



# Waranch & Brown's 2020

**“Top 5 of the Year”**

**Medical Defense  
Strategies**

**Tactics and Thoughts**



**WARANCH + BROWN**

*Representing Health Professionals*

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## INTRODUCTION

To say 2020 has been a year of change would be the understatement of the century. In an environment of rapidly changing legal trends and a rising threat of COVID-19 litigation, how can health care providers, hospitals, and insurance companies – especially those facing medical malpractice, general liability, or professional administrative defense issues in Maryland – learn about strategic alternatives?

That is what this collection of “Think Pieces” from 2020 is all about. The Theme: Eyes Ahead. With topics ranging from a strategic effort by plaintiffs to increase their potential recoveries, to a look ahead at jury trials in the COVID-era, you will learn new ideas for reducing damages, avoiding traps, conserving resources, and staying ahead of the opponent.

Even if you do not specifically relate to a topic, we hope you will gain from the discussion. In fact, after years of helping professionals adopt strategies and tactics that protect their institutions and practices, we believe one can never be too innovative in challenging plaintiffs’ claims.

Happy Holidays!



## Think Piece #1

### Think Twice Before Giving Advice!

It can be so tempting to offer professional advice on social media — but think twice! In this video think piece, partners Christina Billiet and Nicole Deford discuss the problems associated with offering advice on social media.



[https://www.youtube.com/watch?v=dWPsxazxOP4&feature=emb\\_logo](https://www.youtube.com/watch?v=dWPsxazxOP4&feature=emb_logo)

Maybe you've seen something like this in your own Facebook feed:

A mom pregnant with her second baby has just been diagnosed with preeclampsia — again! But she can't get in to see her doctor and confirm when to start aspirin. She posts her

question to a “mommy” message board and commenters jump in left and right with (different) advice. One advisor speaks with significant authority — “MFM here! Start aspirin by 12 weeks. Since you had early onset preeclampsia you may consider first trimester screening. We offer it.”

Helpful, yes. But risky to both the mom and the MFM? Also, yes. That is why we advise our Maryland physicians: Never offer off-the-cuff medical advice, particularly on social media.

There are significant problems associated with offering medical advice on social media; in the example, there was no medical exam and no assessment of her medical history. What if this mom has developed some condition between pregnancies and now aspirin is contraindicated? What if she miscarries or hemorrhages two weeks later? If mom does have a complication due to aspirin and remembers that MFM’s “helpful” advice, the MFM could be the subject of a malpractice claim.

This issue is not limited to Facebook or “mommy” message boards. Doctors are called upon all the time to give impromptu medical advice to non-patients. We know it is hard to resist. But we caution our clients to consider the potential repercussions for all involved.

**Bottom Line:** When it comes to off-the-cuff medical advice to non-patients, think twice before giving advice!

## Think Piece #2

### Future Care Costs: The Make-Believe World of Plaintiffs' Life Care Plans

When we are in pre-school, we learn the difference between reality and make-believe. Little did we know that identifying differences between the real world and fantasy carries into litigation!



Because non-economic damages are capped in Maryland, plaintiffs' lawyers have gotten creative with their life care plans to dramatically increase their potential recoveries. One way to



inflate life care plans is by including the “sticker price” of future care items, though only a fraction of that amount will ever be paid.

What can we on the defense-side do about it?

Maryland Rule 5-702(3) requires a sufficient factual basis for an expert’s opinion to be admissible. That means plaintiffs’ life care planners have the burden to demonstrate the basis for their future care cost projections in their plans.

Public and private databases are resources that provide cost estimates for proposed care. These estimates are based on real-world experiences of public and private third-party payors. We use these databases to attack plaintiffs’ “sticker prices” for proposed care, proving they are not in line with the real prices of plaintiffs’ future care needs. That way, the plaintiff will receive compensation for what will likely be paid and NOT an inflated amount.

**Bottom Line:** We need to fight the “make-believe” future care costs we see in life care plans. Maryland already recognizes that a plaintiff is only entitled to the amount actually paid for past medical expenses in medical malpractice cases. It’s time to expand that rule to include future care expenses as well. Interested in how we can fight plaintiffs’ life care plans?

## Think Piece #3

### The Opioid Epidemic — How Does It Affect Our Doctors?

In this video think piece, partners John Sly and Tony Breschi discuss the opioid epidemic and its impact on health care professionals.



[https://www.youtube.com/watch?v=KmOgN3e6BJo&feature=emb\\_logo](https://www.youtube.com/watch?v=KmOgN3e6BJo&feature=emb_logo)

Health care providers are being sued and pursued by the Board of Physicians and Board of Nursing. If your insureds write opioid prescriptions, they need to protect themselves and their pain management decisions in the following critical ways:



- Creating and enforcing pain contracts with patients;
- Obtaining regular urine and blood testing;
- Diligently assessing the cause of the patient's pain complaints and screening for aberrant behavior; and
- Documenting thoroughly and frequently their thought process in prescribing opioids.

