WARANCH + BROWN

Representing Health Professionals

Waranch & Brown's 2022

"Top 5 of the Year"

Medical Defense Strategies Tactics and Thoughts

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INTRODUCTION

For many Marylanders, 2022 meant a return to business as usual. But there is no turning back for those in healthcare, and the rate of change continues to accelerate. How can healthcare providers, hospitals, and insurance companies – especially those facing medical malpractice, general liability, or professional administrative defense issues in Maryland – keep up with the changes and learn about strategic alternatives?

To help you think through your options, we present our Top 5 Think Pieces from 2022, including strategies, tips and 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

Your Nurse Witness Can Be Your Best Witness – Here's How

A well-prepared nurse witness can help win your case.

Consider this all-too-common scenario in nursing homes, assisted living facilities, and rehabilitation centers: despite quality care, a patient develops a decubitus ulcer and sues. And even though the nurses charted appropriate care, the plaintiffs want to depose them first. Why? They hope the nurses will give the most useful (i.e., damaging) testimony.

Unfortunately, that expectation often turns out to be true. Many of the qualities of a "good nurse" are also what make them vulnerable deponents:

- Nurses are taught, “if it isn’t written, it didn’t happen,” and equate lack of documentation with inadequate care;

- Nurses often believe any deviation from “protocol” is negligence;

- Nurses are trained to educate patients and often volunteer too much information, providing the plaintiffs‘ lawyer with extra “ammunition”;

- Nurses are generally uncomfortable with having to defend their care; and

- Nurses are inclined to be advocates for patients first and foremost.

Given their disparate training and care roles, preparing a nurse to be a witness can be very different than preparing a physician. But with the right coaching, a nurse witness can be an asset to your case. We utilize several strategies in preparing our nurse witnesses for deposition:

- Avoid under-preparation of a nurse witness even if he or she is not the target provider;

- Nurses need ample training to discuss their care and learn “best practices” for deposition;

- Provide emotional support and establish trust: Nurses are sometimes worried this process can impact their career, finances, or license. It is important to address and, hopefully alleviate, these concerns; and

- Define the standard of care. Nurses sometimes expect perfection, and believe that a bad outcome, a missing chart entry, or a deviation from protocol are all breaches in the standard of care. Educate your nurse on the “reasonableness” standard.

All of this takes time, but it is well worth the effort when your nurse does well at deposition!

Bottom Line: Remember, nurses can help your case; they often just require a different approach. That’s our prescription!

Think Piece #2

W&B War Story: How to Win on Reasonableness

In this Video Think Piece, trial attorneys Neal Brown and Michelle Dian explain how sticking to their story of "reasonableness" helped them win a recent trial in Prince George's County.

https://waranch-brown.com/wb-war-story-how-to-win-on-reasonableness/

Here's the story: the patient presented to our hospital's ED with irregular heart rhythm (atrial fibrillation). While in the ED, the patient began experiencing stroke-like symptoms. ED providers

called a “Code Stroke,” ordered appropriate studies, and transferred her to another hospital for specialized treatment. Sadly, this was unsuccessful, and the patient died of a large basilar artery occlusion stroke.

We had a strong defense: the ED physician provided good, timely care that was supported by the medical records. But during trial, Plaintiffs’ counsel kept changing their criticisms. Rather than get “caught in the weeds” combating these ever-changing criticisms, Neal and Michelle stuck with their story of reasonableness. Your legal team should consider following a similar approach when telling their story at trial:

- Use visuals to highlight the care provided with an interactive Timeline;
- Call experts who can explain — in simple terms — complex medicine to the jury;
- Use Zoom testimony with experts when needed; and
- Don’t deviate from your story! You don’t have to combat all of the plaintiff’s ever-changing criticisms.

Bottom Line: Difficult cases can be tried — and won — with a plan for showing reasonable care.

