

THE PRACTICE

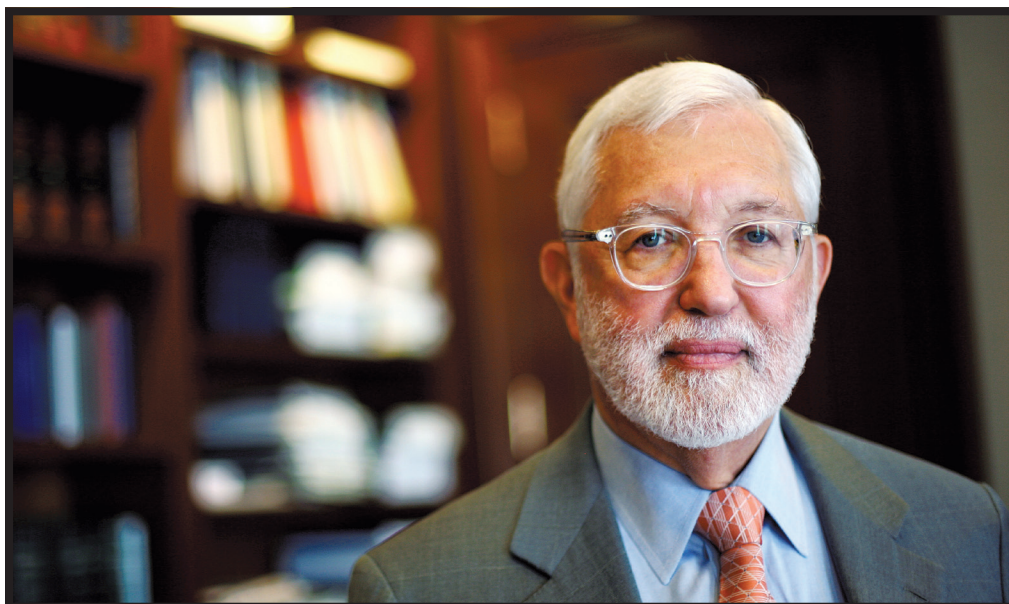
When Both Sides Agree, But the Dispute Lives On

Appeals courts tap amicus counsel even if opposing lawyers see eye-to-eye or if one party bails out.

BY AARON S. BAYER

What happens when neither party to an appeal supports the decision of the lower court or when the prevailing party abandons the position it successfully advanced below? In these circumstances, federal appellate courts often appoint independent amicus counsel to get the benefit of an adversarial process on appeal.

This situation occurred in June in a case before the U.S. Court of Appeals for the Second Circuit involving a district court decision that rejected a settlement agreement between the U.S. Securities and Exchange Commission and Citigroup Inc. In that case, the SEC sued Citigroup for making misrepresentations about a fund that invested in housing-related subprime securities. When the housing market collapsed, the fund's investors lost millions while Citigroup profited, in effect, from having bet against its own fund. U.S. District Judge Jed Rakoff found the SEC's proposed consent decree inadequate and contrary to the public interest and refused to approve it. Both parties sought



JUDGE JED RAKOFF: The U.S. Court of Appeals for the Second Circuit appointed amicus counsel to defend his decision in a case against Citigroup.

reversal on appeal, so the Second Circuit appointed amicus counsel to defend the district court's decision. (The circuit ultimately reversed, holding that Rakoff had abused his discretion by not deferring sufficiently to the SEC's judgment in evaluating the proposed settlement.)

The practice of appointing amicus counsel is used more often than one might think. Many of these cases involve appeals, like the one in *SEC v. Citigroup*, in which the

district court has rejected a position advanced by both parties. In a 2010 appeal, the U.S. Court of Appeals for the Fourth Circuit reviewed (and ultimately reversed) a district court decision to reduce an attorney's contingency fee from one-third of an \$18 million personal injury settlement to just 3 percent of that amount. The circuit appointed amicus counsel to defend the decision below, which neither party supported.

A similar situation arose in the World Trade Center disaster site litigation. That case involved 10,000 consolidated claims brought on behalf of workers who inhaled debris while cleaning up the WTC site. Part of the settlement involved an award of supplemental attorney fees based on bonus and contingency payments to the plaintiffs. The district court denied those additional fees, holding that the overall 25 percent contingency fee of \$187 million was sufficient. The Second Circuit appointed amicus counsel to argue in support of the district court fee decision and ultimately upheld it.

The federal circuits also have appointed amicus counsel when the prevailing party confesses error below and instead sides with the appellant. This situation typically arises in criminal appeals, when the government abandons an earlier position and supports the defendant's appeal. In a 2010 appeal, the U.S. Court of Appeals for the Seventh Circuit addressed an issue of first impression: whether a district court violated the federal rules of criminal procedure when it presided over a home-release revocation hearing by video conference from Key West, Fla. A court-appointed amicus counsel defended the district court's decision because the government conceded on appeal that the district court had violated the federal rules. Similarly, the government reversed its posi-

tion in a 2009 Second Circuit appeal and would not defend a district court's refusal to permanently seal a criminal defendant's sentencing transcript. The circuit appointed amicus counsel "so that the appeal could be considered in an adversarial context."

In some cases, courts appoint amicus counsel because the "prevailing party" never appeared below and is therefore not present to defend the judgment on appeal. The U.S. Court of Appeals for the D.C. Circuit confronted this situation in *Cicippio-Puleo v. Islamic Republic of Iran*, in which relatives of a hostage sued Iran under the Foreign Sovereign Immunities Act. The district court dismissed the claims as unauthorized by that act. Iran, however, never entered an appearance in the litigation and was not a party to the appeal, so the circuit appointed amicus counsel to defend the decision below.

These federal circuit cases are consistent with the U.S. Supreme Court's long-standing practice of appointing amicus counsel—usually former Supreme Court law clerks—to defend a lower court decision or to address an argument not supported by any party before the court. In the 2012 decision on the Affordable Care Act, for example, the court appointed amicus counsel to argue that the individual health insurance mandate is severable from the rest of

the act because no party advocated that position before the court.

Since the practice began in 1955, the Supreme Court has averaged more than one appointment of amicus counsel per term. In a seminal 2011 Stanford Law Review article, Brian Goldman argued that some amicus appointments raise concerns about separation of powers and whether the court exceeds its traditional role of deciding only actual "cases or controversies."

One case in particular stands out: the court's 1982 decision in *Bob Jones University v. United States*. In that case, the Internal Revenue Service revoked the tax-exempt status of a racially discriminatory university. By the time the case got to the Supreme Court, however, President Reagan had been elected and the IRS had changed its position. The government moved for summary reversal on the merits. The court appointed William Coleman Jr., former secretary of transportation, to defend the decision below. Goldman and others have questioned whether the court exceeded its proper role, by effectively overriding an executive branch political decision that flowed from a national election.

In a 1993 patent decision, Justice Antonin Scalia summed up the reason for appointing amicus counsel. "Harmony is heartwarming," he wrote, but the absence of adversary presentation "may encourage us to make bad law."



AARON S. BAYER is a member of the appellate and complex legal issues group at Wiggin and Dana in Hartford. Prior to joining the firm, he served as deputy attorney general of Connecticut and counsel to U.S. Senator Joseph Lieberman. He can be reached at abayer@wiggin.com.