

THEY DID WHAT?!?!?!? THE LATEST IN PLAINTIFFS' BAR TACTICS

Speakers: **Nancy Erfle, Gordon Rees Scully Mansukhani, Portland, OR**
 Mark Prost, Sandberg Phoenix, St. Louis, MO
 Peter Rotolo, Chafe McCall, LLP, New Orleans, LA
 Mark K. Silver, Schenck, Price, Smith & King LLP, Florham Park, NJ

Litigation is a never-ending chess game with large scale companies in a perpetual state of playing defense. The Plaintiffs' bar continually develops new litigation tactics that require the ongoing development of a counter strategy. Inevitably, when Plaintiff's newest maneuver is first revealed, there is an attorney sitting in their office or a client sitting in a conference room who audibly groans: "They did what !?!?!?" This panel seeks to discuss the latest trends in Plaintiff tactics and possible defenses to same. Some of the topics to be discussed are:

I. ETHICAL INTRIQUE - IN RE TALC BASED POWDER PRODUCTS LITIGATION (NEW JERSEY)

In a litigation filled with multiple failed bankruptcy attempts and a decade long legal battle over the state of the science, the most interesting twist came in the form of an ethics decision.

In 2015, Plaintiffs from across the country began filing litigation against Johnson & Johnson ("J&J") and its talc suppliers alleging, amongst other things, that exposure to J&J's baby powder led to the development of ovarian cancer. New Jersey, J&J's home state was an initial jurisdiction of choice for the Plaintiffs' bar. New Jersey became the first state to establish a coordinated MCL (Multi-County Litigation) and shortly thereafter a Federal MDL (Multi-District Litigation) was created and assigned to the District of New Jersey. In the beginning, every prominent Plaintiffs' firm in the country had some measure of talc case inventory. From the start, Beasley Allen ("Beasley") took a lead role in litigation in both the New Jersey MCL and MDL. In New Jersey, J&J was represented by Faegre Drinker Biddle & Reath LLP ("Faegre").

James Conlan was, at one time, a partner at Faegre. Conlan, as attorney for J&J, participated for nearly two years in confidential strategy and settlement analysis of the talc litigation. After departing his firm, Conlan started a new enterprise, Legacy Liability Solutions ("Legacy"). Legacy was set up to acquire and resolve legal liabilities. Conlan, as Legacy's CEO, actively collaborated with attorneys from Beasley on talc litigation. Upon learning of Conlan's

new relationship with Beasley, in 2025, J&J simultaneously moved to disqualify Beasley Allen in the New Jersey MCL and the Federal MDL. A joint evidentiary hearing was held. The New Jersey trial court denied J&J's Motion. However, New Jersey's Appellate Division took the case and reversed the trial court decision. In re Talc Based Powder Prods. Litig., 483 N.J. Super. 370 (App. Div. 2026). The Appellate Division ruled that

Conlan's prolonged access to J&J's privileged information, followed by collaborative efforts with its most prominent adversary, leaves us with clear concern for the preservation of trust intrinsic to the attorney-client relationship. After reviewing the factual record, the arguments presented, and the governing legal standards, we find that as CEO of Legacy, Conlan's association with Beasley Allen violated RPC 1.9(a) and 5.3. Thus, the trial court order denying J&J's motion to disqualify Beasley Allen is reversed.

Id. at 375.

However, a finding of violations of RPC 1.9(a) and 5.3 did not end the inquiry. Under New Jersey law, Supreme Court has noted that "once 'the court concludes that disqualification is required . . . , it must then weigh that conclusion against the affected client's right to counsel of his or her choice.' " Id. at 392 quoting Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 222, (1988). In weighing these interests, courts have found that "extraordinary circumstances" may justify permitting a conflicted firm to continue representation. Id. at 392 quoting Barnes v. R.J. Reynolds Tobacco Co., 246 N.J. Super. 348, 356-57, (App. Div. 1991).

Ultimately, the Appellate Division ruled:

Beasley Allen knowingly collaborated with Conlan on the same issue and in the same litigation that Conlan represented its adversary—J&J. "The rules of professional behavior are not branches which bend and sway in the winds of the job market" but are instead "the bedrock of professional conduct." Dewey, 109 N.J. at 221 (quoting Reardon, 83 N.J. at 475). As such, based on our de novo review, the appropriate remedy is disqualification.

483 N.J. Super. at 394.

Shortly thereafter, the MDL issued a similar opinion. The panel will discuss the implications of this decision and how it might impact other cases going forward.

II. FISHY FACT SHEETS

In both the Xarelto and Taxotere MDLs there were instances of plaintiffs' counsel or their staff signing plaintiff fact sheets either with their names or plaintiffs' names. In one case, plaintiffs' counsel's staff signed their name and the identical signature was observed on several fact sheets, discovering the issue. In other instances, it was noted that plaintiff's signature did not match other signatures of that plaintiff. Of course, plaintiff's counsel argued that there was permission from plaintiff to sign their name. However, the plaintiff fact sheet required that the plaintiff sign subject to the penalty of perjury and with that it could not be transferred to counsel to sign plaintiff's name.

In one instance, defense counsel noted discrepancies after depositions in fact sheets and found that plaintiffs had completed a hand-written fact sheet and signed it but a typed fact sheet was produced. Plaintiff's counsel used the signature page for the typed fact sheet. The court ruled that this was minor violation that the defense could explore in deposition and seek further relief if necessary.

The panel will discuss lessons to be learned and what to look for.

III. INSUFFICIENT INVESTIGATION

In 2011, the law firm of Hagens Berman Sobol and Shapiro filed eleven separate lawsuits in the Eastern District of Pennsylvania on behalf of fifty-two Plaintiffs alleging birth injuries as a result of ingesting Thalidomide in the 1960s. In 2014, Defendants moved to dismiss the cases due to the fact they were all time barred. The Court denied the motions and allowed

discovery to occur. In 2023, a Special Master made finding against the law firm that two of lead partners “conducted grossly inadequate presuit investigations; obstructed discovery; recklessly (or, perhaps, intentionally) made false and baseless allegations intended to toll the limitations clock; and doctored evidence”. In 2025, District Judge Paul S. Diamond referred the matter to the Department of Justice. Johnson v. Smithkline Beecham Corporation, et al., Civ. No. 11-5782., E.D.Pa. (2025), Document Number 888.

The panel will discuss defense tactics to counter such behavior.

IV. WHY DID WE BOTHER MARKING THE DOCUMENTS “CONFIDENTIAL”?

The panel will discuss the dangers of not identifying potential problems with the use of emerging technologies. For example, what happens when Plaintiffs put confidential and highly confidential documents produced in discovery in open AI systems.

In re: ByHeart, Inc. In Fant Formula Marketing, Sales Practices and Products Liability Litigation, 2026 WL 1103170 (S,D,N.Y. Apr. 23, 2026) is an example of a confidentiality order that limits the use of AI platforms to analyze or summarize etc. documents that are confidential or highly confidential produced in discovery. In short these must be closed systems plus other protections.

V. SOCIAL MEDIA

During a Xarelto trial against Bayer and Janssen in Philadelphia one of the plaintiff’s attorneys took a photo of the courtroom without the judge on the bench and then posted it to social media with the hashtag #killin nazis. Another plaintiff’s counsel took a photo of the

courtroom with the judge on the bench without the hashtag bit used the photo in promotional materials for her firm. Plaintiff's counsel apologized but were sanctioned.

The panel will discuss the use of social media to try to influence the jury pool before trial.