



Mark C. Fleming

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Mark Fleming is co-chair of WilmerHale's Appellate and Supreme Court Litigation Practice. He is an accomplished and well-regarded litigator who has appeared in more than 275 appellate cases and personally presented oral argument in 62 of them, including eight oral arguments before the Supreme Court of the United States. He has also argued before the Supreme Judicial Court of Massachusetts, the Massachusetts Appeals Court, and the First, Second, Third, Eighth, Ninth, Tenth, Federal, and District of Columbia Circuits.

A former US Supreme Court clerk, Mr. Fleming has filed briefs in more than 50 US Supreme Court cases on topics such as patent law, immigration, criminal law and constitutional law. Mr. Fleming argues frequently in the Federal Circuit in patent cases involving various technologies and legal issues. In November 2019, he argued three complex Federal Circuit appeals for different clients in a single week. And in June 2022, he won vacatur of the largest patent infringement judgment in history, which caused *Litigation Daily* to recognize him as "Litigator of the Week." And in April 2023, he received that honor again as part of the WilmerHale team that convinced the Federal Circuit to vacate a patent infringement judgment of over \$500 million.

Mr. Fleming's broad-based appellate experience covers numerous subject areas, ranging from patent law, securities and complex business disputes to real estate, antitrust and tax. His clients include leading companies in the fields of medical devices, life sciences, biotechnology, and pharmaceuticals, as well as high-technology industries including semiconductors, smartphones, online storage and processing, and connectivity. He also maintains an active pro bono practice, particularly in matters involving immigration law, where he has argued and won several high-profile Supreme Court cases.

In 2023, Massachusetts Governor Maura Healey appointed Mr. Fleming to be vice-chair of the Judicial Nominating Commission, which reviews all applications for judicial office in Massachusetts.

Mr. Fleming previously served as a law clerk to the Honorable David H. Souter of the Supreme Court, the Honorable Michael Boudin of the First Circuit, and the Honorable John C. Major of the

Supreme Court of Canada. Mr. Fleming also served as an associate legal officer in the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.

Professional Activities

- Vice-Chair, Judicial Nominating Commission of Massachusetts
- Fellow and Board Member, American Academy of Appellate Lawyers
- Member, American Law Institute
- Member, International Association of Defense Counsel
- Member, Massachusetts Joint Bar Committee
- Advisory Board Member, South Asian Bar Association of Greater Boston
- Advisor, American Law Institute for Restatement of the Law Third, Conflict of Laws Project
- Former Chair, Boston Bar Association Council Nominating Committee
- Former Member, Boston Bar Association Council
- Former Member, Boston Bar Association Finance Committee
- Former Chair, Boston Bar Association Amicus Committee

Experience

SUPREME COURT

- *Mathis v. United States* (2016): Mr. Fleming argued and won a major criminal sentencing case in the Supreme Court, which also has important consequences for immigration law. He had previously argued and won the same issue in the en banc Ninth Circuit (*Almanza-Arenas v. Lynch* (2015)). Transcript of oral argument available [here](#).
- *Reyes Mata v. Lynch* (2014): Mr. Fleming argued and won a significant Supreme Court immigration case that confirmed the right of noncitizens to seek equitable tolling of the time for moving to reopen a removal proceeding due to ineffective assistance of counsel. Transcript of oral argument available [here](#).
- *Stanford University v. Roche Molecular Systems* (2011): Mr. Fleming argued and won a closely-watched Supreme Court case regarding the effect of the Bayh-Dole Act on patent assignments. In an opinion by Chief Justice Roberts, the Court ruled 7-2 in favor of our client Roche. This is the first time that the Supreme Court has affirmed the Federal Circuit's judgment in a patent case when the United States government has urged reversal. Transcript of oral argument available [here](#).
- *Judulang v. Holder* (2011): Mr. Fleming argued and won a Supreme Court case challenging a policy of the Board of Immigration Appeals (BIA) denying certain lawful permanent residents the opportunity to seek relief from deportation. Although all but one federal court of appeals had upheld the BIA's policy, the Supreme Court, in a unanimous decision, described the BIA's approach as "headscratching," compared it to a "coin flip," and invalidated it as "arbitrary and capricious"—an unprecedented result in an immigration case. Transcript of oral argument available [here](#). The American Immigration Lawyers Association awarded Mr. Fleming its 2012 Jack Wasserman Memorial Award for Excellence in Litigation in the Field of Immigration Law for his work on this matter.

US COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND OTHER US COURT OF APPEALS CASES

- *Accelaron, LLC v. Dell Inc.* (2023): Mr. Fleming argued and won an appeal following a district court trial involving computer server technology.
- *Centripetal Networks v. Cisco Systems* (2022): Mr. Fleming argued and won vacatur of a \$2.75 billion patent infringement judgment—the largest in history—by convincing the Federal Circuit that the district judge was statutorily disqualified from deciding the case.
- *Intel Corporation v. VLSI Technology* (2021): Mr. Fleming argued and won a patent appeal involving power consumption in computer processors, in which the court reversed a decision of the Patent Trial and Appeal Board that previously sustained patent claims asserted by VLSI Technology.
- *Intellectual Ventures v. Unified Patents* (2020): Mr. Fleming argued and won a patent appeal involving database caching technology, in which the court affirmed the unpatentability of patent claims asserted by Intellectual Ventures.
- *Crane Security Technologies v. Rolling Optics* (2019): Mr. Fleming argued and won an appeal in a complex patent case involving anticounterfeiting technology in currency.

- *Slot Speaker Technologies v. Apple* (2019): Mr. Fleming argued and won an appeal in a patent case involving the design of speakers in smartphones.
- *Medtronic, Inc. v. Barry* (2018): Mr. Fleming argued and won an appeal in which the Federal Circuit, in a published opinion, remanded a decision of the Patent Trial and Appeal Board regarding a reference's public availability as invalidating prior art in an *inter partes* review involving spinal surgery techniques.
- *01 Communique Laboratory v. Citrix Online* (2018): Mr. Fleming argued and won a case involving remote access technology, in which the Federal Circuit clarified that a defendant in a patent infringement case may permissibly argue that, if the patent covers the accused technology, it must also cover the prior art.
- *Braintree Laboratories v. Breckenridge Pharmaceutical* (2017): Mr. Fleming argued and won a significant victory for Braintree Laboratories, when the Federal Circuit reversed a district court's grant of summary judgment of noninfringement for Breckenridge Pharmaceutical and remanded with instructions to enter judgment in Braintree's favor. This Hatch-Waxman matter involved a patent owned by Braintree pertaining to its product SUPREP, a highly successful product designed to cleanse the colon safely before a colonoscopy.
- *L.S. v. Webloyalty.com, Inc.* (Second Circuit, 2020): Mr. Fleming argued and won a Second Circuit decision raising an issue of first impression in any court of appeals: interpretation of the Electronic Fund Transfer Act's requirement that e-commerce companies provide a "copy" of a customer's "authorization" for an electronic transfer of funds.
- *Lenox MacLaren Surgical v. Medtronic, Inc.* (Tenth Circuit, 2017): Mr. Fleming argued and won a Tenth Circuit appeal involving antitrust claims brought against Medtronic by a former supplier.
- *Almanza-Arenas v. Lynch* (en banc Ninth Circuit, 2015): Mr. Fleming argued and won an important immigration case, in which the en banc Ninth Circuit ruled unanimously that a lawful permanent resident was eligible for cancellation of removal because a criminal conviction did not disqualify him under the "categorical approach." The following year, Mr. Fleming convinced the Supreme Court to adopt the Ninth Circuit's rule in *Mathis v. United States* (2016), which changed the law applicable to hundreds of criminal sentencing cases and immigration cases.

