

IPA Wins BIG Over Hospital

Practical Advice Based on What We Learned

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Background

- Highlands Physicians Inc. (HPI) a 100% physician owned and 50% owner of a sister PHO called Highlands Wellmont Health Network (HWHN). Other 50% owned by Wellmont Health System
- Both formed in 1993 and required hospital owners and their employed physicians to contract exclusively (with exceptions) through the PHO.
- HPI and PHO grew in 20 years from less than 100 doctors and 1 hospital to 1500 practitioners and 11 hospitals.
- In 2010 there was a turnover in WHS CEO. She viewed independent physicians as competitors not partners and began efforts to dismantle the PHO.
- HPI tried for 5 years to work with the new CEO, but she was directing contracts outside the PHO in what we viewed, and a jury agreed, was a violation of our PHO agreement.
- On June 15, 2015, HPI filed suit against WHS for breach of fiduciary obligations and breach of contract.
- Throughout the litigation, HPI maintained low expectations for damages recovery because it ultimately wanted WHS to return to honoring its contractual partnership with HPI; WHS's goals were not the same.
- **After 6 plus years of litigation, settlement was reached with WHS paying HPI and more than a thousand members \$83 Million.**

Top 10 Things I Learned During Litigation

▶1. No such thing as a sure thing in litigation

- No matter how right you are and how strong your case, you can still lose 20 % of the time because of the unpredictability of judges and a jury. Judges and juries are human, and they are influenced by many factors in a case - how they feel about the credibility of a witness – or even their external experiences – have they had good or bad experiences with the hospital.
- Excellent attorneys and strong documentation does not guarantee a win.
- Litigation is always a significant risk. Best to use it only as a last resort, but it is wise to give your opponent the perception that you are able and willing to fight in the courts.
- If you are unwilling to litigate, it is like having no agreement.
- Often doctors are hesitant to sue. Most are not comfortable using lawyers, and no one likes to pay fees. Negotiate with your attorneys and keep a risk reserve.
- It took about 2 years to convince our leadership to file suit.



2. You may need REALLY DEEEEEEP pockets to litigate, especially when your opponent has huge financial resources.

- HPI had less than \$2 million in reserves. Our opponent had hundreds of millions in assets.
- HPI incurred \$9 million in expenses in litigating the case.
- **This case unusually expensive.**
 - WHS used all appeal options all the way to the TN Supreme Ct.
 - Two years in mediation.
 - 50+ witnesses deposed – typically is less than 10.
 - Inefficient scheduling with our attorneys traveling from Chicago adding to expenses.
 - Very redundant. I was asked many of the same questions in my 8 depositions.
- We could not have litigated if we had not found qualified attorneys willing to take the case on a contingency basis. Typically, attorneys recover a third of the settlement plus expenses. Research attorneys (your General Counsel can help) and negotiate.
- Consider paying your attorneys to conduct a pre-litigation assessment of the strengths of your case: It gives you projection of the costs of litigation, provides a risk-benefit assessment, and can persuade attorneys, who may be concerned about their risk in taking a complex case like this one, to do a contingency arrangement and at a negotiated percentage of the recovery.
- Be prepared for richer opponents to try to run up your costs and maybe even try to bankrupt you before you can reach settlement. Some courts control this tactic better than others.

3. Finding the right attorneys was a major challenge

- I cannot over emphasize the importance of selecting the right attorneys.
- Not an easy task - took us more than a year.
- Need to consider experience, abilities, and reputation.
- We were challenged to find lawyers to take on a complex case like this on contingency.
- Consider the size and depth of the firm. Small firms of less than 10 may not be willing or not able to take on financial risk of a complex case. Large firms may not have control over negotiating fee arrangements. Large firms have more manpower and resources in complex cases to counter delay and other litigation tactics of your opponent. Small firms may be more responsive and may be open to creative fee arrangements. You can find exemplary lawyers in Large and Small firms, but you must invest the time in finding the right lawyers to fit your case.
- You must be convinced your attorney will stick with you no matter how long it takes.
- You want a lawyer that is passionate about your case or you as a client but will challenge you and keep your expectations reasonable.
- You want to find a lawyer that you feel you trust and want to build a partnership with.

We chose my co-speaker here today Gary Elden. A Harvard educated attorney with truly a world class history of successfully litigating complex cases against Goliaths.

4. No matter how good your attorneys are there will be ups and downs in the case.

- At times it will feel like a roller coaster.
- Especially in a long case you will be surprised and disappointed by Judge rulings.
- We had a very good and fair Judge, but he always seemed to want to rule in favor of each side close to equally.
- At times I certainly worried about something that happened and about winning. Do not over-react. Trials are like baseball games - you do not have to win every inning.
- My advice be prepared for bad days but PERSEVERE

5. Not all people tell the truth — not even all the people you expect to.

- Not only your opponents distort the truth but even people you consider allies and friends.
- Hospital systems especially in hospital monopoly markets can make people feel intimidated to distort the facts. Worries over job security, incomes, being sued, and more can drive some actually to testify falsely.
- A good attorney can expose many distortions through cross examination.
- Discovery documents reveal the truth. It is amazing how much info you gain through discovery.

