

Effective Advocacy Through Amicus Briefs

By M.C. Sungaila

Once rare, amicus curiae or “friend of the court” briefs are now filed in the majority of appellate cases heard by the U.S. Supreme Court and state supreme courts.

In the U.S. Supreme Court, amicus briefs were filed in 35 percent of the Court’s cases in the 1965-1966 term; by 1995, one or more amicus briefs were filed in nearly 90 percent of the Court’s cases. An analysis of the 1999 to 2008 terms conducted by my firm showed that in civil cases, the average filing rate for amicus briefs was 92.4 percent (with a high of 100 percent amicus participation in all civil cases in the 2007 term). The number of civil cases before the Court each term ranged from 39 to 61; the total number of amicus briefs filed each term in those cases ranged from 344 to 627.

The number of amicus briefs filed in state high courts has also grown. My firm’s own survey of amicus filings in the California Supreme Court reveals high amicus participation in the last decade. The amicus filing rate was 59.7 percent from 2000 to 2009 in civil cases: out of 707 civil cases decided by the court, 422 had one or more amicus briefs. The number of amicus briefs being filed in each case is also high. In the 422 California Supreme Court civil cases in which amici participated between 2000 and 2009, 1,868 amicus briefs were filed, an average of more than four per case.

With all the amicus briefs being filed, how do you make your brief stand out from the crowd?

Distinguish between amicus support at the review and merits stages. Consider at the outset the stage at which you intend to file a brief, and tailor the brief to that stage. When a party is knocking at the United States or California Supreme Court’s door asking the Court to take the

case, an amicus can be most helpful in demonstrating the widespread importance of the issue and the need for guidance. In a case involving an aspect of appellate procedure, it may be notable for the California Academy of Appellate Lawyers to weigh in about the need for review; in a case where business interests are at stake, it may be helpful to have the United States or California Chamber of Commerce file a letter or brief in support of review.

With all the amicus briefs being filed, how do you make your brief stand out from the crowd?

Make sure your brief adds something to the case. Judges, clerks, advocates, and scholars agree: the first rule of merits amicus briefs is not to duplicate the parties’ briefs. Indeed, amicus briefs that repeat party positions for the purpose of taking a “strength in numbers” approach should be avoided at all costs. In addition to resisting “me too” briefs, amici should collaborate on a single joint brief rather than file multiple separate briefs which cover similar points. Such an approach limits

the amount of briefs overall in a case, and correspondingly focuses the court’s attention on a few select briefs instead of scattering the court’s attention among many.

Consider whether the brief you propose fills one of three roles for amici. There are at least three important roles an amicus can fill. In the words of court watchers and researchers Victor Flango, Donald Bross, and Sarah Corbally, these are: “to amplify or supplement the legal and factual arguments presented by the parties or, in some cases, to present alternative arguments not raised by either party; to inform the court of implications of a decision or to point out unintended consequences for people or groups not party to the suit; and to communicate the importance of the case by their very presence.” According to their survey of state courts, most state court judges and law clerks “found...amicus briefs useful because they provide legal citations, policy considerations, social-science data, and economic data that might otherwise not be brought to the attention of the appellate courts.”

Many of the U.S. Supreme Court’s decisions have drawn on extra-record data and analysis from amicus briefs. The majority opinion in *Roe v. Wade*, 410 U.S. 113, 148-152 (1973), for example, expressly referred to positions urged by amicus groups and relied heavily on historical, social, and medical data presented by amici. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court upheld the race-based admissions policy of the University of Michigan Law School; at oral argument and in the Court’s decision, the justices referred to and relied on the amicus brief of retired military officers.

Write well and succinctly. Certainly, it is not groundbreaking to assert that an appellate brief should be well-written and as “brief” as possible. But brevity and eloquence are particularly important for amicus briefs. Amicus briefs are, after all, “extra” briefs for the court to read in a case. Indeed, a well-written amicus brief is crucial, according to court clerks and justices. In response to a survey, U.S. Supreme Court law clerks “repeatedly emphasized that most amicus briefs filed with the Court are not helpful and tend to be duplicative, poorly written, or merely lobby-



ing documents not grounded in sound argument.” State supreme court justices and clerks responding to a similar survey also highlighted the need for a well-written and researched brief.

Choose your amici (and amicus counsel) carefully. One political scientist who studied the influence of amicus briefs before the U.S. Supreme Court concluded that who files an amicus brief matters as much as what the brief says. Relying on statistics demonstrating that an amicus brief by the Solicitor General’s Office is the single most influential amicus filing a party can have, Professor Paul Collins has opined that “litigation experience” of the attorneys filing the brief and “the prestige of amicus participants may be vital to success in the Court.” Professor Collins’ findings comport with the responses of Supreme Court law clerks to one survey: “Sixteen percent of the clerks noted who filed a brief — the organization filing and/or the firm representing and the specific attorney authoring — when making their determinations of whether “an amicus brief merited a closer read.” Once the brief has the clerk’s attention, of course, it should satisfy the first rule of amicus briefs and add something to the case in well-written prose.

