

Hospice Insights: The Law and Beyond



Episode 45: Governance Series:

Common Board Challenges and Tips for Dealing With Them

August 11, 2021

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Meg Pekarske	<p>Hello. Welcome to Hospice Insights: The Law and Beyond, where we connect you to what matters in an ever changing world of hospice and palliative care. Government Series: Common Board Problems and Tips for Dealing With Them: After exploring the attributes of a well-functioning board, in this episode we delve into common practices and tendencies that can inhibit board performance. Whether it be factioning, side conversations or confidentiality leaks, there are activities that get in the way of good governance.</p> <p>I sit down today with Stephanie Kaiser to talk through how she has helped leaders identify these roadblocks and institute practical strategies to navigate them. We hope you enjoy this insightful conversation filled with helpful takeaways to improve participation and engagement of your full board.</p> <p>So, welcome, Stephanie. Thanks so much for joining us for our third in this governance series, which I think is our wrap-up. And it's been really well-received and you're so knowledgeable in this area. So, leave it to lawyers to end with the problems, right? So, I wanted to take this episode – and we've touched on some of these throughout the earlier sessions, but – sort of talk about these problems. But more importantly, really talk about how as CEOs and leaders in an organization you can navigate through some of these problems. So, thanks, Stephanie, for being here.</p>
Stephanie Kaiser	<p>Thanks for having me.</p>
Meg Pekarske	<p>And so, the problems that we're going to talk about I think are human problems, right? Anytime your humans are working with humans you're going to run into some of these challenges. And so, you know, some of the</p>



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things we're talking about have "I've heard that before; that's how we deal with the HR" issues. But I think that how they play out in the board context is a little bit different. And so, I wanted to start by sort of a brief recap of, you know, what is the function of the board because these problems we're going to talk about, all of them get into...inhibit a board from really fulfilling their goals and mission and purpose, right? And so, why don't we refresh folks about what is fiduciary duty and whatnot because I think it will become more clear about how these problems really, you know, run head on into "I can't meet my fiduciary duty if I have some of these problems."

Stephanie Kaiser

No, I think that's a great place to start. So, if you can kind of see – and this is the way I see it. When I see a company or a corporation, I see it sort of as a pyramid. And I don't mean that in a pejorative sense or in a hierarchical sense, but just in a natural sense I see it as a pyramid. And so, whether you have a two-person company and/or a 2,000-person company plus, you know, to me, I've got the board at the top of the pyramid. And I do that mentally again not to try to slot people into ranks of importance, just mentally. And so, I start with the board at the top or something that functions like a board – sometimes like LLCs out of Delaware will have a board of managers. And so, something that functions in that way I see at the top. And what their function is largely, as opposed to management and then non-management employees, is to set policy and tone for the company. It's to basically... And by policy – I'm very deliberate when I use the word "policy." Policy is different than procedure. So, boards develop these kinds of policies that basically give the framework under which procedures, programs and other developments can then take place on a management and non-management level. So, board sets policy. They set tone. They establish the tone at the top. You know: How are we going to function? Who are we as a company? How are we going to function? How are we going to flow information? How are we going to govern ourselves? And their compliance, to me, is critical to have the compliance flow down in the right way. If they're compliant, then the rest of the compliance tends to flow.

So, okay, right below that, then, you have the board, as part of one of their many functions, is to generally set...to hire the CEO – to set the compensation of the CEO and to set the job parameters and requirements for that job and, of course, to give the reviews of the CEO, among other things. And so, sometimes you'll see guidance in this area, Meg, that talks about, you know, the board oversees management. And I think – put an asterisk mentally whenever you see that phrase or if you read that because really it doesn't mean the board oversees management across the board of a C-suite level, for example. It's really about the board holding accountable the CEO. And I think maybe earlier in one of our conversations we talked



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about the healthy tension that's supposed to exist between a board and a CEO. And that's what that means is that the CEO and management is responsible for the day-to-day operations of that company. They're supposed to take the board's policies, which in each policy if it's set up correctly it's going to have a section that says, "The board hereby authorizes management to develop policies, to develop and maintain – excuse me, to develop and maintain procedures, you know, that basically accomplish the objective and purpose of this policy." So, management is supposed to develop those procedures or programs consistent with the policies as advised and directed by the board. And that helps the functioning of the day-to-day operations of the company. And so, board's on top. They set tone. They set policy. Management then reads those policies and develops procedures and programs and, basically, processes for how the company's going to work. The CEO answers directly to the board and then the CEO holds the rest of management accountable and then reports back to the board as appropriate. And, of course, various C-suite members or others are going to give board reports from time to time that the board needs to function. I'll stop there for a second and then address the second part of your question, which is fiduciary duties.

As a quick reminder, both the board and officers, which are those C-suite and, I would say, managers and supervisors that, you know, govern departments, what have you, owe these things called fiduciary duties under the common law. And so, it's not set in any guidance in the company; it's just by common law they owe these fiduciary duties, which generally include three: that's care, loyalty and obedience. And care is the duty of care. To me, it means being careful. Generally, it's described as being diligent, being appropriately discreet and maintaining discretions. Loyalty is making sure you have undivided loyalty to the company – putting the company's interest ahead of your own or that of others with whom you have a relationship or really just anyone else. Making sure that you make decisions in the best interest of the company. And then, last, you also have obedience. So, duty of obedience is just making sure you obey the applicable laws to the company on whose board you sit, or if you're an officer of that company. And then, also making sure for obedience purposes you monitor and maintain and abide by the internal company guidance, which are policies, procedures and the like. So, that's generally kind of quick background on why I see it as a pyramid. You know, board is smaller. You've got management in C-suite and non-C suite managers in the middle of that pyramid, and then the non-management employees. And that's supposed to be how the tone is set and how it's supposed to flow down from top to bottom.

