a single deadline for both sides to file supplemental briefs at the same time. Amici file next, and the parties may respond to the amici after that. The parties never directly answer each other's merits briefs. The first real response comes at oral argument.

When the Rules of Civil Appellate Procedure were adopted in 1977, they appear not to have contemplated any merits briefing in the Supreme Court at all.[1] Over time, the Court began issuing orders permitting simultaneous supplemental briefs, and the practice hardened into a default even though it isn't in the rules. Although many of us have simply grown used to it, the current practice dilutes the benefits of our adversarial system, does a disservice to the Court, and often frustrates the parties. We think it's time to switch to sequential briefing.

We aren't alone. Last year, we, along with 40 other appellate practitioners,

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The Debate

A conflict has been brewing in the appellate world: Should the Arizona Supreme Court allow sequential briefing (opening brief, answering brief, reply) after it grants review, or should it stick with its current practice of requiring a single simultaneous brief from each side?

The question is live. In 2025, a group of appellate practitioners petitioned the Court to adopt sequential briefing. Although the Court did not adopt the petition, interest in the issue has intensified, and the proponents intend to try again.

What follows is a debate. On one side, **Joshua D. Bendor** and **Eric M. Fraser** argue that sequential briefing would benefit the Court by letting adversarial testing work the way it normally does in litigation, with each side responding to the other.

On the other side, **David J. Euchner** and **Mikel P. Steinfeld** argue that simultaneous briefing works just fine, and the Court shouldn't fix what isn't broken.



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Don't Fix It If It Isn't Broke: Simultaneous Briefing Works

Let's start with an acknowledgment: Simultaneous supplemental briefing is a different style of briefing. That's not to say it's rare. Our superior court and court of appeals regularly order parties to submit simultaneous supplemental briefs. Still, it's different from the argument-answer-reply rhythm that we're used to.

But the key question raised by this debate isn't whether simultaneous briefing is different from what an attorney might expect. The most important question is: What form of supplemental briefing best serves the Arizona Supreme Court after review has been granted?

The framing of this question is crucial. Our focus should not be on the lawyers or what they might find familiar. Nor should we focus on a mathematical count of how many jurisdictions use simultaneous versus sequential briefing. These inquiries don't answer the key question.

Our focus must be on assessing what is most helpful to the Arizona Supreme Court. With simultaneous briefing, we believe the Court already has the right answer for two reasons. First, by the time review is granted, the Court already has the benefit of sequential briefing. Second, simultaneous briefing gives the Court something it does not already have.

The Supreme Court Already Has the Benefit of Sequential Briefing

By the time our Supreme Court grants review, the issues have already gone through several layers of briefing. We believe in the

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petitioned the Court to adopt sequential briefing in most merits cases.[2] The signatories included civil and criminal lawyers, plaintiff- and defense-side, prosecutors and defenders, government, private, and public interest, large firms and solo practitioners, from across Arizona. The State Bar of Arizona supported the petition, as did the Pima County Bar Association. The Court did not adopt it, but based on recent discussions with the Justices at public panels, we believe the door remains open. We intend to try again, perhaps limiting our proposal to certain types of cases. And if the case laid out here persuades you, we hope you will submit a comment in support.

The Premise Should Not Be Controversial

Nearly every stage of litigation is sequential: the pleadings, trial-court motions, the appellate briefing below, and the petition for review itself. There is a reason almost nothing in our system asks both sides to argue at once and hope they happen to meet. Adversarial testing works best when you can answer what your opponent actually said, not what you guess your opponent might say.

'But the Parties Already Know the Arguments'

The main defense of simultaneous briefing is that, by the time review is granted, the parties have already briefed the case below and know each other's positions well enough to brief the merits blind. That assumes the merits have fully hardened and nothing will change. That's usually not true.

The briefing that precedes review is not really merits briefing. A petition for review is, first and foremost, an argument about why the Court should take the case at all—that the issue recurs, that it is important, that the decision below will wreak havoc. Many of the most effective petitions say relatively little about the merits themselves, and the response to the petition mirrors that focus by trying to downplay the case's significance and impact. So, when the Court grants review, the supplemental briefs are often the first time the parties truly engage the merits in the Supreme Court. That is exactly why the merits exchange should be a real, robust, responsive cycle.

The status-quo defenders say that the parties have fleshed out their arguments in the court of appeals. But that's not quite accurate, either.

> Our focus must be on assessing what is most helpful to the Arizona Supreme Court. With simultaneous briefing, we believe the Court already has the right answer.

First, good appellate lawyers refine their arguments with every brief. Each round is a chance to think harder, to see more clearly which part of the statute controls, how the pieces fit together, what the key cases really mean. If you didn't refine your argument, you might as well just copy and paste your lower court briefing into your Supreme Court brief—something good lawyers never do.