Be honest and forthright. The Judge, jury, and our attorneys' efforts brought the truth to light.

6. Be very thoughtful and professional in what you write or what you say.

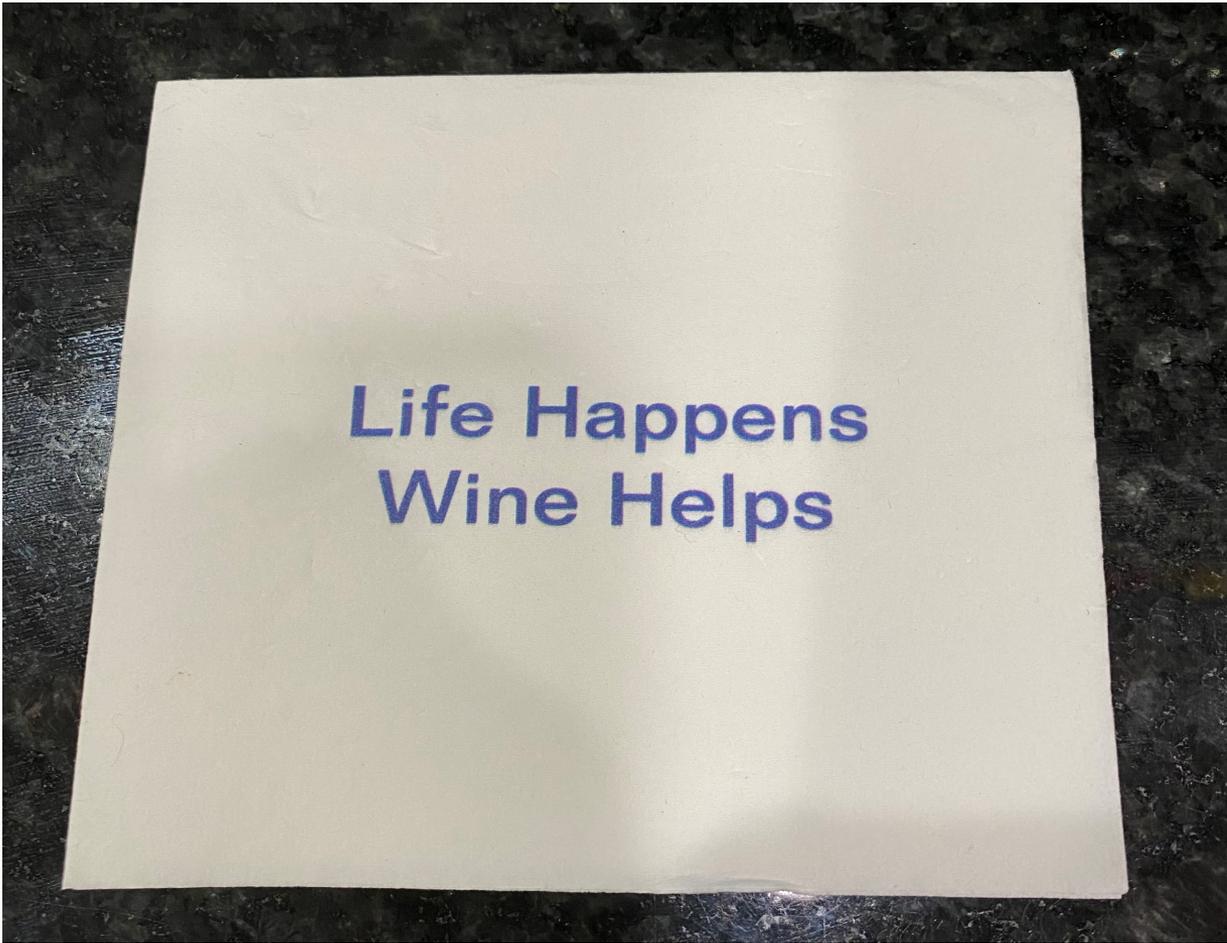
- Make a habit of keeping good, accurate records and notes.
- What is written in documents can make or break your case.
- Maintain professionalism and be deliberate about what you say in meetings even if not openly recorded.
- Be especially thoughtful about what you put in emails. People do not routinely edit their emails or even draft them carefully. Always consider that your business writings may be seen by someone else and may be evidence in a case.
- Over 10,000 of my emails had to be produced and were reviewed by attorneys. You should expect that the opponent will “misinterpret” your writing for advantage in the case.
- Staff and officers of the hospital actually put in emails their plans and actions that documented WHS’s breach of contract.

7. Be prepared to work longer hours than you ever imagined.

- As Executive Director of the IPA, I was the logical choice to serve as corporate witness; manager of the case; and expert witness on damages.
- I put in more than 6000 hours working on the case including being deposed 8 times, and testifying over 2 days during the trial. This is very uncommon . My work on the trial would usually be split between at least 3 people. Most of our witnesses spent less than 40 hours on the case.

The special litigation committee of 3 docs did spend about 500 hundred hours on the case. Gary will talk more about the importance of such a committee.

