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THE DEFENSE LINE

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The COVID Cases Are Coming

By John T. Sly & Nancy Ross

Also Featured

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As the legal and healthcare communities begin to wrestle with the complexities surrounding the COVID-19 pandemic, our message to clients is simple: *be prepared*. Be prepared in terms of their record-keeping. Be prepared regarding document retention. And, for lawyers, be prepared by understanding evolving rules and regulations related to the pandemic. Finally, when working with health care providers, be aware that many have experienced a great deal of stress during this pandemic.

Co-author, Nancy Ross, Esq., R.N., shares her experience taking care of the first ICU COVID patient in Maryland. Co-author, John T. Sly, Esq., then discusses key legal issues relevant to attorneys and health care providers.

The First COVID Patient — Ground Zero

My name is Nancy Ross. Before becoming a nurse, I was a lawyer. For as long as I can remember, when I planned my career, I knew I wanted to help those who needed help. After graduating from law school, I found that in my first policy job, I was able to help victims of domestic violence. I was on track. Fast forward 10 years, I had moved into state and then federal policy, and I felt further away from seeing the people that I helped. After serious contemplation, I decided to make a career change. I enrolled in an accelerated masters program in nursing, and, much to my joy, I loved my nursing school from my very first class. I particularly liked the clinical experiences, and from that point on, I knew I was in the right career.

After graduating with my masters in nursing, I took a job in critical care in a trauma unit in a major hospital. I love the intensity of my job; I appreciate my opportunity to examine all of the pieces of the medical issues confronting a patient. It is "on me" and a team of doctors and nurses to determine the best course of treatment for very sick patients. It is an honor to care for people in their most vulnerable time.

Perhaps the most challenging time in my 10 years of nursing has been working in an ICU COVID unit. I knew I wanted to be

a significant part of the frontline response to the pandemic. In very short time, the surgical and neurological intensive care unit (ICU) I was working in was transformed into the COVID ICU. I was assigned the very first ICU COVID patient, and experienced caring for a very sick patient without the support of their family. The unit of 16 beds filled to capacity in a matter of a week or two.

COVID patients are unable to inhale enough air into their lungs, which required nursing care beyond anything I had ever experienced. The patients require manual rotation from their backs to their stomachs for 16 – 20 hours each day. This critical process requires a respiratory therapist and 3 to 4 nurses or therapists to protect the patient's airway and lines to keep them alive and safe. The doctors and nurses I work with must make critical decisions about medication, and therapies, minute to minute at times. The 12 – 15 hour days are long, and the work is grueling. Yet, I would not want to be doing anything else.

Liability and Immunity Issues

Maryland:

On May 6, 2020, Maryland issued a critical Order. It provided that any licensed healthcare facility or healthcare provider resuming elective and non-urgent medical procedures must have at least one week's supply of personal protective equipment (PPE) for themselves, staff, and, as appropriate, for patients. This Order was renewed on October 1, 2020. The Hogan Administration made clear that PPE requests to any state or local health or emergency management agency would be denied for elective and non-urgent medical procedures. As a result, if your client is a Maryland healthcare provider performing elective procedures, or even seeing patients in their office, they must have the required PPE available. Regarding hospitals with COVID-19 patients, the Maryland Department of Health is responsible for determining a daily PPE-per-patient-use-rate for PPE requests. In addition, as COVID evolves, additional limitations on elective procedures may be imposed. Your clients must be aware of these evolving rules and comply with them.

Maryland's Order also required that any healthcare facility or healthcare provider must be able to procure all necessary PPE for its desired services via standard supply chains. One cannot rely on non-standard sources. Every healthcare provider must certify, in writing, that they are following Governor Hogan's Order. They must also certify that they will abide by social distancing standards, that all healthcare workers, patients, and visitors will be screened for COVID-19 symptoms upon arrival, and that the facility and staff will implement enhanced infection control measures in accordance with the most recent CDC guidelines.

We have been asked whether Good Samaritan laws apply to COVID-19 patient-related care. In Maryland, the Good Samaritan law provides limited immunity for care provided to a person where no payment is made, and no payment is expected. However, if your client was paid or expected to be paid for medical services, the Good Samaritan law does not apply.