The lawyers at Waranch & Brown are experienced in representing doctors and health care providers accused of improperly prescribing opioids. The list above represents a few of the many ways providers can be proactive in protecting themselves through the opioid crisis.

## Think Piece #4

### Do You Really Need a Jury?

Most parties to a lawsuit want their “day in court.” But does that need to occur in a courtroom, and in front of a jury? For the right case, there is a less time-consuming and far less expensive alternative to trial that can make sense — binding arbitration. With arbitration, the parties refer their disputes to an impartial third person — an arbitrator — for a decision based on the evidence and arguments presented before the arbitrator. In other words, a shortened, simplified “trial.”



[https://www.youtube.com/watch?v=7TrvV5M7c&feature=emb\\_logo](https://www.youtube.com/watch?v=7TrvV5M7c&feature=emb_logo)

Our firm recently arbitrated a medical malpractice case. The case was a good candidate for binding arbitration for several reasons: the medical issues involved were straightforward, the damages were limited, and the attorneys and parties were able to agree on the arbitration terms. We gave brief opening statements and closing arguments, and limited testimony to two fact witnesses and one expert per side. The arbitration took one day, and we received a binding verdict the following week.

Arbitration has many advantages over a trial:

- Significant time savings;
- Significant cost savings;
- A less formal atmosphere;
- The ability to “set the rules”: choosing the arbitrator(s), deciding the time allotted for arbitration, and setting limitations on discovery and evidentiary rules; and
- The process can be private and confidential.

Some disadvantages include:

- The lack of appeal possibilities;
- The lack of a judge for evidentiary rulings; and
- Arbitrators are often not inclined to provide an explanation for the reasoning behind their decision.



It's also important that the lawyers cooperate, as there is no judge involved.

**Bottom Line:** For the right case, binding arbitration may be a good alternative to a traditional jury trial. It gives the parties the chance to tell their side of the story—just not to a jury.

## Think Piece #5

### Return of the Jury Trial — COVID-style

Months after COVID-19 brought everyday life to a halt, jury trials are back in Maryland. Our firm had the distinction of trying (and winning!) one of the first medical malpractice jury trials — during the pandemic — in the state.



Partners John Sly and Tony Breschi recently finished the two-week trial in Baltimore County, before Judge Mickey Norman. Extraordinary efforts were made to keep everyone safe. They shared with us the below “insider tips”:

- **Process and Procedure:** Jury selection was conducted in the jury assembly room. General questions were conducted first in the main area, followed by individual voir dire in a different room based on answers to the general questions. After selection, jurors were seated in the courtroom's jury box, which was extended into the well of the courtroom. Jurors were seated in three rows, with each row separated by plexiglass and each chair separated by 6 feet;
- **Preparation:** Preparation ahead of trial is more important than ever. We made advance visits to the courtroom to check the layout, acoustics, and lighting issues to decide how to position ourselves and equipment. This helped our Audio-Visual expert quite a bit;
- **Presentation:** AV is key. With an inability to get close, we needed clear visuals and sound. Also, we could not publish anything physically to the jury, so we had to display exhibits large enough for all to see;
- **Communication:** All counsel, including the Judge, used the wireless device that interpreters use for bench conferences. We remained at the counsel table and spoke into the microphones. We all thought it worked very well;
- **More Communication:** Good communication between counsel was very important. We had two seats up front: for



the lawyer and the client. The second lawyer was socially distanced, which meant we had to have a clear idea of what each was doing;

- Even More Communication: Volume, volume, volume. We had to be ready to “yell.” With all the plexiglass in the courtroom and masks on the entire time, we had to speak loudly. Witnesses were constantly reminded to “speak up”; and
- Face-coverings: Lastly, we had to find the most comfortable mask we could for both speaking and getting through the day. Plastic face masks turned out to be not-so-great due to fogging, “echo” effect and discomfort.

**Bottom Line:** We are ready and able to try your cases in the COVID world. If you have any questions about COVID trials, please contact us.

## ABOUT THE AUTHORS

*Waranch & Brown "thought leaders" publish electronic "Think Piece" newsletters on current legal issues.*



*Waranch & Brown, LLC is a regional litigation practice based in Baltimore County, Maryland.*

*Our clients include solo practitioners, hospital systems, and national insurance carriers.*

*The firm provides trial attorneys with over 100 years of collective litigation experience.*

*To speak with a representative of Waranch & Brown, please visit <https://waranch-brown.com>, or call us at (410) 821-3500.*

*Click for a [virtual tour](#) of our new offices!*