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This Week's Feature



Defending Health-Care Decisions to Juries in a Post-Coronavirus World

By Erin Frohardt Tatman, Lisa DeCaro, and Joel S. Neckers

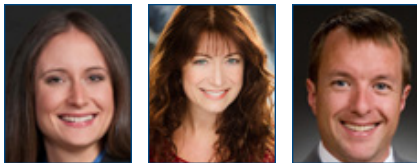
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If you are struggling to reconcile those competing thoughts, you are not alone. Health-care clients are experiencing an unprecedented crisis. Regulations, standards, and circumstances change daily, exposing health-care providers to unprecedented risk. But we can help our clients mitigate these risks. By studying lessons from past crises, defense lawyers and health-care clients can position themselves for success in jury trials in the coronavirus litigation onslaught that has already begun.

Critical Questions to Consider

Life will eventually return to “normal,” and countless pandemic-related lawsuits will come. To defend clients on the frontlines of the crisis, consider these basic questions now:

- How is the crisis changing jurors' perceptions of health-care systems and providers?
- What effect will this crisis have on the juries that hear the cases that we defend?
- How will jurors vote when courtrooms reopen and our clients are aggressively questioned about the care and treatment that they risked their lives to provide?

No one has a crystal ball to answer these questions definitively. But we can draw on lessons from past and current research to guide us in helping our clients in the future.

What We, and Our Clients, Can Do Now—and Why

There is no precedent for the coming pandemic litigation, so throw out your playbook and start a new one. Begin by understanding the limits of the immunity protections afforded to your clients and build defenses accordingly. For jury trial defenses, look to the changing standards of care to address jurors' perceptions of our clients; collect

snapshots of daily life to understand the crisis's effect on juries; and urge your clients to document meticulously now to protect against aggressive questioning later.

Jurors' Changing Perceptions

Recommendation: Track changing standards of care. “Best practices” change almost daily. Last month's standard of care is not today's, and today's standard will not be next month's.

Rationale: Memories and perceptions are not set in stone. Research in the wake of 9/11 shows that individuals resurveyed one year after 9/11 were only 63 percent accurate when recalling certain facts. Ingfei Chen, [How Accurate Are Memories of 9/11?](#), *Scientific American* (Sept. 6, 2011). When it came to recalling their emotions, this dropped to 40 percent. Health-care workers today are rightfully perceived as heroes. Next year, however, jurors may not remember health-care workers' contributions—or the harrowing conditions that those providers face today—particularly if the jurors have continuing pandemic-related struggles of their own. It is on us, then, to remind *and show* jurors what our clients were facing during the crisis to ensure that the care they delivered is measured against the proper standard.

The Crisis's Effect on Juries

Recommendation: Track snapshots of daily life across your potential jury pools. Despite #WereAllInThisTogether, we aren't all experiencing the same pandemic.

Rationale: There won't be a one-size-fits-all approach to presenting coronavirus cases to juries because the pandemic is affecting everyone in different ways. There are “sharp racial disparities in personal experiences with knowing people who have had serious illnesses arising from COVID-19.” [Health Concerns From COVID-19 Much Higher Among Hispanics and Blacks Than Whites](#), Pew Research Center (Apr. 14, 2020). There are also differences across income, age, and political party in individuals' coronavirus-related fears. *Id.* And even within political parties there are geographic differences based on whether individuals live in counties with a high number of COVID-19 deaths, or in areas that have not been hit as hard. *Id.* We

must take it on ourselves to understand how our jurors have experienced or continue to experience the pandemic and then find ways to show them their experiences in our clients' realities.

Stand Up to Aggressive Questioning

Recommendations: Take notes and continue to provide excellent care. “Profits over people” is a common refrain, so hospital administrators should document their decisions to put patient care above profits and to protect and support their staff and communities selflessly. Providers should continue to document properly and spend time and energy connecting with their patients. In a pandemic-stricken world, basic human kindnesses and caring for others will shine through.

Rationale: Skeptical jurors aren't going to blindly accept our well-credentialed expert's opinions regarding the correctness of what our clients did; jurors must *want* to believe in our clients. And people become more skeptical, disillusioned, and suspicious after crises. Douglas L. Keene & Rita R. Handrich, *The Enron Effect: Uncertainty, Mistrust, and Cynicism* (2012) (white paper). The care that our clients provide and how they treat their patients, staff, and communities will do more to prevent negative outcomes and lawsuits—and to help win the lawsuits that do come—than anything else. Show, don't tell. The best way to prove that care and concern is to let jurors read the documentation for themselves.

Closing Argument

Amid today's uncertainties, one thing is clear: we, and our clients, need to be proactive *now*. If we can build our defenses and support our clients now, and if our clients can look back at this time and feel proud of what they did, it will be far easier for us to tell their stories to jurors—

effectively—when courts reopen and the wheels of justice resume turning.

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