- If you litigate, you are likely to need to add staff .
- You will definitely need someone who can take on some of your normal duties. And that person has to be very good. We were very fortunate I had someone. She is here today — Vickey Blanken . We may not have survived without her. She kept the organization surviving while I was obsessed with the litigation.
- Vickey, thank you from the bottom of my heart.
- Vickey is now the Executive Director of HPI. The 6 plus years took a lot out of me and I have semi-retired.



8. At times you will think this case will never end.

- We knew this case would take time to settle, but I had no idea it would go on and on and on.
- We went through multiple mediations proposed by either the Judge or WHS adding about 2 years of delay to the verdict.
- WHS used many delay tactics, which also ran up legal costs, including appealing the unanimous jury decision to the appellate court which confirmed the jury decision and then appealing to the TN Supreme Court which declined to take the case. This added at least another year to the case.
- Part of the WHS strategy may have been to drag out the litigation and it would go away since our lead attorney, two other witnesses, me were in our 70s.
- I think WHS was truly surprised HPI could survive financially with the high litigation costs and loss of HPI's payor contracts, including one with largest employers in our area and one of the largest insurers (CIGNA).
- Do not go into such a case without understanding the truth in a quote by Warren Buffet's right-hand man and a billionaire on his own - "Litigation is notoriously time consuming, inefficient and unpredictable".

9. If you can afford it employ a general counsel for your organization.

- HPI did not have a General Counsel until final settlement. We were lucky.
- A General Counsel can keep you from making legal and strategic mistakes.
- Having General Counsel gives your organization more credibility before, during, and after a battle. The opponent knows you have a legal expert protecting you so may be less likely to take advantage of you.
- A General Counsel is trained to keep or make a good record that can help in the case.
- A General Counsel will be able to identify risk issues and know when to call in a specialized lawyer and can help control legal costs and risk.
- Use of a General Counsel frees you to do your job. I functioned in this role for HPI even though I was not an attorney - part of that was to save \$ but it was foolish.
- A General Counsel can limit your risk and save you \$ in the long run.

10. Be prepared for personal attacks and attempts to intimidate witnesses.

- WHS attorneys tried to portray me as unqualified; incompetent; and a liar with a bad memory.
- WHS also sued me personally for \$6 million. The suit was without merit, which I knew , ignored, and went forward with all my efforts to help win the case

In conclusion avoid litigation if you can but do not be afraid to litigate. Especially if you are in the right AND are realistic about what you face. And you may end up proud of what you did.

Next up is Gary Elden, our lead attorney. Someone I had more than my share of disagreements with over the 6 plus years, but we ended up friends.

First does anyone know what UFOs and great attorneys have in common?
You always hear about them but you never see one.
But you are about to - Gary take over.



“Permission, Your Honor, to treat the witness with hostility.”





ADD DATE OF PRESENTATION

TRIAL ATTORNEY'S THOUGHTS ON LITIGATION LIKE HPI V. WELLMONT

Presented By | Gary M. Elden



Preliminary Considerations

1. If you are not ready to sue to enforce your rights, you may as well not have them.
2. That said, trials are costly and settlement is always desirable, if it can be accomplished on reasonable terms.
3. Willingness and ability to sue are necessary to have leverage in negotiations.
4. Sometimes a contingency fee is necessary, but this approach has both upsides and downsides.
5. You may need a “Special Litigation Committee” to help avoid conflicts, and facilitate considered, prompt decisions.

Preliminary Considerations (Cont'd)

6. What to look for in a lawyer? It depends, but:
 - Usually more important to have trial experience in complex cases than specialized expertise.
 - But you may need both, and large firms often can supply both at a premium cost.
 - A local lawyer is less expensive, needs less travel time, and knows local rules and practices.
 - Combining a local and national firm can sometimes be the most effective approach, but this requires monitoring since—very rarely—lawyers have egos.

As Litigation Unfolds

7. Preparation is essential. It is a mistake to skimp or delay, but there should be a budget and continuous monitoring to control costs.
8. As the case proceeds, each side continues to assess the staying power, financially and psychologically, of the other side.
9. Defendants (that is, those who will pay if the case is successful) often try to delay and drive up costs; Plaintiff must try from the first day to expedite the case, and should expect to get some, but not enough, cooperation from the Court in this endeavor.

As Litigation Unfolds (Cont'd)

10. Expect this: Examine documents early; use algorithms to avoid the need to review most documents; identify and meet twice with each key friendly witness.
11. Try to avoid this: Depositions and motion practice are usually far overdone, especially by those wanting to delay the case and add to costs; ask the Court to help by setting scheduling and other pretrial orders.

As Litigation Unfolds (Cont'd)

12. Expect mediations to be required by the Court, and to accomplish nothing unless both sides are ready to settle.
 - To avoid having too many imposed on you, commence settlement negotiations early and advise the court they are ongoing.
13. Risks of retaliation, and what can be done to eliminate or mitigate those risks.

Conclusion

14. In sum: Litigation is like surgery.

- A good practitioner will try to avoid it using conservative methods.
- It necessarily involves risks and expenses.
- But it has to be considered as an option to make a good decision.



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