

Unless Your Name is Mark Fleming, Don't Even Complain About Being Busy This Week

The Wilmer Cutler Pickering Hale and Dorr partner is arguing three complex IP cases in four days this week before the Federal Circuit. How is he handling the challenge?

By Jenna Greene
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Think you've got a tough week ahead? It's almost certainly nothing compared to Mark Fleming's.

The Wilmer Cutler Pickering Hale and Dorr partner is arguing an appeal today before the U.S. Court of Appeals for the Federal Circuit. He'll be back before the Federal Circuit on Wednesday in a completely unrelated case. And again on Thursday, in yet another separate appeal.

"I guess I should be grateful they're not all on the same day," Fleming said, sounding remarkably sanguine about the back-to-back-to-back cases—all richly detailed IP disputes that require command of extensive trial records, complex technology and obscure points of civil procedure.

He got word of the calendaring on Sept. 20. When notice of the first date came in around 2 pm, he shrugged. "OK, that was about what I expected," he recalled thinking. But 30 minutes later came the second notice, and then the third—with each case set for the first week of November.

So ... how did he feel? "Shock," he said. (Personally, I could think of another word that starts with 's'—a four-letter one ...)

What about his clients—what was their reaction?

"One laughed out loud," Fleming said. "Another said, 'That's what happens when you're good at your job.'"



Mark Fleming, with Wilmer Cutler Pickering Hale & Dorr

He asked all three if they'd rather another Wilmer appellate ace handle their argument. (The firm's roster includes Seth Waxman, after all.) "They all said no, full speed ahead," recalled Fleming, who is vice chair of Wilmer's appellate and Supreme Court litigation practice.

He's a veteran appellate litigator, appearing as counsel in more than 150 appeals and personally arguing 36 of them, including 13 before the Federal Circuit. Just not in the same week.

On Monday, he's representing Ariosa Diagnostics/Roche Molecular Systems Inc. in a patent fight over prenatal DNA testing technology. Fleming faces off against Verinata Health/Illumina Inc. and

its counsel from Weil, Gotshal & Manges led by Edward Reines and Derek Walter.

A jury in San Francisco federal court last year sided with Fleming's opponent, awarding \$27 million in damages. Fleming wants the Federal Circuit to reverse or vacate the trial court's judgment of liability, arguing in court papers that the asserted claims are invalid and Roche's Harmony test was designed around them anyway. Verinata wants the Federal Circuit to issue a permanent injunction to prevent Roche from continuing to infringe.

After Monday's argument, Fleming gets a one-day break. Then he's back again on Wednesday for plaintiff Medtronic, seeking a declaratory judgment in a long-running licensing dispute involving medical devices used in spinal surgery.

But for now, the fight in *Warsaw Orthopedic et al v. Rick C. Sasso, M.D.* isn't about the technology—it's about jurisdiction. Fleming will argue that underlying dispute should be resolved in federal district court, not Indiana state court.

He'll cap off the week with *Crane Security Technologies, Inc. v. Rolling Optics AB* on Thursday.

Fleming represents Crane, which makes special paper for printing currency. At issue: technology that's used in the U.S. \$100 bill and banknotes around the world.

Crane won handily in U.S. District Court in Massachusetts. On summary judgment, the court held that all of Rolling Optics accused products infringed Crane's patents. A jury took less than three hours to reject the Sweden-based company's remaining invalidity defenses.

On appeal, Fleming wants the court to award Crane attorneys' fees for post-Markman

proceedings. Rolling Optics, represented by Pierce Atwood, wants its trial court losses reversed.

Most lawyers would have their hands full arguing any one of these cases by itself—let alone all three in four days. How has Fleming approached it?

"I got some very good advice from [Wilmer partner] Bill Lee, who said to prep all three cases in parallel," Fleming said. That way, he'd be fluent at switching between them.

And Waxman, who served as solicitor general from 1997 to 2001, advised him to plan out every day from the calendaring notice to oral argument. "The first thing I did was to schedule moot courts," Fleming said—he's done six, two per case.

But he also built in some down time. "You can't just do this," he said he said of his work. There needs to be an opportunity for it all to sink in—and hey maybe see your family too. (His kids are 14 and 12.)

Fleming admitted he often sleeps badly the night before an oral argument. But in the morning, he finds value in sticking with his normal routine—a 30-minute workout, a good breakfast, a little time outside if possible. "The morning of oral arguments is not the time to do things differently," he said.

He's also full of appreciation for his colleagues who have worked with him on the cases and supported him at every turn. "Each of these teams is immensely talented," he said.

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