But No One Argued *That*

Sua Sponte Decisions on Appeal

By E. King Poor and James E. Goldschmidt

When appellate courts decide issues on their own, they may undermine the values of our adversary system. *Sua sponte* decisions need greater consistency to preserve those values.

It happens. It doesn't happen on every appeal, or even often, but it *does* happen. Lawyers frame the issues for a reviewing court in their briefs. They present them again at an oral argument. Then, months later, the court decides the case based on an issue that neither side ever mentioned.

Over 25 years ago, Professor Robert Martineau provided a metaphor for *sua sponte* appellate decision making that still rings true. He noted that there's a "general rule" that appellate courts should not decide issues not raised by the parties. And then there's the exception, known as the "gorilla rule," "that is, unless they do." R. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023 (1987). That is because the 800-pound gorilla may sit wherever it wants. *Id.* fn. a. The image of the gorilla sitting wherever its wants makes a point: it calls for a discussion of how reviewing courts are governed by more than the law of the jungle.

This article looks at what is at stake—for litigating parties and for our legal system as a whole—when reviewing courts render decisions *sua sponte*. And it asks two basic questions. First, what can appellate advocates do to anticipate and address *sua sponte* rulings? And second, what can the judiciary do to articulate more consistent and evenly-applied principles and procedures for when a court may decide a case based on an issue that no party has raised?

Party Presentation and the Adversary System

Our adversary system is grounded in the principle of parties raising and presenting the issues. The Supreme Court explained the principle succinctly in *Greenlaw v. United States*, 554 U.S. 237 (2008):

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for

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> decision and assign to courts the role of neutral arbiter of matters the parties present.

Id. at 243.

Though at times it may be hard to see day-to-day, our adversary system serves as one of the guardians of our freedoms. At its most basic, the adversary system values individual freedom to frame and resolve controversies over more extensive control by government intervention. The adversary system is the principal feature distinguishing the Anglo-American legal system from the inquisitorial system of civil law countries. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (rule that points not argued will not be considered "is more than just a prudential rule of convenience; its observance… distinguishes our adversary system of justice from the inquisitorial one"). This system is "grounded in American cultural conceptions regarding the proper role of the judiciary in a constitutional democracy," and "is thought to promote dignitary and participation values by affirming human individuality and showing respect for the opinions of each party, producing an outcome more satisfying to winners and losers alike." A. Frost, *The Limits of Advocacy*, 59 Duke L. J. 447, 459 (2009) (internal citations and punctuation omitted).

The adversary system is also central to due process. Not only do the parties receive notice and an opportunity to be heard, but they also have the primary responsibility for determining what issues should be raised in the first place. In this way, parties select issues and judges decide them, ensuring that controversies are not both defined and determined by the judiciary alone. *Id.* at 460.

Finally, party presentation offers distinct practical benefits. Judicial economy is served when courts do not need to expend their own resources identifying legal issues themselves. Cases are resolved most efficiently when all arguments are identified and addressed by the parties at the outset. The cores principles of stability and finality are best served when parties can rely on the assumption that they will not be surprised at the end of a case by new issues that neither side has raised. *Id.* at 461.

Mandatory Exceptions

But the principle of party presentation, like any rule, has its exceptions. Chief among these is the threshold requirement of subject matter jurisdiction, which courts must raise on their own to protect their own jurisdiction. *See, e.g., Gonzalez v. Thayer*, 132 S. Ct. 641, 648 (2012) (as to subject-matter jurisdiction, "courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented").

In addition to subject matter jurisdiction, courts may also raise related threshold issues of constitutional standing, ripeness, or sovereign immunity. *See, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (standing); *U.S. v. Quinones*, 313 F.3d 49, 57–58 (2d Cir. 2002) (ripeness); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 686 (8th Cir. 2011) (sovereign immunity). Reviewing courts have long raised these issues on their own, since they implicate a court's competency to decide a case.

The Foggy Terrain of Permissive Exceptions

Beyond these limited mandatory exceptions, there lies a murkier field of permissive exceptions. One author has identified eleven categories of the gorilla rule at work, while another has identified fifteen. J. Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 Notre Dame L. Rev. 1521, 1568–93 (2012); B. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 San Diego L. Rev. 1253, 1279–86 (2002).

These permissive exceptions run the gamut from disposing of frivolous cases to upholding the "right" result. *See, e.g., Lucien v. Johnson*, 61 F.3d 573, 575 (7th Cir. 1995) (ruling that merits, which had not been briefed, were frivolous); *Sunray Mid-Continent Oil Co. v. Federal Power Comm'n*, 239 F.2d 97, 101 (10th Cir. 1956) ("a judgment correct in ultimate effect will not be disturbed on review although the authority below relied upon erroneous reasoning").