While the Good Samaritan law does not apply where one is paid, Governor Hogan also has included and continues to include in the Proclamation Renewal of State of Emergency and Existence of Catastrophic Health Emergency — COVID-19, a provision that provides limited immunity when a healthcare provider is caring for a COVID-19 patient. In this instance, pursuant to Maryland Code, § 14-3A-01(b) of the Public Safety Article, "A health care provider is immune from civil or criminal liability if the health care provider acts in good faith and under a catastrophic health emergency proclamation." Based on this statute, it is the burden of the health care provider to

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demonstrate that (s)he acted in good faith. However, in Maryland, it is unclear whether this enhanced standard applies to patients who allege they contracted COVID-19 during care or whether it applies to patients who claim their care was delayed or impaired because of the pandemic. In other words, while the language appears to broadly apply to any health care provider treating a patient diagnosed with COVID-19, its application may be more narrow.

Federal:

At the time of this writing, Congress is discussing whether, and to what extent, it will extend immunity to healthcare providers working with COVID-19 patients. It is difficult to know if Congress will act, and when. However, there is some immunity applicable to COVID-related care under federal law. The Public Readiness Emergency Preparedness (PREP) Act was enacted in 2005 by Congress. The PREP Act authorizes the Secretary of the U.S. Department of Health and Human Services to declare that certain "covered persons" are immune from liability (in claims of tort or contract) for taking certain "covered countermeasures" that are necessary to combat a public health emergency such as COVID-19. On March 10, 2020, Secretary Alex Azar issued such a declaration, effective February 4, 2020. PREP Act immunity includes any claim under federal or state law for loss that has a causal relationship to the administration to or use by an individual covered by a countermeasure. A loss is defined as: death, personal injury, emotional injury, property damage, business interruption, or fear of personal injury.

PREP Act protection is very broad and applies "without regard to the date of the occurrence, presentation, or discovery of the loss." People covered by the PREP Act include healthcare providers, administrators, and support staff.

While the PREP Act appears to provide broad immunity, it is directed toward countermeasures in the fight against COVID-19. For example, these would include the use of non-NIOSH-approved KN95 respirators made in China and other medicines and intervention tools. Additionally, the CARES Act amended the Prep Act to cover respiratory protective devices. It is not clear whether it would immunize against claims of negligence brought by a patient where the allegation is that the healthcare provider generally acted negligently in their care of the patient. Indeed, on the face of the statute, we do not believe it does.

Further, the CARES Act protects voluntary health care providers that treat COVID-19 patients. We have seen healthcare providers travel outside their home state to heroically assist COVID hotspots. Depending on the circumstances, they may further be immune from suit under the federal Volunteer Protection Act of 1997 (VPA). The VPA establishes that volunteer healthcare professionals of non-profit organizations or governmental entities are not liable for economic damages stemming from medical care provided within the scope of their volunteer responsibilities.

In light of the pandemic, on March 17, 2020, Secretary Azar issued a limited waiver of certain HIPAA sanctions for healthcare providers to improve data sharing and expand telehealth patient care during the pandemic. It is important to note, however, that the HHS did not waive or extend the 60-day time limit for medical providers to notify affected patients of a breach of their protected health information. How these points will impact one another will certainly be the subject of coming litigation.

Enhanced Informed Consent

During this pandemic, healthcare providers should remind themselves of how to properly obtain a patient's informed consent. While a physician extender, partner, or nurse can provide supplemental information about treatment options, *the individual who provides the care is personally responsible for obtaining informed consent.* As always, the health care provider must discuss the risks, benefits, and alternatives to any care option with your patients. During these discussions, they should disclose any additional risks due to COVID-19. If they have data regarding the risks of treatment, they should provide it to their patients either verbally or in writing. Be aware that as a patient's condition changes, or as your knowledge of the patient's condition changes, the health care provider *must* obtain informed consent again. Keep this requirement of the informed consent process in mind, because our evolving understanding of COVID-19 can have a direct impact on risks of treatment for their patients.

Further, documenting the consent conversations with patients is essential to protecting a health care provider against informed consent claims, as is obtaining signed consent forms. Due to the impact of the pandemic on healthcare, we recommend incorporating additional language into informed consent forms. Consider the following example:

COVID-19 is an infectious virus that currently has no direct treatment and for which there is no current vaccine. While we have taken reasonable steps to limit the potential for transmission of COVID-19 in our office, you agree that you understand transmission of COVID-19 is still possible.

