



## BRIEFLY

Eric Magnuson



Lisa L. Beane

## Get review with a little help from your friends

By Eric Magnuson and Lisa Beane

Special to Minnesota Lawyer

The Minnesota Supreme Court recently filed an opinion in a legal malpractice case—*Frederick v. Wallerich*, No. A15-2052 (Minn. Feb. 7, 2018). What struck us about the opinion, even more than the substantive legal issue and the merits of the decision, was that there were three amici listed as participants in the case. It started us thinking about just how important amici are in the Supreme Court's process. Our conclusion was that while amici may submit briefs that guide the court on the merits, their most significant impact may be in communicating the importance of the case and why review should be granted.

Because the Minnesota Supreme Court takes only a small number of cases, review is generally limited to significant issues of statewide importance. What better evidence of that than requests from third parties to be heard on the particular legal issue because a decision by the court will have consequences far beyond those affecting the particular litigants?

The merits arguments of the parties are often case specific and narrowly focused, as they should be, on the interests of the litigants at bar. But amici can broaden the discussion considerably and focus the court's attention on the implications of a particular holding for future cases and statewide policy.

The reaction of the legal community can tell the court a lot about how important a given case is. Justice John Simonett wrote in the *Art of Advocacy* that it might sometimes be a good idea to include in a petition for review newspaper articles addressing the impact, or perceived impact, of the case. Marshall Houts, et al., *Art of Advocacy: Appeals* § 8.09 (Lexis Nexis 1990). He observed that “[i]ssues that gain notoriety and public attention may be deemed worthy of consideration by the final appellate court.” *Id.*

So if demonstrating the potential statewide impact of your case is an important factor in convincing the court to grant review, it is easy to see that an amicus might add even more value at the petition for review stage than at

the merits stage. A request by an amicus for leave to participate can point out directly, or at least by implication, the breadth of a particular case's impact. For that reason, it may be a good idea to put an amicus request before the court before it decides the petition for review.

A petition for review must be filed within 30 days of the filing of the Minnesota Court of Appeals' decision. Minn. R. Civ. App. P. 117, subd. 1. That time limit is mandatory, *see, e.g., Minn. Envtl. Sci. & Econ. Review Bd. v. Minn. Pollution Control Agency*, No. A14-1694 (Minn. Sept. 25, 2015), although it may be extended “in the interests of justice” in exceptional circumstances. *See In re Welfare of Children of M.M.M. and M.J.*, No. A09-483 (Minn. Dec. 23, 2009) (order accepting late petition for review in interest of justice); *Weber by Otten v. Gates*, C8-91-727 (Minn. Jan. 30, 1992) (order accepting late petition); *State v. Raymond*, No. A03-295 (Minn. 2004) (order granting motion to extend time for filing a petition for review in a criminal case where the petition was filed 27 days late). But while the Supreme Court has the power to accept late appeals, it rarely grants relief in those circumstances. *See In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 3 (Minn. 2003). Failure to follow the rules precisely may result in the rejection of even a timely filed petition. *See, e.g., Quinn v. Johnson*, No. A15-0322 (Minn. Oct. 29, 2015).

From the perspective of an amicus, the request for leave to appear also must be timely, but it can be filed as late as 15 days after the court's order granting review. Minn. R. Civ. App. P. 129.01. A potential amicus may get more mileage out of a request filed before the court issues a decision on the petition for review, however. Because an opposing party has 20 days to respond to a petition for review, Minn. R. Civ. App. P. 117, subd. 4, a potential amicus hoping to get its request for leave to appear before the court before it decides the petition for review should file within that time frame.

It is also important to present the right issue in the petition for review because it is highly unlikely that the court will consider issues not clearly identified in the petition. Although the court has recognized that it has discretion to

consider issues not raised in the petition for review, it generally will not do so. *Tatro v. Univ. of Minn.*, 806 N.W.2d 509, 515 (Minn. 2012). The court has explained that the requirement that the petitioner include all issues on which review is sought in the petition facilitates effective appellate review by providing notice of the issues presented to the respondent and giving the court the opportunity to narrow the issues, if appropriate. *Id.*

Amici are generally limited to the issues raised by the parties and may not raise new issues on appeal. *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 687 n.7 (Minn. 1997). But on rare occasions, an amicus may bring to the court's attention a legal argument that the parties missed that is nonetheless important for the development of the law. In *Baker v. Ploetz*, 616 N.W.2d 263 (Minn. 2000), the court considered an issue raised by an amicus, despite the fact that the issue was not presented to the court of appeals and was not included in the petition for review at all. The court directed supplemental briefing on the issue raised by the amicus. The court has explained that its obligation to “decide cases in accordance with the law ... is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities.” *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). The court recently reaffirmed that view in concluding that the court of appeals properly addressed the ambiguity of a municipal ordinance as a necessary first step to deciding an insufficiency-of-the-evidence claim. *Court of Appeals v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017). The Appellate Practice Section of the MSBA submitted an amicus brief in *Vasko* addressing the procedures an appellate court should follow if it decides *sua sponte* to consider an issue not briefed by the parties.

So how do you maximize the chances of your petition for review being granted? Of course, you need to file a compelling petition that is timely and conforms with the rules. But you might also look to see if you can find some help in explaining why the issue presented has significance beyond your particular case. Get by with a little help from your friends.