

## Briefly: What are the odds of reaching Supreme Court?

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One of the questions clients often ask us is “What are my odds of the Minnesota Supreme Court taking my case and reversing the Court of Appeals?” The answer is never as clear as clients would like it to be. Obtaining Supreme Court review is generally an uphill battle, and there are a whole host of issues the court considers that may or may not increase your chances.

To our knowledge, there are no publicly available empirical studies showing the Minnesota Supreme Court’s PFR-grant rate and its reversal rate of the Court of Appeals. Yet there are still resources available that can provide you and your client some insight into your chances of getting a PFR grant from the Supreme Court and obtaining reversal. But first, it helps to have some background information on the relationship between the Court of Appeals and the Supreme Court.

The principal motivation behind creating the Court of Appeals was the need to reduce the overwhelming caseload of the Supreme Court. See Symposium on an Intermediate Appellate Court in Minnesota, 7 Wm. Mitchell L. Rev. 41 (1981). To that end, there must necessarily be a high degree of finality in decisions of the Court of Appeals. This finality is accomplished by selective review of those decisions by the Supreme Court.

When the Court of Appeals was created, the Supreme Court expected that more than 90% of the cases filed in the Court of Appeals will be finally determined there. See Douglas K. Amdahl, Appeals to the New Minnesota Court, 10 Wm. Mitchell L. Rev. 623, 624 (1984). During the Court of Appeal’s first year of operation, fewer than 5% of its decisions were reviewed by the Supreme Court. Review was requested in about 20% of the cases decided by the Court of Appeals, and only one in four requests was granted. See Eric J. Magnuson, David F. Herr, and Sam Hanson, 3 Minnesota Practice Series: Appellate Rule Annotated, § 117.3 at 614 (West 2019).

The Minnesota Judicial Branch issues an Annual Report each year in which it publishes statistics on the number of cases filed and disposed of by both courts. But the numbers are not deeply examined, so we have engaged in our own—admittedly nonscientific—analysis to see how often the Supreme Court reviews Court of Appeals civil decisions, and how often those grants lead to reversal.

According to the 2016 Annual Report, 648 petitions for review were filed, 89 of which the Supreme Court granted, a grant rate of approximately 12%. The 2017 Annual Report, the most recent report issued by the Minnesota Judicial Branch, shows that the court agreed to review 81 of the 635 petitions filed that year, granting approximately 13% of the petitions filed.

These statistics should not be a big surprise. As we have written in the past, the Supreme Court takes only a small number of cases, and review is generally limited to significant issues of statewide importance. See Eric J. Magnuson & Lisa Beane, *Get review with a little help from your friends*, *Minn. Lawyer* (Feb. 19, 2018). If anything, the numbers show somewhat more grants of PFRs than expected.

This data point is somewhat limited, however. It does not indicate the nature of these petitions (i.e., civil or criminal) or provide insight into the chances of successfully seeking review in a civil case. We thought we would take a stab at that.

We reviewed Supreme Court cases decided in 2017, determined how many were civil cases, and how many of those civil cases were decided on a petition for review. We then looked into how many of these civil cases led to the Court of Appeals being affirmed or reversed.

According to the 2017 Annual Report, the Supreme Court issued 104 opinions. We reviewed all the opinions from 2017 through the Minnesota State Law Library's internet database and determined that 24 were in civil cases. One quick note: given the time between when a petition for review is filed and review is granted to when a case is fully briefed and a decision is finally issued, it is likely that many of these petitions were filed in 2016 or earlier. In other words, the 24 civil opinions which the Supreme Court decided in 2017 were likely from petitions for which the court granted review in 2016 or later.

Of the 24 civil cases the Supreme Court decided in 2017, 18 cases got to the court on a petition for review. This is an interesting statistic, since it shows that that only 17% of the Supreme Court opinions in 2017 were civil cases stemming from a grant of a petition for review. Nine of these cases resulted in a reversal, partial reversal, or vacation of the judgment of the Court of Appeals; nine affirmed the court.

If you thought the percentage of reversals would be higher (why would a court take a case simply to affirm?), keep in mind the criteria of Rule 117, subd. 2. It focuses on the need for the Supreme Court to speak on an issue, because it has statewide importance, because it touches on a developing area of the law, or involves a constitutional issue. Merely correcting an erroneous Court of Appeals decision is not one of the grounds listed in the rule for review, unless you can show that "the lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the Supreme Court's supervisory powers". *Minn. R. Civ. App. P. 117, subd. 2(c)*. The fact of the matter is that the Supreme Court often takes review of cases in which it thinks it needs to say what the law is. The Supreme Court, and not the Court of Appeals, makes the law in Minnesota. See *Willis v. County of Sherburne*, 555 N.W.2d 277, 282 (Minn. 1996) (stating that decisions of the Court of Appeals "do[] not represent a definitive statement of the law in Minnesota.")

Still, getting review is a necessary step in obtaining relief from an adverse Court of Appeals decision. In 2017, the Court of Appeals was reversed or partially reversed in approximately 50% of the civil cases.

A few more points of interest. Almost all of the civil cases involved only one or two important issues. We have written before about the importance focusing on the one or two issues that are most significant and present the highest probability of success. See Eric J. Magnuson & Andrew J. Crowder, *Good references are simply not enough*, *Minn. Lawyer* (Aug. 21, 2018). Limiting the issues on appeal increases the chances that an overburdened appellate court will consider your case.

Over 40% of all the civil cases featured “amici curiae,” or “friends of the court,” and approximately 60% of the cases that were reversed or reversed in part featured amici. Amici can be government agencies, trade associations, public interest groups, or other businesses or organizations that may face cases raising similar issues. Amicus support not only can influence the outcome of the case, but if an amici requests to participate while the court is still considering the PFR, the odds of a grant are improved, since the amicus requests should demonstrate a broader interest in and impact of the case than is shown by a simple dispute between litigants.

So what does this information tell us—if anything at all—about maximizing your chances of your petition for review being granted and winning on appeal? First, as always, you need to file a compelling petition that is timely and conforms to the rules. The petition should be tailored to address each of the factors in Rule 117 of the Minnesota Rules of Appellate Procedure. Amici, as we have long suspected, seem to help in getting the Supreme Court’s attention and in obtaining a reversal of the Court of Appeals’ decision.

It is an uphill battle to get Supreme Court review, and relief from that court once you get there. But it is not impossible, and in many cases, it may even be likely.

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