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Briefly: Deadlines are tight for filing amicus briefs

By: [Charlie Gokey](#) and [Eric Magnuson](#) | [March 22, 2022](#)

We have written about further review in the Minnesota Supreme Court on a number of occasions. The court grants only 10-12% of petitions for review (PFRs). *See What are the odds of reaching the Minnesota Supreme Court*, Eric Magnuson and Kelvin Collado (Minnesota Lawyer, July 15, 2019). The cases the court takes generally raise issues of statewide importance.

Amicus support can be a crucially important indicator that a case merits review. *See Get review with a little help from your friends*, Eric Magnuson and Lisa Beane (Minnesota Lawyer February 19, 2018). Indeed, amici may have more impact weighing in on whether to grant review than on the merits of a case. As explained by Justice John Simonett in the *Art of Advocacy*, "[i]ssues that gain notoriety and public attention may be deemed worthy of consideration by the final appellate court." Marshall Houts, et al., *Art of Advocacy: Appeals* § 8.09 (Lexis Nexis 1990).

But 2019 amendments to the Minnesota Rules of Civil Appellate Procedure set a tight deadline for amici to support or oppose review — 14 days from the filing of a PFR. Minn. R. Civ. App. P. 129.01, subd. b. This ensures that the parties have a fair chance to respond to points raised by amici, but means that amici must act quickly if they want to be heard on whether the Minnesota Supreme Court grants review.

Parties seeking review from the Minnesota Supreme Court must file their PFR within 30 days of the Minnesota Court of Appeals' decision. Minn. R. Civ. App. P. 117, subd. 1. That time limit is mandatory, *see, e.g., Minn. Env'tl. Sci. & Econ. Review Bd. v. Minn. Pollution Control Agency*, No. A14-1694 (Minn. Sept. 25, 2015), but 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).

Potential amici must request leave to participate, filing a request for leave that "identif[ies] whether the applicant's interest is public or private in nature, identif[ies] the party supported or indicat[e]s whether the amicus brief will suggest affirmation or reversal, and . . . state[s] the reason why a brief of an amicus curiae is desirable." Minn. R. Civ. App. P. 117, subd. c.

Up until the 2019 amendments, amici could request leave to appear on a relatively leisurely schedule—any time prior to 15 days after the court's order granting review. Amici regularly filed requests for leave to participate in the event that the court granted review, and included arguments in their brief supporting review. This meant that a party responding to a PFR had no opportunity to address the arguments raised by amici when amici chose to request leave to appear after the responding party had already filed its PFR response. Responding parties could choose to file an additional brief objecting to the amicus request with additional arguments opposing review. But that risked drawing further attention to the amici and their arguments.

In 2019, the Minnesota Supreme Court amended Rule 129.01, subd. b. which now states:

(b) Timing of Request. The applicant shall serve and file a request for leave no later than 14 days after the filing of the notice of appeal, the petition which initiates the appeal, the appellate petition for declaratory judgment, or the appellate court order granting review. Any request for leave to participate filed before a pending petition for review is granted under Rule 117 of these rules shall be served and filed not later than 14 days after the filing of any party's petition for review. This 14-day limitation does not apply to a request for leave to participate limited solely to an issue raised in a conditional cross-petition.

In addition, the amended Rule includes a new 1,500-word limit, sharply curtailing the space a putative amicus has to make its arguments. *Id.* The court similarly amended Rule 117, subd. 5 to say:

An applicant who requests leave to participate as amicus if review is granted, *and wants to include an argument on the question of granting review*, shall file its request to participate as amicus not later than 14 days after the petition is filed.

Minn. R. Civ. App. P. 117, subd. 5 (emphasis added).

The notes to these revisions explain how this change "levels the playing field."

The new limitation is designed to level the playing field where any potential amicus asks to participate before the Supreme Court has decided whether to grant a pending Rule 117 petition for further review (PFR). Any request to appear as amicus while a PFR is pending must be filed within 14 days of any party's filing of a PFR. If that deadline is missed, an amicus request cannot properly be filed until the court decides the PFR. This allows the parties to the appeal to express their views on the request for leave in the PFR briefing if appropriate.

Rule 129.01, Advisory Committee Comment – 2019 Amendments.

The Minnesota Supreme Court has made clear that it strictly enforces Rule 129.01. In *Musta v. Mendota Heights Dental Ctr.*, the Court very nearly denied the Minnesota Attorney General leave to weigh in on an appeal concerning the constitutionality of a state statute for failure to abide by the requirements of Rule 129.01. No. A20-1551, 2021 Minn. LEXIS 129, at *7 (Mar. 30, 2021). Because the party taking the adverse position did not object and responded to the arguments raised in the Attorney General's brief, the court held that it would excuse noncompliance with Rule 129.01 "in the specific circumstances of th[at] appeal." *Id.* at *8. But it "caution[ed] parties, including the Attorney General, to view [its] decision ... narrowly," stating the Court was "unlikely to excuse a future failure to follow the clear and plain language of these rules." *Id.* at *8-9. Private amici who fail to observe the strictures of Rule 129.01 cannot expect a similar dispensation.

With the 2019 changes to the rules, the party responding to a PFR now has an opportunity to address arguments raised by amici in support of review. But the flip side is that amici have only a very limited window in which to act if they want to weigh in on a PFR. It has become more important than ever for the party seeking review to line up amici well in advance. The wisest choice for a losing party who wants to seek review in the Minnesota Supreme Court is to get out the rolodex of potential supporters no later than upon receiving the bad news from the Court of Appeals, and in some cases, based on how the oral argument went, maybe even earlier.

Charlie Gokey is a partner at Robins Kaplan LLP whose practice focuses on commercial litigation in the health care industry.

Eric J. Magnuson is a partner at Robins Kaplan LLP and served as Chief Justice of the Minnesota Supreme Court from 2008 to 2010. He has more than 40 years of experience practicing law and he focuses his practice almost exclusively in appellate courts.



ABOUT CHARLIE GOKEY AND ERIC MAGNUSON