What unites these exceptions is their lack of any consistently-applied limiting principle. To be sure, courts have articulated some general rules here. For instance, they are more likely to decide an issue *sua sponte* when it presents a "pure" question of law, or to avoid plain error, even if the parties waived the issue below. *See, e.g., United States v. Marcus*, 560 U.S. 258, 262 (2010) (articulating circumstances under which intermediate appellate court may consider plain error not raised below); *Borntrager v. Cent. States Se. & Sw. Areas Pension Fund*, 577 F.3d 913, 924 (8th Cir. 2009) (an ERISA preemption question was purely legal and did not require additional evidence or argument, so the court could review it *de novo* "for the first time on appeal").

When a court chooses to treat a case as a vehicle to decide an issue that the court believes is an overlooked, dispositive issue, rather than one addressed by the parties, then the court has ventured away from its role as a neutral decision maker into a subjective realm.

At other times, reviewing courts may be more inclined to raise and decide an issue *sua sponte* if they believe that the issue involves an important public concern or is "in the interests of justice," or even to protect *pro se* litigants. *See, e.g., Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 125 (1st Cir. 2010) (emphasizing that the issue decided *sua sponte* was significant to the administration of justice in the federal courts); *Gramegna v. Johnson*, 846 F.2d 675, 677–78 (11th Cir. 1988) (suspending the rules and raising a matter *sua sponte* to protect a *pro se* litigant).

And then there are well-known Supreme Court cases decided *sua sponte*. In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Court overturned *Swift v. Tyson*, 41 U.S. 1 (1842),

which previously had declared that the federal courts had the power to make federal common law, though no party had argued for that result. Similarly, in *Mapp v. Ohio*, 376 U.S. 643 (1961), the Supreme Court overruled earlier precedent and applied the Fourth Amendment exclusionary rule to the states without briefing or hearing arguments on the issue.

When judges engage in intuitive decision making—as opposed to the more disciplined process of judicial deliberation—they are prone to a number of pitfalls, including anchoring, framing, hindsight bias, and egocentric biases.

But these permissive exceptions are not consistently applied, and there remain ample examples of courts adhering to the principle of party presentation. *See Hartmann v. Prudential Life Ins. Co. of America*, 9 F.3d 1207 (7th Cir. 1993) (applying the appellate waiver rule, due to an error by counsel, against orphans whose stepmother killed their father after bribing an insurance agent to defraud the orphans). Commentators agree that such exceptions, together with balancing tests specific to various federal circuits, are susceptible to outcome-oriented application and may just be so many manifestations of the gorilla rule. Miller, *supra*, at 1279.

"No General Rule"

This patchwork of rules and exceptions leaves *sua sponte* decision making without any widely-accepted body of authority that is consistently applied, let alone any controlling authority on this question. As the Supreme Court summed up in *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), "[t]he matter of what questions may be taken and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule."

If the general rule is really that there is "no general rule," then where does that leave us? One place to begin is to ask, what happens to our adversary system and the values underlying it when a court resolves a case without hearing from the parties involved?

Undermining the Adversarial Process

When a court raises an issue on its own and decides it without hearing from the parties involved, it chips away at our adversary system. When a court chooses to treat a case as a vehicle to decide an issue that the court believes is an overlooked, dispositive issue, rather than one addressed by the parties, then the court has ventured away from its role as a neutral decision maker into a subjective realm. In doing so, the court concludes on its own that a particular new question will dispose of the case. It then returns to being a neutral decision maker to decide the very issue which it has selected as dispositive. A. Milani & M. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 277–78 (2002).

But when a court itself selects new issues—without party participation—and then decides those very same issues, the values underlying our adversary system are compromised. The parties are far more likely than the reviewing court to explore the peculiarities and nuances of the case; after all, they have every incentive to do so. On the other hand, considerations of efficiency may cause courts to be more likely to reach conclusions on issues that they themselves have already identified as resolving the case more directly. *Id.*

Moreover, even if identifying new issues does not actually undermine a court's impartiality, it may still create that impression: "When a decision maker becomes an active questioner or otherwise participates in a case, she is likely to be perceived as partisan rather than neutral." *Id.* at 280. Decisions reached under a court's own initiative do not "promote respect either for the Court's adjudicatory process or for the stability of its decisions," and other commentators have described such decisions as "unseemly," "not likely to be regarded favorably," a breach of the parties' trust, and a sacrifice of the court's function as an adjudicator. *Id.* at 280–81 (quoting Justice Harlan's dissent in *Mapp v. Ohio*, 367 U.S. 643, 677 (1960)).

Such perceptions work against both litigants' and society's acceptance of judicial decisions. *Id.* at 284. As explained elsewhere, "If the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant… the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning." *Id.* at 285 (quoting L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 388 (1978)).

Increasing the Likelihood of Error

Not only do *sua sponte* decisions risk creating perceptions of partiality, they also increase the risk that a case will be decided wrongly. A core value of our adversary system is that party presentation is central to reaching the right result. Frost, *supra*, at 499–500. Indeed, "our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error." *Mackey v. Montrym*, 443 U.S. 1, 13 (1979). *See also Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981) ("[O]ur adversary system presupposes [that] accurate and just results are more likely to be obtained through the equal contest of opposed interests").

