



2020 MVP

Paul Clement

Paul Clement of Kirkland & Ellis LLP, who argued his 100th case in front of the U.S. Supreme Court this year, scored a high court victory for an insurer in a \$12 billion case over obligations in the Affordable Care Act and represented Little Sisters of the Poor in a fight over religious exemptions to the ACA's contraception mandate, earning him a spot as one of Law360's 2020 Appellate MVPs.

His biggest accomplishment this year:

Clement told Law360 that his biggest case was the win he secured at the Supreme Court for Maine Community Health Options, in a suit looking to hold Congress to its promise to provide \$12 billion in reimbursement payments to health insurers.

Under the ACA, the federal government encouraged insurers to join in health insurance exchanges by

guaranteeing that the government could cover some of any losses, but Congress later added riders restricting the funds and refused payment.

Clement said one reason it was his biggest case was the stakes, as the \$12 billion at issue was a hefty sum.

"By that measure, there aren't too many more important cases that the Supreme Court, frankly, has ever had," he said. "It's just a hugely important case given the financial stakes."

The decision also meant the federal government is held to its obligations even after a change in the government, he said, adding it was "fascinating" to him that the issue had never reached the Supreme Court before this point.

The other element that he highlighted was the challenge in getting the high court to hear it in the first place, as it wasn't a "classic" Federal Circuit case and there was no circuit split that he could point to when seeking the court's review.

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“It really felt like that was a case where both the court’s original decision to grant cert in the case over the government’s opposition, and then to rule in our favor, both of those were really significant hurdles to clear, so it made for a very satisfying decision in the end,” he said.

His biggest challenge this year:

The biggest challenge Clement said he faced wasn’t in the courtroom — in fact, it kept him and others out of courtrooms entirely.

Adjusting to the COVID-19 pandemic and the resulting lockdowns that closed down offices and courthouses and sent deliberations and trials to online platforms like Zoom proved the biggest hurdle, as it threw nearly everything he’s used to out the window, Clement said.

While Clement is used to an office where he can easily meet face-to-face with colleagues, bounce ideas off of others and hold practice “moot court” sessions, the challenge this year was in making sure everyone could work effectively from home and adjusting the workflow to make sense.

Arguing cases proved a new experience as well, when Clement had to face the Supreme Court over Zoom while representing the Little Sisters of the Poor. In that case, the Catholic nonprofit was fighting for an exemption for employers with religious objections to the federal mandate to provide contraceptive coverage through employer health insurance plans.

He said he argued it on the Wednesday of the first week of the high court’s telephone conferences, and it changed the dynamic.

“It was definitely a challenge, because as a Supreme Court advocate ... you feel like the fact that you’ve done this before is one of the advantages you bring to the table for your clients,” he said. “Here, you’re being asked to argue a case using a format and under circumstances where neither you nor anybody else has any real experience with it.”

His proudest moment:

Clement told Law360 that reaching his 100th argument after nearly 20 years in front of the nation’s highest court was a major milestone.

He hit this mark while representing the Atlantic Coast Pipeline and

securing a victory that gave the U.S. Forest Service the authority to allow the pipeline to cross the Appalachian Trail, and he said the milestone made him “take stock.”

“I’ve had the opportunity to serve a lot of different clients in the Supreme Court,” he said. “In each of the cases, a client has entrusted what’s probably their most important case to you as the advocate. So you take a lot of pride from not just the result in the 100th case, which was a good result, but also just the fact that so many clients over time have entrusted you with their cases.”

In his 20 years arguing in front of the court, he said the well-established traditions have promoted more continuity than change in that time, even as the court has had significant turnover, with only Justices Clarence Thomas, Stephen Breyer and Ruth Bader Ginsburg serving that entire time, until Ginsburg’s death in September.

Why he is an appellate attorney:

Clement said he got into appellate work partly because he had the opportunity to clerk in the D.C. Circuit and Supreme Court, where he encountered a lot of appellate cases.

He said appellate work is particularly interesting to him because not only does he work to secure legal victories for his clients, but winning at the nation’s highest court gives him the chance to impact the law more broadly.

“ ...The best thing young attorneys can do is find opportunities to take and argue cases, so they can gain experience and ‘show their stuff’ to future clients and bosses.”

A district court's decision is not typically precedential, he said, but when litigating in the Supreme Court, the way the court decides the case will set the nationwide rule, such as in the Maine Community case.

"I had my own individual clients interested in the case, that were very, very substantial, but they didn't get the \$12 billion dollars, the \$12 billion dollars is the effect on the whole industry," he said. "Every member of the industry's case is going to effectively be decided by how the Supreme Court decides the case. But then, even beyond that, there's now a much clearer

precedent than there ever has been, when it comes to promises to pay money — Congress, just like the rest of us, has to keep its word."

His advice for junior attorneys:

Clement said the best thing young attorneys can do is find opportunities to take and argue cases, so they can gain experience and "show their stuff" to future clients and bosses.

"Clients want to know, if they're thinking about hiring you to argue a case, they want to know, how many times have you done this before?" he

said. "If they're looking to hire you to try a case, they're looking to say, how many jury trials have you had?"

He added that young attorneys shouldn't be afraid to take "smaller" cases, go through government service or do whatever it takes to get into court early and often to get that experience under their belts.

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