

## Most Admired Attorneys: Wheeler Trigg's Malcolm Wheeler

By **Ben James**

Law360, New York (September 13, 2010) -- Wheeler Trigg O'Donnell LLP partner (and one-time aspiring physicist) Malcolm Wheeler has a razor-sharp, science-savvy mind that helps him grasp even the most complex aspects of high-stakes product liability cases, regardless of the products at issue. That versatility has helped win him a place among Law360's 10 Most Admired Product Liability Lawyers.

Wheeler, whose undergraduate degree is from the Massachusetts Institute of Technology, told Law360 that he originally wanted to be a theoretical physicist but opted instead to go into the legal profession.

He has now been practicing for about four decades, has argued before the U.S. Supreme Court, and has defended clients such as Pfizer Inc., Ford Motor Co., and Whirlpool Corp.

Wheeler's fellow attorneys touted his intelligence and tireless work ethic and said he had an uncommon ability not only to defend product liability cases spanning a wide variety of industries but to achieve a near-expert understanding of whatever products and industries may be at issue.



Malcolm Wheeler, Esq.

Dechert LLP's James Beck said that while many product liability attorneys specialize, Wheeler — whom Beck called a "Renaissance man" — can litigate pretty much any type of case. Over the past two decades, Wheeler has been involved in litigation over cutting-edge questions all over the country, Beck said.

"He may well be the smartest guy I know," Beck said of Wheeler.

Wheeler said his first exposure to product liability issues came when an Indiana prosecutor went after Ford Motor Co. following a August 1978 accident that claimed the lives of three teenage girls. The Ford Pinto the girls were riding in caught fire after being rear-ended.

A grand jury indicted the company in September 1978 on three counts of reckless homicide, but a defense team that included Wheeler and litigator James Neal convinced the jury to find Ford not guilty on all three counts. That case marked the first time a product manufacturer had ever been indicted for homicide.

A 1977 Mother Jones article called the Pinto a "firetrap" and said Ford had ignored crash tests showing that the car's fuel system would rupture easily in a rear-end collision.

Wheeler said the Pinto criminal case was the most significant of his career and that a guilty verdict against Ford would have had an "enormous impact" on manufacturers.

Wheeler's background in hard science benefited him not only in the Pinto case but also in other product liability and general business litigation in which scientific and statistical analysis played a significant role, he said.

Prior to defending Ford in the Pinto matter, Wheeler had been an antitrust lawyer, he said. But his experience in that case steered him into product liability work, and he went on to represent Ford in air bag litigation and a consumer fraud class action over the Explorer SUV.

"I was very interested in the science and engineering that went into the products liability litigation, and it just seemed natural to continue on that area," Wheeler said.

Hughes Hubbard & Reed LLP's Deputy Chair Theodore Mayer worked with Wheeler on the Pinto criminal case. Mayer recalled that Wheeler, who cross-examined the prosecution's accident reconstruction expert, had mathematical formulas enlarged on poster boards in his office, so they were "burned into his brain."

There are other product liability lawyers that are versatile, but the depth of understanding Wheeler achieves on both the technical — as well as legal — elements of cases is extraordinary, said Mayer, who added that Wheeler had a terrific facility for engineering issues, physics and accident reconstruction.

"I've seen him apply that same curiosity and determination to master all the technical aspects of the case to a number of different subject areas," Mayer said.

Wheeler Trigg O'Donnell partner Jack Trigg, who worked alongside Wheeler on the Ford Explorer class action, said Wheeler's devotion, combined with his intellect, made him an "awesome opponent." Wheeler can tell when an expert for the opposing side is on less-than-steady footing with his theories, Trigg added.

"When Mal goes to trial, there isn't a piece of paper he hasn't read," Trigg said. "There isn't a legal issue he hasn't thought about."

Jim Neal, whose experience includes serving as private counsel for then Vice President Al Gore in the late 1990s, also said Wheeler's drive and trenchant mind made for a potent mix.

"You put his extraordinary intellect and his willingness to work extremely hard together, and you've got a powerful combination," Neal said.

Wheeler has argued before the Supreme Court once and was successful. He represented American Honda Motor Co. Inc. in a case brought on behalf of a plaintiff who said her 1987 Honda Accord should have been equipped with air bags.

In that case, the nation's highest court concluded that the plaintiff's case was preempted by the National Traffic and Motor Vehicle Safety Act of 1966 and a Federal Motor Vehicle Safety Standard that

allowed automakers to decide whether to install air bags or some other restraint system. By ruling that federal rules preempted state law, the Supreme Court precluded what could have been thousands of potential lawsuits.

Wheeler has also represented Pfizer Inc. in litigation over the antidepressant Zoloft, and Howmedica Inc. in a hip implant case. In addition to Wheeler Trigg, he has worked for Skadden Arps Slate Meagher & Flom LLP, Hughes Hubbard & Reed LLP and Parcel Mauro Hultin & Spaanstra PC and held teaching positions at the University of Iowa and the University of Kansas.

If the Zoloft case *McNellis v. Pfizer Inc.* — a pharmaceutical preemption case in which Wheeler represented Pfizer — had gone to the Supreme Court instead of *Wyeth v. Levine*, the outcome would likely have been different, and more favorable to drugmakers, according to Wheeler.

The Supreme Court's March 2009 ruling in the *Levine* case said federal law did not preempt Diana Levine's state law claims.

In 2008, however, the U.S. Court of Appeals for the Third Circuit had issued a consolidated opinion that covered both *McNellis v. Pfizer* and another case, *Colacicco v. Apotex*, and found that federal guidelines on drug warning labels trumped state law.

In light of the decision in *Wyeth v. Levine*, the Supreme Court remanded the *McNellis* matter to the Third Circuit, which in turn remanded to the trial court, and the case settled.

Wheeler said he saw a parallel between selective serotonin reuptake inhibitors like Zoloft and air bags, because both had lengthy regulatory histories showing that the relevant federal agencies believed that federal safety policies would be undermined by the type of state law claim being asserted. That regulatory history was lacking in the *Wyeth* case, he added.

"I really believed it would present the court with the best picture of under what circumstances preemption should apply in the pharmaceutical industry," Wheeler said of the *McNellis* case. "It would have been a very different flavor if that had been the first case on preemption in the pharmaceutical context."

Wheeler said he tends to represent companies at the front end of what is referred to as "pattern litigation" and that if he feels that people have been hurt because the defendant made a mistake or didn't do the right kind of job, he advises the client to settle.

Wheeler also said he was passionate about mounting a vigorous defense when manufacturers and the scientists and engineers they employ — who must strike a balance between safety, price, comfort and convenience — are unfairly tarred as negligent.

The chance to learn is among the most attractive and enjoyable parts of Wheeler's practice, he said.

"The most fun thing about being a litigator is being in that learning curve, and learning about some new industry or a new product," Wheeler said.

*Methodology: From May 25 through June 11, Law360 invited readers to nominate attorneys they admire to be profiled for the "Most Admired" series. Readers were asked: "Is there an attorney you've argued against in court who you respect — or whose briefs you fear? What about a lawyer whose views on the*

*latest hot-button issues you eagerly seek out? Or a former classmate who is practicing the law in novel ways?" Survey participants were not permitted to nominate attorneys from their own firms and submissions from public relations and marketing professionals were not considered.*

*Separately, Law360 sought out nominations from practice group heads at the 100 largest law firms in the United States. In total, 1,016 nominations were received.*

*Nominations were reviewed by a board comprising experienced lawyers and Law360 editorial staff. Sixty-five attorneys covering seven practice areas of the law were then selected to be profiled for the "Most Admired" series.*