You understand that our office offers a HIPAA compliant telemedicine option. However, your care and/or your preference requires an in-person visit with our staff and healthcare providers. When required to provide you care, our staff and healthcare providers may be within six (6) feet of you and may touch you and your personal objects. You understand that person-to-person contact may increase the chance of COVID-19 transmission. It may be necessary that you quarantine and/or take other steps in the event it is determined that you may have been exposed to COVID-19.

You further understand that recommendations and guidelines regarding COVID-19 are subject to modification.

Telehealth

We have been hearing of the coming of telehealth for years. However, in the wake of the COVID-19 pandemic, Maryland has dramatically expanded the availability of telehealth. There are some critical points to keep in mind as we move into this "Brave New World." Recall that telehealth, regardless of the formality of the platform a health care provider is using, is still real medicine. All negligence rules still apply. Further, all HIPAA rules still apply, and this is particularly critical when communicating electronically. The health care provider must ensure that the communication modalities are HIPAA compliant.

Asynchronous, *i.e.*, not real-time, communication with patients is expanding.

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Maryland, for example, expressly allows it. With asynchronous communication comes additional and different risks. If a patient leaves a message the night before and a health care provider prescribes a medication the following morning, the health care provider must be sure that the condition of the patient has not substantially changed. How often and in what circumstances the health care provider needs to recommunicate with the patient is unclear. We recommend that a health care provider use their best judgment and be sure to document their thought process.

Speaking of documentation, it is even more critical in light of the increase in telehealth. Other than the health care provider and the patient, there is often nobody else who knows they interacted. A health care provider cannot call their secretary as a witness to demonstrate the patient came into the office when they may be communicating with the patient from home at night. Document! Document! Document!

Finally, with regard to telehealth, a health care provider must be sure to have procedures in place that provide for document retention. Patients may wish to use all of the various communication modalities available today. If a health care provider communicates with them through those modalities, they must save those communications. Otherwise, the health care provider may find their chart bereft of documentation even when they were actively engaged with the patient.

Prepare for potential litigation

Due to COVID-19, we find ourselves working remotely, in unfamiliar circumstances, and using new communication modalities. A healthcare provider must do what they can to protect themselves from lawsuits and, if one is filed, be ready to vigorously defend themselves.

A health care provider must be sure to record what they knew and when regarding COVID-19 and relevant recommendations. We have all watched as our knowledge of the virus has changed dramatically since February of 2020 and, as a result, have seen guidelines and recommendations evolve accordingly. Will the health care provider recall what their understanding was on a particular date if they fail to document it now? Because of this dilemma, we recommend that they obtain/collect all CDC and state recommendations and orders. They may wish to document what they have done to protect patients from the virus including videotaping/photographing their office to show signage, sanitizer dispensers and other steps they have taken.

Health care providers should ensure that their staff and colleagues are familiar with the rules, regulations, and statutes related to COVID-19. In fact, a health care provider should consider designating a person or a team to coordinate COVID-19-related training and to field COVID-19-related complaints from patients.

A health care provider may wish to create a timeline that includes the information they know/have known about COVID. Also, consolidate maintenance of tracked staffing allocation, PPE supplies and ventilators, and assure those records are maintained in their repository of information.

If a health care provider maintains a large practice or works in a hospital, they should plan today for the potential need for a corporate representative in the future that can speak on behalf of an organization during litigation. It is advised that they have someone they trust who can speak to what was being done and why. It will be much harder years later in litigation to get someone up-to-speed.

