Boston Bar Association

Tipping the Scales

Mark Fleming: "Disagreeing Without Being a Jerk Is the Hallmark of a Really Good Advocate"

Mark Fleming is a partner in Wilmer Hale's Litigation/Controversy Department, and a member of the Appellate and Supreme Court Litigation Practice Group. His practice focuses on appellate litigation and other complex litigation matters. Mark has argued cases before the Supreme Court of the United States, the US Courts of Appeals for the First, Third, Eighth, Ninth, District of Columbia, and Federal Circuits and the Massachusetts Supreme Judicial Court and Appeals Court. Mark's prior experience includes

clerkships with the Honorable David H. Souter of the Supreme Court of the United States, the Honorable Michael Boudin of the US Court of Appeals for the First Circuit, and the Honorable John C. Major of the Supreme Court of Canada. Mark also served as an associate legal officer in the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia. A member of the BBA's Amicus Committee since 2007, he became Co-Chair starting in 2013. He also served as Co-Chair of the International Law Section from 2007-2009.

1. **You will soon be arguing your third case before the Supreme Court, which very few attorneys have the opportunity to do. Can you explain a little bit about the case, and how you have mentally prepared for it? What have you learned with each new appearance in front of the Court?**

It's an immigration case involving the family-based visa system. Imagine that your brother is a U.S. citizen and you're a foreign citizen – your brother can petition for you to come into the country. If the petition is granted, you can bring your spouse and any children younger than 21 with you as derivatives, but often since lines to get visas are so long, children under 21 may turn 21 while you're waiting and then can't come in as derivatives. When you get a green card you can petition for your adult children to come to the country. But at that point, under the prior law, the clock was reset to zero, so to speak. The child effectively lost her 'place' in line for the visa and had to restart the process, which can take years. So you face a difficult choice – do you come into country and leave your kids behind, or do you just give up on coming at all?

Congress tried to fix this in 2002 with the Child Status Protection Act, which provided that children who "age out" can keep their place in line as adults – basically that they get credit for the time they have already waited. But agencies have been construing the law in a narrow way so it will not apply to people who are coming in as derivatives on petitions filed by U.S. citizens. The Fifth Circuit in Texas held that these agencies were acting contrary to statute, and by a 6-5 vote, so did the Ninth Circuit in California; the Second Circuit in New York said that it was fine. Our clients are the winners in the California case; the Obama administration asked the Supreme Court to take the case. In addition to filing our clients' brief on the merits, we also worked with counsel for some "friends of the court" who filed amicus briefs supporting us. A brief by former and current Senators who were in the Senate (many on the Judiciary Committee) when the law was passed said that their intention in crafting the law was aligned with our position. It was signed by three Democratic senators and three Republican – including some really well-known figures, like Senator John McCain and Senator Dianne Feinstein – and for them to come together to speak with one voice is very telling. While I think we are right on the merits, I expect the oral argument to be challenging;

the Administration is represented by the Office of the Solicitor General, which always comes to the Court with real credibility.

My preparation, as with any case, is to practice as much as I can. I try to figure out what points I want to do my best to get out in that half hour before the Court. This includes having moot courts, where I ask people who are not familiar with the case to read the briefs and ask hard questions. The team that has been working with me for months critiques my answers. And then I stand in my office and talk out the case to myself. Overall, I try to get used to what it's like, either being barraged by questions or having uninterrupted time to speak – it's rare in front of that bench, but sometimes it does happen.

Honestly, I don't think I'm any less nervous now than I was the first time. My first Supreme Court argument was a patent case, and our opponents were the U.S. government and Stanford University, both of which had very capable advocates. I was a rookie doing it for the first time. It's not as though you ever stop worrying about getting a question that trips you up – the fear is always there. The only thing I can do is to try to know a case inside and out, so that I can talk to Justices in a conversational manner and given them the information that's helpful to them in deciding a case, hopefully in our favor.

2. During your clerkship with Justice Souter, what did you learn from him about leadership? How did this inform the way you approach your work?

On my first day on the job, I arrived at the Court's entrance – the guards didn't know who I was, and I had no badge since I was just starting work as law clerk. One guard asked, "Who are you working for?" I answered, "Justice Souter." He said, "Ah, he's the best of the nine." I always remembered that, and I understood why as I continued, because Justice Souter was somebody who would take the time to talk to everybody he encountered. He was polite, gentlemanly, and genuinely interested in every conversation – he remembered people's names and details of their lives. That struck me as a thing he was able to do better than others, and because of it, he would always have people willing to stretch and help him. Even though people might disagree with him, they would never dislike him. I can never be as good at it as he is, but that taught me the importance of doing your best to be nice, even though the nature of the profession can be confrontational. Our job is to clash and disagree – doing it without being a jerk is the hallmark is a really good advocate. People who inspire the best work in their teams do it by being respectful and understanding.

In another instance, when I was thinking of what I wanted to do after my clerkship ended, I asked Justice Souter if he could give any advice about what I should be considering. He

suggested that we get lunch in his office and talk. We did, and I was amazed not only about the amount of time he took, but also the perspective he offered. I was seriously considering living in Washington and joining a firm that practices in front of the Supreme Court often, and he told me, "You should think hard about whether you want to live in Washington." One of the lessons he was keen to impart was that you do a lot better if you're from somewhere else. Not only did he take the time to give me this advice, he explained why he felt this way, and his reasons were quite compelling in many ways. It was an easy sell for me to choose Boston over Washington, but it was good to be reminded that place matters. I was very lucky that I was able to work at WilmerHale, where I could live in Boston, but work on cases—like the Child Status Protection Act case—that have a solid Washington component.

3. Knowing that amicus briefs are going to be representative of the entire BBA, what are the dos and don'ts for leading a group with diverse backgrounds to support one ideology?

The most important thing is to get a clear position formulated as concretely as possible early on. If you can do that, then you can go to relevant Sections for input, and then present the position to the Executive Committee and Council. The issues for which we produce amicus briefs are usually ones where the legal profession has a pretty clear interest one way or the other, and it's usually cases where the BBA has taken a position before, or it's clear what position it might want to take. We've had some situations where the Council couldn't come to an agreement, so in the end, the proposal was dropped and nothing was done – and that's fine. What's most difficult is when everyone thinks a brief should be filed, but no one has thought of what it should actually say. As a Committee, we have instituted procedures about how a proposal is brought, and to make sure there's an understanding of what position the BBA is to take. It is the Committee's job to flesh that out, identify counsel as possible authors, and make sure there's enough time to make outline or draft, so that it's a proposal that the Council and Executive Committee can evaluate fully.

4. Is there any other advice or experience about leadership that you would want to share?

There is one thing that I think we're in danger of losing in the profession: because people work so hard and are so tethered to their devices, it's harder and harder to get out and just talk to people. You don't have to go back that far to find senior lawyers who say that, in days past, you used to go over to a club or bar association and talk about issues of relevance to profession. This is not the case as much as it used to be, and it's something we need to be careful not to lose. Whenever you are sitting talking to intelligent people who share an

interest in law, far more often than not, you end up learning something of value to you in your practice. That type of interaction is not something our generation makes time for as much anymore, but we really should.

***Tipping the Scales* is a blog by the Boston Bar Association.**