Second, cases change shape on the way up. A party generally cannot raise a new issue, but the case often turns a quarter turn. The court of appeals may frame the question differently than the parties did, decide the case on a ground no one emphasized, or draw a new statute or case into the dispute. The order granting review may rephrase the issue or add one. An intervening decision may shift the ground.

And the Supreme Court's task simply differs from the court of appeals' task. The court of appeals is bound by precedent and usually asks what precedent requires, whereas the Supreme Court is free to decide what the rule should be, often reasoning from other states' law and from treatises not addressed below. For example, we were involved in a case where the court of appeals faithfully applied a long line of court of appeals opinions, but when the case got to the Supreme Court, the focus shifted to whether that line of cases was ever correct.

The problem is especially acute for the party that opposed review. Having already filed a response to the petition, that party's next filing is a simultaneous supplemental brief written before the petitioner has said anything new. Nothing has changed since the last round, so the brief sometimes repeats the response to the petition or guesses at arguments the petitioner has not yet made. Sequential briefing would fix this directly: The responding party answers an actual opening brief on the merits instead of writing into a void.

'You Can Handle It at Oral Argument'

Some say the lectern is answer enough—that a capable advocate can respond to anything in 20 minutes. Sometimes, yes. But oral argument is a poor substitute for a written response. The bench may never ask the question that matters. Twenty minutes before a hot court is no time to marshal authority or walk through a careful counter-analysis. And argument comes too late to shape the Court's first, most careful read of the briefs.

Time and Money

Simultaneous-briefing defenders say that because sequential briefing involves three briefs instead of two, it will add time and expense. Our proposal tries to address both concerns.

Before getting to that, however, the criticism is equally true in trial courts and the court of appeals, which use sequential briefing for almost everything. But no one proposes to abolish sequential briefing there, because the benefits of sequential briefing are worth it. The same logic holds here.

The added time is also shorter than it first appears, because the Court's schedule already builds in weeks for amicus briefs and responses to them after the parties' supplemental briefs. In our proposal, those amicus briefs can be interleaved into a sequential merits briefing schedule, where an amicus brief gets filed shortly after the party brief

Table 1

Current Arizona Practice	Proposed (sequential)	U.S. Supreme Court
Simultaneous supplemental briefs—20 days	Petitioner's merits brief—28 days	Petitioner's brief—45 days
Amicus briefs—14 days later	Respondent's merits brief—28 days (amici interleaved)	Respondent's brief—30 days (amici interleaved)
Responses to amici—20 days later	Petitioner's reply—20 days	Petitioner's reply—30 days
Total: 54 days	**Total: 76 days**	**Total: 105 days**

it supports, and then the parties respond in the next brief, exactly as the U.S. Supreme Court and federal appellate courts do.

The briefing schedule itself would lengthen by 22 days, from 54 to 76 (**Table 1**). That is a small fraction of an appeal that typically runs one to two years. In cases involving amicus briefs, our proposal results in fewer briefs and fewer total pages, addressing the increased-expense concern for most cases.

We take seriously the concern that delay is never costless. It falls hardest on defendants whose liberty is at stake while an appeal is pending, on families waiting for finality, and on litigants and appointed counsel who bear the expense of another brief. In our view, however, it is backwards that the most consequential briefing in the case, at the court whose decisions bind every Arizonan, is the fastest briefing in the entire appeal, and among the fastest in the entire case. This is the stage to make sure the Court has the best possible briefing.

Arizona is an Outlier Without a Reason

Arizona is one of only four states in which the court of last resort uses simultaneous supplemental briefing. There's nothing wrong with being unique. But we think the rest of the country gets this one right. Sequential briefing is the norm because the idea of responding to your opponent's arguments is central to our adversarial system of justice. That should be just as true in Arizona's highest court as in its lower ones.



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value of adversarial testing. We're both public defenders—adversarial testing is fundamental to that role. The argument-answer-reply rhythm is invaluable. But it is also important to remember where we are in the life of a case.

At the trial court, there has been a motion, response, reply, and ruling. At the court of appeals, there has been an opening brief, answering brief, reply brief, and decision. There may also be amicus briefs and responses. Then, before the Supreme Court, there is the petition for review and the response. Again, there may be amicus briefs and responses.

None of that disappears when the Court grants review. By that point, the Supreme Court has already received more than two full rounds of sequential briefing. Even if the Court reads only the second round, by that point the attorneys' product in the second round is usually improved significantly.

The proponents repeatedly distinguish between the petition stage and the merits stage. But in Arizona, that distinction is overstated. A petition for review must explain why the issue matters, including factors like the importance and novelty of the legal question and the likelihood it will recur. Because our Supreme Court reviews only one court, vehicle problems are less important than getting the decision right. This means discussion of the merits is critical. Maybe not a full-blown discussion of the merits, but something.

And when the Court grants review, it expressly instructs the parties that supplemental briefing "should not be construed as an invitation to repeat the contents of the Petition for Review, the Response, or any Reply."