We expect a range of claims arising out of this pandemic. Some are obvious, such as the failure to timely diagnose COVID-19 — or a failure to diagnose it at all. But also consider that plaintiff lawyers are creative. They will likely, where possible, bring suits alleging:

- Delay or denial of deemed "elective" or "non-essential" care to patients that is later asserted to be critical in the course of treatment;
- Negligence whereby patients and family members are infected with COVID-19 by "community spread" in a clinic or office setting;
- Negligent treatment of COVID-19 (consider whether the PREP Act provides immunity for this);

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Editors' Corner

The editorial staff are proud to present this edition of *The Defense Line*. As always, we are grateful to you, members of the MDC, who answer the call for articles, advice, resources, and spotlights. We are especially pleased to present submissions in this edition highlighting the continued successes of our members as we adapt to the ongoing challenges brought on by the pandemic. We wish to thank the following individuals for their contributions to this edition: **Jeff Trueman** of Jeff Trueman, Esq., Mediator & Arbitrator, **Joshua Kahn** and **Daniel Adamson** of Miles & Stockbridge, **John Sly** of Waranch & Brown, LLC and **Nancy Ross** of Ross Legal Nurses, LLC.

The Editors sincerely hope the members of the MDC enjoy this edition of *The Defense Line*. If you have any comments or suggestions, or would like to submit material for a future edition, please contact the Publications Committee.

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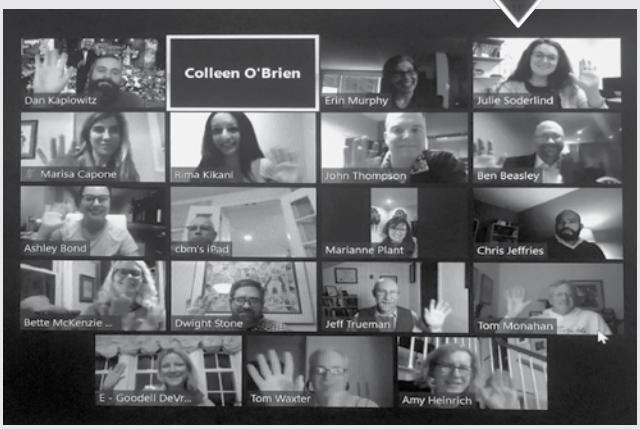
MDC's Virtual Trivia Night

Maryland Defense Counsel ("MDC") and Exponent hosted their first Virtual Trivia Night on **Tuesday, January 12, 2021** on Zoom.

Following a heated competition, including a tie breaker question, the winning team was "Torts Illustrated"— consisting of **Rima Kikani** (Captain), **Ben Beasley**, **Ashley Bond**, and **John Thompson** — all of Rollins, Smalkin, Richards & Mackie, LLC.

Congratulations to all our players, and thank you to Exponent's Trivia Masters — **Dan Kaplowitz**, **Erin Murphy**, and **Julie Soderlind**!



Exponent®

Meet your Exponent Hosts!

Dan Kaplowitz, Ph.D., P.E., CWI

- Managing Engineer at Exponent
- Metallurgist, professional engineer, certified weld inspector
- Works with: weld failures, pipeline ruptures, and consumer product failures
- Fun fact: went to UMD!

*Pre-COVID-19 appearance

Erin Murphy, Ph.D.

- Managing Scientist at Exponent
- Polymer scientist
- Works with: broken plastic and rubber components, adhesives and coatings, and trace component analysis
- Fun fact: rides motorcycles (typically one at a time)!

Julie Soderlind, Ph.D.

- Associate at Exponent
- Metallurgist
- Works with: materials characterization and testing, corrosion analysis
- Fun fact: loves gardening and golf!

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- Delay or denial of care due to lack of facility capacity or access to medical equipment due to patient overload;
- Negligence in not guarding against "community spread" of COVID-19 in sensitive areas such as ICU, cardiology, surgery, oncology, etc.;
- Failure to communicate infection rates;
- Failure to prevent the development of pressure ulcers because of staffing issues; and,
- Failure to prevent falls due to understaffing.

If a health care provider is sued, be sure to have them contact their risk manager or insurance company immediately. If there is good documentation, as discussed in this article, the health care provider will be in a strong position to defend what they did because they will know when and why they did it.

We hope this article provides you with a roadmap on how you can effectively protect yourself from lawsuits while continuing to help protect yourself, your patients, and your staff from COVID-19.

John T. Sly is a partner with Waranch & Brown, LLC and is a past President of MDC. John has also been named to Super Lawyers through 2021. waranch-brown.com/people/john-t-sly/

Nancy Ross is a nurse in the Surgical/Neurological Intensive Care Unit in a hospital in the suburbs of Washington, D.C.. She is also a Legal Nurse Consultant and the Owner of Ross Legal Nurses, LLC.