



Gerson Smoger (2008-2009)

“There's not a choice other than to be optimistic. I think that our training as lawyers is no matter how bad the hand is dealt, we have developed skills to get around the bad deal and to win. I'm optimistic because we have a profession that allows us to push creativity.”

Neville Johnson: Who are you?

Gerson Smoger: Gerson Smoger.

I have a law firm called Smoger & Associates with offices in Dallas and in Berkeley.

[Neville: When did you first get involved with Public Justice?]

Gerson: Approximately 1995, 1996 as a board member. I was involved other than as a board member before that.

There were similar cases that were worked on that were within my specialty at that time and also was an interest of Public Justice. And I knew a lot of the attorneys there. But I wasn't a member until around '95 or '96, when somebody named [Len Schroeter](#), who was [on the board](#) -- since passed away -- Len asked me to come to a meeting where Mike Withey was the president.

[Neville: Then you, later on, held offices at Public Justice, didn't you?]

Gerson: Yes. Four different years I've been on just the executive committee. I've held every office -- secretary-treasurer or vice president, president-elect, president, and past president.

[Neville: Why did you join Public Justice?]

Gerson: I divide attorneys into two groups that do our profession: there's one group that found this as a way to earn a living and make money. Then there's another group, the other half, that were really public interest-minded lawyers that found when they did the kinds of work they were doing, they made money. Public Justice attracted those. Just people that had a public interest mindset, and a mindset for litigation as a way of improving society, and that's what the lawyers that I viewed, or met were involved with at Public Justice. So I wanted to be part of it.

[Neville: How did you became part of it, in the sense of the cases that you worked on?]

Gerson: I've written probably more amicus briefs for Public Justice cases than I imagine anybody else outside of the organization. I can start listing a lot of the amicus briefs: I've done them recently on our First Amendment issues related to farming. I did two for the US Supreme Court, and our US Supreme Court cases -- one that [Paul Bland argued with Home Depot](#), and the other one [Jen Bennett argued \[Oliveira v. New Prime, Inc.\]](#). Before that, I did have amicus briefs in 10 or more cases. Now sometimes I've written amicus briefs on behalf of Public Justice, other times I've written them for other organizations in support of Public Justice cases.

[Neville: Do you ever get compensated for these?]

Gerson: Never gotten compensated for any of them. And never asked.

[Neville: How can you afford to do this?]

Gerson: And this is true my entire career, I've always split 50% [of my] time working on something that would earn income and 50% of my time has always been free on nonprofit issues. It's actually a little more now.

[Neville: Have you been involved in cases at the trial court level with Public Justice?]

Gerson: Well, Public Justice itself doesn't try many cases. So I assisted in getting trial counsel and reviewing material in two different cases for Public Justice. One was in the [Asbestos case in St. Louis](#), and the other one was helping with preparation on the Seattle case when [we represented the people that protested in Seattle](#) [against the World Trade Organization in 1999] and were arrested.

They [substantially changed the law](#). Leslie Bailey and Mike Withey were the lead counsel on that. Mike asked me to come up for a weekend and go over all their strategy and review what they were going to do for trial. I flew up to Seattle for that, and then I assisted in getting counsel where we're stuck with -- our counsel had left for another case and I found counsel to try the case for us.

[Neville: You were the trial lawyer of the year one year.]

Gerson: I've been nominated twice and [I won once. That was in 2012 for Trial Lawyer of the Year](#).

The nomination was as part of a team. It was a very large team. In that case the lead trial attorney was Steve Tillery. I had worked on the case for a long time related to light cigarettes, and we had a [multi-billion-dollar verdict in Illinois that went up to the Illinois Supreme Court](#) twice and [ended up being taken away from us](#).

[Neville: That must have hurt. There's this time [you won for Trial Lawyer of the Year](#). What was that?]

Gerson: That was a case on behalf of 16 children in Missouri. I was the lead trial counsel in that case. I had worked on it a very long time for children exposed to lead at the largest and only remaining primary lead smelter in the United States. Kids were being poisoned, nobody had ever tried a case against them, and the [jury came back with the \\$358 million verdict](#) against the owners of the smelter.