MASSACHUSETTS APPEALS

- *Nemirovsky v. Daikin North America, LLC* (Mass. 2021): Mr. Fleming convinced Massachusetts' highest court to confirm that a supplier of component parts cannot be held liable for a defect in a larger system into which the components are installed, resulting in vacatur of a \$10 million products liability judgment against a supplier of components for a residential heating and cooling system.
- *Hatt v. McGraw* (Mass. App. Ct. 2018): Mr. Fleming successfully defended a museum's board against an effort by museum members to overturn the board's decisions regarding museum governance.
- *New England Biolabs v. Picone* (Mass. App. Ct. 2015): Mr. Fleming successfully defended the executives of a Massachusetts startup against accusations of trade secret misappropriation.
- *White v. Hartigan* (Mass. Supreme Judicial Ct. 2013): Mr. Fleming successfully argued an appeal of a Land Court decision regarding rights to a beach on Martha's Vineyard.
- *Brewster Wallcovering v. Blue Mountain Wallcoverings* (Mass. App. Ct. 2007): Mr.

Fleming argued and won an appeal by a Canadian wallpaper manufacturer from one of the largest jury verdicts in Massachusetts in 2003.

Recognition



Litigation Star

Benchmark Litigation

2023 AND 2024



Litigator of the Week

Litigation Daily

2022



Immigration Law Trailblazer

The National Law Journal

2020

- Honored in the Social Impact category of *The American Lawyer's* New England Legal Awards.
- Selected by peers for inclusion in *Best Lawyers in America* for appellate practice in 2023.
- Selected by *Benchmark Litigation* as a "Litigation Star" (2023 and 2024).
- Named to *Boston Magazine's* Top Lawyers list in 2021–2023 in the area of appellate law.
- Named a "Massachusetts Super Lawyer" for appellate litigation (2016–2023), and was previously recognized as a "Rising Star" (2007–2013).
- Named an Immigration Law Trailblazer by *The National Law Journal* (2020).
- Named to the Lawdragon 500 Leading Litigators in America list.
- Recognized along with the firm with the Immigrant Defense Project's Champion of Justice Award for work in the area of immigrant rights, including on pro bono cases *Judulang v. Holder* and *Mathis v. United States* (2018).
- Recommended by *The Legal 500 United States* for his appellate practice (2016–2018).

- Selected by *Benchmark Litigation* as a "Future Star" (2011, 2012, 2013, 2017, 2021, 2022).
- Named a "Rising Star" in appellate law by *Law360* (2013), and selected to its list of "10 appellate lawyers under 40 to watch" (2010).
- Recipient of the American Immigration Lawyers Association's Jack Wasserman Memorial Award for Excellence in Litigation in the Field of Immigration Law in recognition of *Judulang v. Holder* (2012).
- Recognized by *Law360* as an "MVP of the Year" with distinction in Appellate law (2011).
- Named *National Law Journal's* Appellate Lawyer of the Week (2011).
- Recipient of the Boston Bar Association's "President's Award" in recognition of representation of Guantanamo Bay prisoners (2007).
- Named "Pro Bono Attorney of the Year" by the Political Asylum/ Immigration Representation Project (2001).

Credentials

EDUCATION

JD, Harvard Law School, 1997

magna cum laude

*Executive Editor and Editor,
Harvard Law Review*

BA, English and German,
University of King's College,
Dalhousie University, 1994

with honors

ADMISSIONS

Massachusetts

US Supreme Court

US Court of Appeals for the
Federal Circuit

US Court of Appeals for the
First Circuit

US Court of Appeals for the
Second Circuit

US Court of Appeals for the
Third Circuit

US Court of Appeals for the
Fourth Circuit

US Court of Appeals for the
Fifth Circuit

US Court of Appeals for the
Sixth Circuit

US Court of Appeals for the
Eighth Circuit

US Court of Appeals for the
Ninth Circuit

US Court of Appeals for the
Tenth Circuit

US Court of Appeals for the
District of Columbia Circuit

US District Court for the
District of Massachusetts

US District Court for the
Eastern District of Michigan

CLERKSHIPS

The Hon. David H. Souter, US
Supreme Court, 2002 - 2003

The Hon. John C. Major,
Supreme Court of Canada,
1999 - 2000

The Hon. Michael Boudin, US
Court of Appeals for the First
Circuit, 1997 - 1998

LANGUAGES

French

German

Spanish

Solutions

Appellate and Supreme Court
Litigation

International Arbitration

Education

Intellectual Property Litigation

Litigation

Life Sciences

Government and Regulatory
Litigation

Administrative Law

Trials