Think Piece #3

Remember, the Jury Sees Everything

It was the second week of a two-week trial. The lawyers were having a bench conference with the judge, and the Defendant doctor took a minute to check his work phone. Though quick, it did not go unnoticed by the jury.

After the trial, we had the opportunity to interview members of our jury. These “focus groups” are always enlightening and inevitably provide useful information for the next trial. We were reminded: the jury is always watching. Watching the judge, watching the lawyers, and — most importantly — watching the Defendant physician.

Although these jurors accepted that the Defendant physician saved the plaintiff's life, they were displeased with some of his behaviors in the courtroom. Several jurors noted that he "looked at his phone" during bench conferences when they, the jury, were prohibited from doing so. They interpreted that to mean he was disinterested in the trial and had more important matters to address. Nothing could have been further from the truth. Thankfully, that observation did not affect the result of the trial, although it was eye-opening.

As we have learned from many jurors over the years, they notice "off-stage" behavior such as lawyer interactions, personal grooming (including clothing and hair styles), whether parties or lawyers "make faces," conduct in the courthouse and surrounding areas, and now, client phone etiquette.

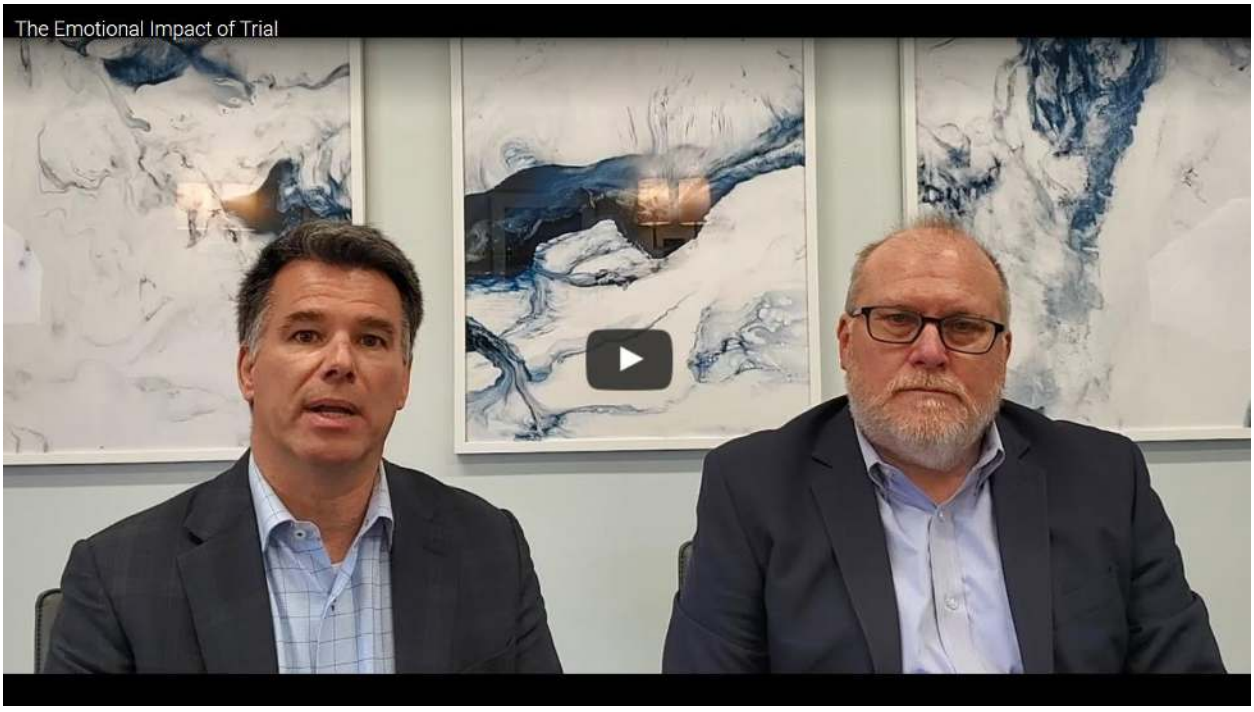
Although these jury observations would rarely cause one to lose a case, there is no point in risking that possibility.