Consider the impact of an unusual constellation of amici joining a brief. As important as it may be to have a notable lawyer file a brief or a well-respected organization join one, sometimes the collection of amici on a single brief can be even more important. In a recent case before the Inter-American Court of Human Rights against Mexico, for example, my firm submitted a brief amici curiae by over 50 American law professors,

human rights organizations and clinics, with Amnesty International as lead amicus. Amnesty International was the first human rights organization to document the pattern of gender-based killings which were the subject of the case; Amnesty International’s participation signaled the continued importance of the human rights issues in the case, and lent gravitas and credibility to the briefing. Moreover, few American organizations had participated in previous cases before the court; their en masse participation in this case also signaled the case’s importance and reinforced the need for court intervention.

This article is adapted from a piece in the International Association of Defense Counsel Appellate Practice Committee Newsletter.



M.C. Sungaila is a partner in the appellate law firm of Horvitz & Levy. She is Chair of the Amicus Briefs Committee of the International Association of Defense Counsel and past Chair of the Women Lawyers’ Association of Los Angeles’ Amicus Briefs Committee.

Why Are People So Eager To Hate All Lawyers?

By Paul Lisnek

Attorney Paul Lisnek shows you how to be the lawyer you grew up wanting to be. Full of practical advice on how to live your values in the courtroom, around the office, and in the community at large, “*The Art of Lawyering*” is written especially for the new lawyer who wants to excel in his or her chosen career, whether starting a solo practice or joining an established firm.

BOOK EXCERPT

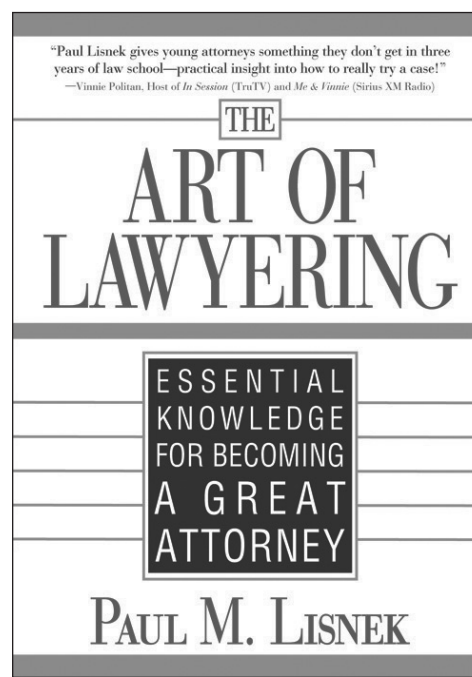
First Thing We Do, Let’s Kill All the Lawyers

Improving Public Perception of the Law

Talk about lawyers and ethics in the same sentence, and you can hear the laughter erupting among the crowd. “Lawyers and ethics; isn’t that an oxymoron?” our well-meaning friends like to ask with a hearty chuckle. How upsetting this comment should be to us! Well, maybe, just maybe, most lawyers are indeed good, talented professionals whose aim is to assist their clients in resolving their problems. Maybe there is no such thing as a norm of unethical lawyers. That’s where I come out on this issue, and having served as a disciplinary commissioner on the Attorney Registration and Disciplinary Commission in my home state of Illinois for well more than twenty years, I have good reason and strong support to back up my position.

Let me be honest with you. It drives me crazy when people complain that there are too many lawyers in this country, too many lawsuits filed, that all lawyers are unethical, and that life would be better for all if there were no attorneys in our society. The jokes may be funny and the sentiment may be real, but the truth is that these people just don’t understand the critical role lawyers play in society. And I don’t say this because I am a lawyer (that’s both a disclaimer and a confession). I say it because it’s true. These people don’t get it, and I am not sure they ever have understood, as we see through the course of how lawyers were treated in history and even in the theater.

“First thing we do, let’s kill all the lawyers.” Remember that line from Shakespeare’s *Henry VI, Part II*, spoken by the character Dick the Butcher? Written likely as a point of humor back then, it was not intended to say that lawyers were the problem of society but rather to make the point that if the bad guys wanted to take down the ruler and topple the govern-



ment, the first thing they had to do was to kill all the lawyers. Regardless of Shakespeare’s actual intent, though, it is clear that lawyers will forever have their characters maligned and purpose denigrated by non-lawyers (and playwrights, of course).

Laypeople like to point to surveys of public trust in which they can always count on lawyers coming in last, or certainly below the profession of the dreaded used-car dealer. Again, such studies trigger laughter in people, because non-lawyers love to hate lawyers. I find it interesting that while people do not like lawyers, surveys also suggest that people note one glaring exception to this negative view of lawyers, and that exception is that people tend to love their own lawyer, believing they have found the one and only respectable person in the profession.