[Neville: Where was that trial?]

Gerson: That was in St. Louis. At the time, it was the highest payable, verdict in the history of Missouri. The defendant had the resources to pay the verdict.

[Neville: Wow. Any other notable cases you've worked on that you can tell us?]

Gerson: I've worked on a lot of groundwater contamination and toxic cases related to air contamination. I've worked on a series of bank litigation, consumer fraud related to violation of banking rules related to the 2008 crisis. I was [lead counsel in the Agent Orange cases](#) trying to revive them. I argued that in the US Supreme Court.

[Neville: Wow. What was that like arguing in the Supreme Court?]

Gerson: I think the best advice I got was somebody that told me that they know enormous breadth of information, but they don't go very deep because there's so much stuff they have to know. So, a lot of it was-making sure that I explained facts. I actually enjoyed it. I had a great time arguing with them because it was like, you've got all these people peppering you with questions, but they don't know as much about it as I do, so it was fun. It's almost like teaching.

[Neville: Have you seen Public Justice evolve over the years?]

Gerson: I can say it's broadened and it's enlarged. The original Public Justice primarily was related to – it was founded on something I thought was very important – is to take cases that nobody else would take. And there are cases that can change and make change that aren't being taken by others, and that's what we did.

Nobody – Paul Bland, for instance, had this arbitration project. But when he started it, nobody was really fighting arbitration, and Public Justice did.

And we've done a lot of court secrecy --- when people really didn't think about hiding all these documents within the basis of courts. And that was something that aided the plaintiffs -- that was part of the plaintiffs' bar -- but those things actually could change things.

I've seen us broaden and narrow at the same time. We did a lot of preemption work. I'm not sure we're going to do as much as we once did, in terms of the way that lawsuits are being preempted by a misuse of federal legislation that was never intended to take the lawsuit away.

Neville: If Public Justice doesn't do a tremendous amount of trial work, what does Public Justice do?

Gerson: That's a tremendous amount. I go back to when we were co-counsel on the Title IX cases, against Brown University, and that was trial work. But, on the whole, we do appellate work. We assist people with appellate arguments they need to make, or we write amicus briefs or more often now -- we'll take over the case in the circuit or the state Supreme Court and we'll be the ones to argue it and to brief it.

In addition to that, In addition to that, I'll just answer the prior question. When I said broadening, we broaden into things like the Food Project, we broadened into the Prison Project of Leslie Bailey. We've taken on new areas that we didn't have before.

[Neville: Do you think that courts recognize Public Justice as a important player when you're arguing in the court of appeal? Does it make a difference that Public Justice has its name on the briefs and is arguing?]

Gerson: It definitely makes a difference because they view us as a very significant nonprofit organization -- and more importantly, that is going to present quality, legal work that has to be reviewed.

There are nonprofit organizations that are very conservative and they throw basically junk at every case. I know that the judges see those, and they put them aside and they don't bother to read them because they're not going to get quality work.

If Public Justice puts a brief in a case, it's almost always going to get read because they know it's going to be quality work and it's important for them to review in coming to their decision.

[Neville: Do amicus briefs really make a difference, when would they?]

Gerson: I can tell you, personally -- in the Public Justice case that Paul Bland argued in the [Home Depot case, the first two questions out of Justice Kagan](#) came directly from my brief. I recognized the questions because I asked them that way and she obviously read them and they were stumpers for the other side so he couldn't answer them. And so yes, they can make a difference, and they can give information to the court.

[Neville: It seems to me that Public Justice is fulfilling a need in society that really fills in the hole of something the government ought to be doing or watching out for. Is that right?]

Gerson: It's hard to say what the government does or watches out for -- but we see that the government changes. If you flip a coin every four years, you can decide whether the Public Justice briefing will agree with what the government's briefing is or disagree. It's very hard. There are some things that are political and not purely legal. I think we supply the underlying legal basis for the positions that we take. The government doesn't always

have the same interests that we do, for a variety of reasons. They might be coming in on a brief where they have to follow the requirements of the DOJ, [which] represents all of the other parts of the administration. So if Treasury has a brief for court, DOJ represents Treasury. And Treasury's interests related to banks might be different than we believe the consumer interest is for banks because Treasury has to look at the industry of the bank, at the same time they look at the consumers. We are looking at what the consumer interest is and if the consumer interests are violated. It's important to give a very strong voice to those people that we represent, which are essentially individuals and consumers and not the corporations or the big businesses.