Bottom Line: For healthcare professionals engaged in litigation, it is an absolute best practice to coach your doctors on demonstrating appropriate trial behavior. An annoyed smirk or checking e-mails at the counsel table may sour a juror against the defense; let's not take that risk!

Think Piece #4

The Emotional Impact of Litigation

Being involved in a lawsuit can certainly take a toll on the healthcare professionals and practitioners we serve, even when the process is working as it should. Not only can it be time-consuming, emotionally challenging, and disruptive, but it can take months or even years to resolve. There are, however, ways to minimize the psychological impact and manage the stress of litigation.



https://waranch-brown.com/the-emotional-impact-of-litigation/

In this Video Think Piece, John Sly and Tony Breschi discuss a case they tried in which their physician client was experiencing emotional stress over the impending trial. He was well-prepared and knew the case well. But with trial looming, the prospect of testifying was provoking anxiety and uncertainty of the outcome was causing self-doubt. John and Tony took the following steps to manage their client's litigation stress:

- Ensured he was well-prepared. Knowing the case and the defense themes well can help alleviate the stress of a lawsuit;
- Impressed on him that his trial testimony is the opportunity to tell his side of the story;
- Acknowledged the emotional impact litigation has on those involved;
- Advocated for ways to balance the demands of litigation with the physician's wellness; and
- Encouraged teamwork and open communication.

Bottom Line: For lawyers, the litigation process becomes the norm. But for healthcare professionals and practitioners like you, the tensions of litigation can be a real concern. Your legal team should take the steps necessary to help you manage the stress of litigation.

Think Piece #5

The Unapparent Agent

The emergency room is in chaos. A fugitive, disguised as a hospital orderly, examines a patient when no one is looking. The "orderly" secretly changes the patient's diagnosis, saving his life.

This is the stuff of Hollywood; and, the method by which Harrison Ford's character in The Fugitive sought redemption. In real life, though, even the good intentions of independent contractors can introduce serious risk to a hospital.

Consider a recent ruling. A divided Court of Appeals ruled that a hospital may be vicariously liable under the doctrine of apparent agency for a non-employee surgeon's treatment of a patient in the hospital's emergency department even though the patient (1) did not know the surgeon; (2) was never introduced to the surgeon; and (3) did not have a choice as to his treating physician.

Williams v. Dimensions Health Corporation involved a patient injured in an auto accident and brought by EMS to the Hospital. The Court of Appeals held there was sufficient evidence at trial for a reasonable jury to conclude the surgeon was an apparent agent of the Hospital because:

- The Hospital's designation as a Level II trauma center suggested to the public that a surgeon was available to treat patients in emergency circumstances, creating the impression that the surgeon was its agent;

- EMS transported the patient to the Hospital because of the Hospital's designation as a Level II trauma center; and

- The patient knew he was at the Hospital and relied on the Hospital to treat him.

The majority opinion arguably changes the standard of what satisfies the subjective belief requirement for apparent agency. Before Williams, apparent agency required the patient to have held an objectively reasonable belief that an agency relationship existed and to have relied upon that belief in seeking the services of the apparent agent. Pursuant to Williams, when a patient in acute distress — or one acting in the patient's interest (here, the EMS providers) — seeks emergency medical assistance, that person looks to the hospital rather than to a specific health care provider.

Bottom Line: Maryland's expansion of the apparent agency doctrine in the Williams opinion may have significant implications for hospitals, emergency facilities, and providers. A hospital could (perhaps) be held vicariously liable for the acts of any independent contractor simply based upon its designation as a trauma center and treatment rendered via an emergency transfer. In our view, this ruling comes dangerously close to creating strict vicarious liability.

It remains to be seen how this decision could be expanded upon in the future.

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 250 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.

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