I know a woman who loves to hate lawyers. She considers all lawyers to be ambulance chasers; nothing I ever say to her appears to adjust her viewpoint in a positive direction. But then she suffered an accident herself. She

had been on a cruise ship and got bumped by another passenger on the ship, which led to her taking a fall and breaking her wrist. Well, this anti-lawyer, anti-lawsuit woman could not wait to sue the woman who bumped her, the ship, and the cruise line. She wanted to sue everybody and anybody who could compensate her for her injury. She interviewed with several lawyers, but none of them would take the case. Not one lawyer saw a viable legal theory to be applied against any of the suggested defendants. I would argue that this was the system working at its best. I assumed that this challenge to her opinions would finally help her see the light, that not all lawyers are case-chasers who file frivolous lawsuits.

Alas, her anger with lawyers increased, because the entire profession failed to see that she had the only worthwhile and important case ever to emerge in the history of mankind! Do you see a possible pattern here? Laypeople are often misinformed, biased in their views on the legal process, and so unfamiliar with exactly how the process works that the tendency is for them to view lawyers in a negative light without looking at the truth about how lawyers make and reach decisions.

I know, there is “that woman who got a jury to award her two million dollars for spilling some coffee on herself at McDonald’s.” Everyone knows that case, but does anyone know that an appellate court ultimately reduced that jury verdict award to a reasonable amount? Does anyone understand that sometimes jurors and judges make errors in judgment and corresponding awards, and that we have an appeals process to correct what would otherwise stand as an error? The corrections never seem to make the newspaper. The point is that lawyers have a job to do, which is to represent their clients with an appropriate and ethical zeal and within the boundaries of the law and the rules of professional responsibility. Mistakes occur in the system, and these should be addressed; but that’s no reason to hang all lawyers out to dry.

Excerpted from “The Art of Lawyering,” by Paul M. Lisnek. Published by Sourcebooks © 2010. Used by permission.



Dr. Paul M. Lisnek is a nationally recognized Emmy-winning television and radio host, legal analyst, trial consultant, lawyer, and lecturer for bar associations, law firms, and the Justice Leadership Institute. He currently anchors “*Newsmaker*” and “*Political Update*” and is the political analyst for WGN-TV and CLTV.

Daily Journal

<p>Charles T. Munger Chairman of the Board J.P. Guerin Vice Chairman of the Board</p>	<p>Gerald L. Salzman Publisher / Editor-in-Chief Robert E. Work Publisher (1950-1986)</p>
<p>David Houston Editor</p>	
<p>Alexia Garamfalvi San Francisco Editor</p>	<p>Sharon Liang Legal Editor</p>
<p>Liz Enochs Associate Editor San Francisco</p>	<p>Pia Sarkar Associate Editor San Francisco</p>
<p>Christian Berthelsen Associate Editor Los Angeles</p>	<p>Michael Gottlieb Associate Editor Los Angeles</p>
<p>Evelyn Larrubia Associate Editor Los Angeles</p>	
<p>Aris Davoudian, Designer</p>	
<p>Los Angeles Staff Writers Pat Alston, Gabe Friedman, Evan George, Kari Hamanaka, Sandra Hernandez, Catherine Ho, Ciaran McEvoy, Susan McRae, Jean-Luc Renault, Anna Scott</p>	
<p>San Francisco Staff Writers Rebecca Beyer, Laura Ernde, Dhyana Levey, Sara Randazzo, Jill Redhage, John Roemer, Fiona Smith, Amy Yarbrough</p>	
<p>Bureau Staff Writers Craig Anderson, San Jose, Jason W. Armstrong, Riverside, Don J. DeBenedictis, Santa Ana, Pat Broderick, Mandy Jackson, San Diego, Lawrence Hurley, Washington D.C.</p>	
<p>Robert Levins, S. Todd Rogers, Photographers Lisa Kestenbaum, Carla Pineda Editorial Assistants</p>	
<p>Rulings Service Seena Nikravan, Rulings Editor Meryl Chambers, Verdicts and Settlements Editor Edward Chang, Genevieve Knoll Legal Writers</p>	
<p>Advertising Audrey L. Miller, Corporate Display Advertising Director Monica Smith, Los Angeles Account Manager Joel Hale, Michelle Kenyon, San Francisco Account Managers Kari Santos, Display Advertising Coordinator Nikki Delucchi, San Francisco Administrative Coordinator</p>	
<p>Art Department Kathy Cullen, Art Director</p>	
<p><small>The Daily Journal is a member of the Newspaper Association of America, California Newspaper Publishers Association, National Newspaper Association and Associated Press</small></p>	