[Neville: Talk about the lawyers and the staff at Public Justice. How good are they?]

Gerson: Some are good. Some are great. Right now, Leslie Bruckner, is great. She's gotten to a point where she's extremely well respected everywhere. [Adele] Kimmel is great. You have different lawyers at different times. It's very hard to be great earlier on in your career. It takes a while to have experience and be in enough courts that part of "great" is does the court immediately respect you when you walk into that court? Do they know who they are? Do you have a reputation behind you? You might argue just as well. You might brief just as well, but you come with a certain amount of respect.

Some of our lawyers have developed that. Jim Hecker argues anything related to the air or water cases that he brings, every court knows it's Jim Hecker walking in there and he's going to know more than we do.

[Neville: What's your opinion of justice as a general concept? Do you feel that it's tougher now than yesteryear in obtaining fair results for the public, or is it just a fluid situation that depends on the case?]

Gerson: Both. The reason I say that is, I try cases and I do a lot of appellate work. I've done the entire gamut. I'll say that the irony is that conservative jurors are more punitive than liberal jurors are, as a whole. If you have a really compelling fact scenario that gets people really upset, the conservative jurors might punish more than liberal jurors who are willing to give more leeway to it.

But, on the whole, if you're talking about the judges, there's been a massive effort to change the nature of who's judging cases -- something I've worked on in both the Federal Courts and in the Republican State Courts.

[Neville: Do you feel that justice is thwarted for political reasons sometimes?]

Gerson: I think it's incumbent on people, even if they have conservative jurors, to know where their jurist is coming from and make your position palatable to their underlying beliefs. Sometimes it's impossible.

[Neville: Let's talk about class actions. The wings have been clipped, haven't they?]

Gerson: I debated in the US Congress before several senators against the other side on the problems of the [Class Action Fairness Act \[CAFA\]](#). I think the final Act answered some of the things in terms of mass torts, but the desire, it was clear -- if you control the appointments to the federal court and you have conservative judges who are basically corporatists, then the problem was you had to get the cases to them.

The purpose of CAFA was to get cases to the judges that they were appointing and they've continued to do that. Arbitration is a rule that has been made entirely by the courts.

I briefed the initiation and the origination of the [Federal Arbitration Act](#) in-depth in [one of my amicus briefs for Public Justice](#) and showed that it was not anything near what the courts have made of it. If you actually did what I did, which was to go back and look at the original historical documents, the original notes, and the original meetings on it and show that they had completely misinterpreted how they were viewing it. They created a body of their own history on the Federal Arbitration Act and as a result, stuffed everything to it.

Now, I'll say that fabulous argument by [Jenn Bennett and the incredible briefing by Public Justice, we won the Oliveira \[v. New Prime\] case](#). The *Oliveira* case set out transportation workers from the Federal Arbitration Act. I will tell you categorically that all workers were meant to be out of that Act. That the meetings and the deals that were done at the time with labor were to keep them out and it's been completely historically misinterpreted. But because of the way the Supreme Court has interpreted it, then we very excellently carved out the least part of it, which was transportation workers because there was absolutely no question that they were never part of it.

[Neville: Talk about the opposition and, in particular, the International or National Chamber of Commerce.]

Gerson: You have to distinguish that because local chambers of commerce are very different from the national chamber. There's often been local chambers that have been on our side on issues where the local businesses were being gored by large businesses or credit card companies. The national chamber is really a front for a few large corporations, in my opinion.

I co-wrote a series with [Senator Sheldon Whitehouse](#) on climate change. We've gone into how much the Chamber and those organizations have used [Citizens United](#) and used their lobbying to undercut any legislation. Then they have the gall to go in the court and say that the courts should leave it up to the legislature that they spent millions of dollars lobbying [to undercut any legislation].