One case may go a long way to illustrate this risk of error. In *Poyner v. Loftus*, 694 A.2d 69 (D.C. 1997), the court—on its own and without the benefit of briefing—determined the case on the basis of a common law doctrine that had been abrogated by statute within the court's jurisdiction. The result was that the plaintiff, a blind man injured in a fall from an elevated walkway, lost the benefit of a remedial statute passed for his benefit some 25 years before the court's decision. Milani & Smith, *supra*, at 259–62. *Poyner* illustrates that "*sua sponte* decision making can, and does, lead to erroneous decisions because it eliminates

from the deliberative process the very persons who are most strongly motivated to assure its full and accurate consideration." *Id.* at 261.

Recent research into the cognitive aspects of judicial decisions reinforces this conclusion. When judges engage in intuitive decision making—as opposed to the more disciplined process of judicial deliberation—they are prone to a number of pitfalls, including anchoring, framing, hindsight bias, and egocentric biases. C. Guthrie *et al.*, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001). To the extent that *sua sponte* decisions are more likely the product of intuitive selection rather than the more disciplined and balanced process of party presentation, they are more likely to suffer from such flaws.

Do *Sua Sponte* Rulings Violate Due Process?

In addition to increasing the twin risks of error and perceptions of bias, *sua sponte* decisions may in certain cases violate due process. As discussed above, party presentation fulfills essential aspects of due process by permitting litigants to develop the issues, receive notice, and have an opportunity to be heard before a judicial decision affects their rights. Yet when a court decides a case without hearing from the parties on a dispositive issue, it may deprive them of these fundamental rights of due process.

Some 85 years ago, in *Brinkerhoff-Faris Trust & Saving Co. v. Hill*, 281 U.S. 673 (1930), the Supreme Court ruled that the Missouri Supreme Court had violated due process by *sua sponte* overruling its own precedent without permitting the affected party an opportunity to be heard. Justice Brandeis stated: "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support." *Id.* at 681.

While the Supreme Court has not issued a similar ruling in recent years on *sua sponte* decisions by reviewing courts, it has held that *sua sponte* trial court dismissals may violate due process and that due process is denied when parties are deprived of a chance to respond. Miller, *supra*, at 1288–92 (collecting cases). And if a *sua sponte* ruling by a trial court violates due process, there is little reason why a similar ruling by a reviewing court would not also do so. Some commentators have come to that very conclusion. *Id.* at 1290; Milani & Smith, *supra*, at 262.

Taming the Gorilla

Attorneys and courts can play crucial roles when it comes to "taming the gorilla."

Counsel's Role

Though *sua sponte* decisions may undermine the values of our adversary system and may in some cases violate due process, they are not necessarily going away, and they may come in variety of different forms. Thus when mapping out a case, an appellate advocate should consider that possibility. So what might a lawyer do to anticipate and to address *sua sponte* decisions?

First, of course, one way to avoid a *sua sponte* ruling is to raise issues before a court does. And that means anticipating what may be a court's primary concern. One strategy to increase the likelihood of that is to ask a colleague who has no familiarity with the case to "moot" a draft brief. A first-time reader of a brief may offer insights and questions that may be close to those that would be raised by a court.

Second, when oral argument is granted that may be the first time to gauge a court's concerns and whether it seems inclined to resolve the case based on a ground that no party has briefed. If so, counsel should consider requesting permission to file a supplemental brief on any new issue raised by a court.

Finally, if a court resolves a case based on an issue that was never mentioned in any briefing or at oral argument, then counsel should consider filing a petition for rehearing highlighting that the court has decided the case without hearing from the parties on a dispositive issue.

The Court's Role

There may be times when a court believes that a case turns on an issue that neither side has raised. But in such cases, a court should tread with caution. First, as noted, though courts have offered certain rationales to support when they may decide a case *sua sponte*, our adversary system deserves more: clearly articulated, unifying principles for *sua sponte* decision making that are consistently applied.

Next, respecting our adversary system also means either inviting supplemental briefing or granting that opportunity liberally if a court is inclined to decide a case on an issue that no party has raised. Similarly, although petitions for rehearing are seldom granted, when a decision turns on a question never before addressed by any party, this should call for a greater willingness by a court to consider such a petition. As Justice Breyer stated in *Trest v. Cain*, 522 U.S. 87, 92 (1997), "We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often… that somewhat longer (and often fairer) way 'round is the shortest way home."

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The motto of the Illinois Supreme Court is *Audi alteram partem,* or "Hear the other side." That motto has a special meaning for *sua sponte* decision making. Not only should each party in a case be able to respond to the others, but maintaining the integrity of our adversary system also means that each party should be able to respond to the reviewing court if it raises new issues on its own.