This instruction reflects an important point. Supplemental briefing is not intended to recreate another round of adversarial exchange. The Court already has that. The purpose of supplemental briefing is to provide something different. Something the Court gets from simultaneous briefing.

Simultaneous Briefing Gives the Court Something More

As our counterparts correctly observe, the Arizona Supreme Court performs a different function than our lower courts. For the most part, lower courts apply rules that have already been announced.

The Supreme Court, on the other hand, must often decide between two reasonable choices. As our counterparts put it, the Court often decides "what the rule should be." This is precisely why simultaneous supplemental briefing is so useful.

The Court knows that the parties disagree. It has multiple rounds of briefing in which the parties have argued back and forth. Another sequential round would simply encourage lawyers to again organize their thinking around what the other side did or did not prove.

What the Court lacks is each side's clearest statement of why its proposed rule is the better one.



Should the Arizona Supreme Court Adopt Sequential Briefing?

Simultaneous briefing gives the Court what it needs. It breaks attorneys out of the familiar argument-answer-reply rhythm and instead forces each party to focus on its own affirmative case. It requires the attorneys to argue for their rule as if they were writing on a blank slate—to identify their best arguments, strongest authorities, and clearest explanation of what the law should be.

Litigation is not merely strategy and research, but also art. Simultaneous briefing requires lawyers to engage in deep thought about the contours of the case, explore all the angles, anticipate the best opposing arguments, and present their strongest affirmative theory. We'll admit that exercise is more difficult than writing a response brief. But difficulty is not a defect. For a court deciding what the law should be, that focus is invaluable.

Respondents Illustrate Why Simultaneous Briefing Works

The proponents' greatest concern is the respondent. They argue that sequential briefing is preferable because "the responding party answers an actual opening brief on the merits instead of writing into a void."

We understand that concern. We've both appeared as respondents before the Arizona Supreme Court. We've both wished we had a brief to answer. That would have made our job easier.

But that is precisely why simultaneous briefing has been so valuable. It forces respondents to step outside the natural instinct to rebut the petitioner's latest argument and instead identify the independent reasons the judgment below should be affirmed.

Making advocacy easier is not the objective. Helping the Court reach the right answer is. In our experience, simultaneous briefing works particularly well for respondents. Responses to petitions focus on why review should be denied—minimal impact, a poor vehicle, little likelihood of recurrence. Once review is granted, simultaneous briefing forces the respondent to shift gears and present the best affirmative justification for upholding the decision below.

For a Court deciding what the law should be, that discipline matters. If the respondent cannot explain why the judgment should be affirmed except by attacking the petitioner's latest brief, that says something. Simultaneous briefing forces both parties to present affirmative theories rather than simply responding to each other.

> The current system is not the product of oversight or omission. It complements the adversarial process rather than repeating it.

The Juice Isn't Worth the Squeeze

Our counterparts correctly observe that lawyers refine their arguments with every brief. Parties refine their arguments between the court of appeals and the Supreme Court, between the petition and the supplemental brief, and in preparation for oral argument. That's why we support simultaneous briefing. It channels that refinement away from another round of rebuttal and toward the question the Supreme Court must answer: What should the law be? It forces the parties to refine their arguments in the manner most helpful to the Court.

Likewise, cases sometimes change shape on the way up. The current process already accounts for that. The petition identifies why review is warranted. The response addresses that framing. The order granting review identifies the question before the Court. Supplemental briefing then allows both parties to develop their positions on that question.

The best value litigants will obtain from sequential briefing is in addressing new authorities an opponent cites. Foremost, attorneys should anticipate the strongest arguments that can be made against their position. Parties' failure to identify weaknesses and address them is not a process failure. Even when attorneys miss an argument or authority, they can address it at oral argument. Our counterparts fret that "twenty minutes before a hot court is no time to marshal authority or walk through a careful counter-analysis." But our Supreme Court is "hot" in part because they routinely ask pointed questions that expose weaknesses in new authorities or novel theories. Our Justices get it.

In the end, the advantages claimed by the proponents are minimal. But adoption would mean losing the value added by simultaneous briefing.

Don't Fix What Isn't Broken

By the time the Arizona Supreme Court grants review, it already has the benefit of extensive sequential briefing. Another round of attorneys responding to one another adds relatively little.

Simultaneous supplemental briefing serves a different purpose. It forces each side to focus on its best affirmative case—its best arguments, strongest authorities, and clearest explanation of what the law should be. That is exactly what a court of last resort should want.

The current system is not the product of oversight or omission. It complements the adversarial process rather than repeating it. We should not abandon that approach simply because sequential briefing is familiar, more common in other jurisdictions, or easier for the lawyers.

The Court doesn't need another response. It needs each side's best affirmative argument.

endnotes

1. *See* Susan M. Freeman & Paul G. Ulrich, *The New Arizona Rules of Civil Appellate Procedure*, 1977 Ariz. St. L.J. 715, 750 (1977).
2. Rule Change Petition No. R-25-0005.