[Neville: Is Public Justice doing the best job of protecting consumers vis-a-vis any other entity or even governmental entity, in your opinion?]

Gerson: Within our lane -- which I'm very pleased that we have a lane -- our lane is through the courts. There are other organizations that are very powerful for organizing people or for lobbying in different ports. That's not our lane. Our lane is how well can we protect consumers in courts? We're probably the best there is at doing that within the judicial system.

[Neville: What is the future of Public Justice as you see it?]

Gerson: I think that we have a lot in the right direction. I think that we have to develop one thing -- I'm being frank in looking at this. I think that our administrative and organization were really good. I think that some of our really senior lawyers are getting to the point where they're making way and I'm hoping we build in a way off of their legacies because we have fabulous lawyers, they're senior. I think Jim Hacker is a good example at the Environmental Enforcement Project.

Jim is unbelievable. He's unmatched in the United States. He's also, I think, going down to halftime and we have to figure out -- for all of our projects -- how we replace or buttress people doing it, with time, which is true of any organization.

[Neville: How does Public Justice exist? What sustains it?]

Gerson: This is the difference between Public Justice and any other organization. I'm on the board of six different organizations, so I know the budgets and we have the exist on the basis almost entirely of gifts from members. The bulk of our budget is its membership and special gifts from members. What's great about that is that they're not tied gifts. If you exist in a world where everything is coming from foundations, then the foundation's tie and say exactly what you can do with the gift and they also don't really pay for your overhead.

Even though you're using the money for what you want, you might actually be losing money because they're not compensating your overhead fully. That's one of the problems. With Public Justice, the non-tied gifts, so the leadership can allocate their use, which really helps a lot. And it makes Public Justice unique.

[Neville: Is there any one case in particular that stands out in your career in connection with Public Justice?]

Gerson: There's a lot. I would say [Brown University because we changed the nature of Title IX](#). Another one is Jim Hecker.

[Neville: Wait, let me stop you there. You need to explain what that case is about.]

Gerson: We took a case against Brown where there was unequal treatment between men's athletics and women's athletics. It was substantially unequal. We took that all the way and set precedence on how treatment between men and women would be dealt with. [At one of our galas, \[tennis star\] Billy Jean King was there](#) to say what a great difference we've made.

If you take what's happening in West Virginia, we've single-handedly stopped more pollution and more mountain tops from being taken off than anybody else in the country in [Jim Hecker's mountain top removal litigation](#).

There are truck drivers all over the country in *Oliveira*, which I did work on, that aren't being forced into sub-wage arbitration because the Supreme Court has ruled that they're not bound by federal arbitration. There are a number of things that I've worked on. The one in Seattle, Mike Withy was the lead. We've restructured the Seattle Police Department on how they dealt with protests and that was extremely important. I can keep going.

[Neville: Has it been fun or just rewarding or both?]

Gerson: Both. Sometimes it's not fun at all when you're sitting there. When you're sitting doing the work and reading all those cases. I wrote one for Public Justice - it was the [only brief on any side ever submitted in the history of the New England Journal of Medicine](#) with every editor of the journal. I wrote that brief and I killed myself writing that brief because it was being written for 11 editors. Oh, actually, I had 15 editors on that brief.

That was a brief on preemption related to whether brand-name pharmaceuticals had the right to preemption. I wrote the New England Journal of Medicine's brief because the editors of the journal were afraid that all that was going to happen was the pharmaceutical companies that were making these drugs would get off the hook, and the only part of it would be doctors. It was tremendously unfair, given what they knew about all the things hidden in clinical trials. I wrote really intensive explanations of three different ones. One was [Fen-Phen](#) at the time. All the new England Journal all signed on. They had never before ever -- and I don't think since -- taken a side before the Supreme Court saying we want this side to win. That I wrote [for Public Justice].

[Neville: You seem optimistic about the future of our country and our legal systems. Is that fair?]

Gerson: Yes. There's not a choice other than to be optimistic. I think that our training as lawyers is no matter how bad the hand is dealt, we have developed skills to get around the bad deal and to win.