Meg Pekarske

So, that's a really helpful recap. And I think keeping care, loyalty and obedience as we talk through... And I put some labels on some of these



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problems just for our own levity. But let's jump into some of these, you know, these problems and then I think it will be apparent how care, loyalty and obedience can be impacted by these things. So, we have the silo and as you and I were preparing for this you had talked about that that's something that crosses your path frequently. Why don't you explain a little bit more. How do you see silo play out? And then, we can switch gears to, "So, how do I deal with this?"

Stephanie Kaiser

Sure. So, there's a couple of different ways that the silo can be developed – and some of it is just innocent and some of it is just lack of knowledge or appreciation or danger. But – and some of it, it's just naïveté or maybe intent. But all the while, silos, to me... And the way that I use that term is, let's say, on a C-suite level – that's a good way to describe it – let's say you have a CEO. And let's say you have an executive committee meeting coming up. And so, whether you have an agenda or not, let's say the CEO kind of goes to each different executive and kind of polls their answer or tries to get preliminary feedback and kind of will start talking to each person separately about the agenda items or the things that should be on an agenda for the executive committee to decide. You kind of start forming these little pockets of discussion and information that isn't benefitting the entire executive committee; it's just benefitting these one-on, one-off, you know, conversations. And I'm not saying those are never appropriate – there are, and I can discuss that in just a second. But when you start getting in the practice of having these kind of one-off, siloed discussions and benefits, not everyone gets to benefit from that entire discussion, and they may need to depending upon what's being discussed.

The same thing can happen at a board level. Let's say the board has their agenda set up for the next month. They know what the reports are going to look like. They know what's coming down the pike. And they want to start having the pre-meeting. You know, they want to start... You know, the board chair may call another director and say, "Hey, we've got this coming down. What do you think about that? What are you going to do? What do you think we should say?" You know? And, "Should we be sensitive?" You know, if they start having these kinds of pre-meetings, again, not everybody's benefitting from that discussion and they might need to as a matter of fiduciary duties. They might need to have all of those inputs so they can make an informed decision. Now, there are certainly times when there are sensitivities, and someone may have a question, especially like a new director. Or someone saying, "Hey, I got that. I know it's on the agenda. I know we're going to discuss it, but should we do part of this in executive session because it's sensitive?" Or, you know, "Can we fully discuss this other issue that's related?" Or, you know, "How, Mr. Chair, do you see that?" Or "Mrs. Chair, do you see that being, you know, as a part of the discussion?" Those kinds of questions about flow or timing or



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appropriateness – that’s okay, you know, if you really don’t know, especially for new directors and they’re wanting guidance. But for the most part, you know, it should always be if you’re going to start discussing the thing on the agenda, really question whether having a pre-meeting, a one-off, siloed conversation, is appropriate. Are you denying your other executive members or other members to that meeting you have a vote or input opportunity or requirement? Are you really depriving them good opportunity for discussion? And why are you wanting to meet people one-off? Is it truly sort of a sensitive issue and you want to make sure you can fully discuss that – if it’s legally appropriate to discuss that? Because sometimes there’s a legal question. I get a call as a lawyer – someone will say, “Stephanie, we have this on the agenda. Should we do it in regular session of the board? Should we do an executive session?” Same thing for executive committees. “Can we have this discussion with a certain consultant in the room? Is there any fiduciary duty breach opportunities we could have? You know, who all can be in there? Who all should be in there? And when should you come in? When should you not?” Those kind of, you know, pre-meeting preparations I think are definitely okay to make sure we’re all on the same page and you don’t guffaw in the middle of a board meeting or executive committee meeting.

But to truly discuss the substance of an agenda item in one-off scenarios, the danger that I’ve seen sometimes from that – there’s a lot of dangers. One is, you’re kind of teaching people and modeling that behavior that having these sidebar conversations is appropriate and it’s not. It’s not as a general measure. There are obviously prep times and other discussions – clarifications you might need and things like that. But truly, going into the substance should be reserved for the meeting itself. That’s why it’s on the agenda. And so, frankly, the CEO, the board chair – whoever is leading that meeting – should say when they get those phone calls or those, you know, those closed-door... If anybody has been in an office and you see someone knock, knock, knock, “Hey, you know, I saw the agenda. Can I talk to you about that for a second?” And they start closing the door and it’s like, Oh no, what are they going to do? What position am I going to be put in? Sometimes it’s like, if they say, “Hey,” you know, they start asking the prep questions, that’s okay. You know, “How can this flow? How’s that going to be? Can I bring this up?” That’s okay. But when they start going one layer deeper inadvertently, innocently or otherwise, I would just say, “You know what? Keep all... Those are great thoughts. Keep all of those ready. Get your notes ready for the meeting and be prepared to bring those forth.” And if you ever have a question in a middle of a meeting and you’re not sure if you can go forward or not, you can always just say, “You know, Miss Chair, Mr. Chair, you know, I have some concerns about that might be more appropriate for executive. You know, can we, can we, you know, take those and go into executive session briefly to discuss those issues?”



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They may say yes; they may say no. But, you know, there are times when even in a meeting if something doesn't occur to you, you need to bring it up.

But the downsides, again, are you model to people that it's okay to start having these one-off sort of polls and that really isn't appropriate. It can be divisive. It can deprive people of their independence. I have seen some people who lead those silo opportunities to basically say, "Oh, don't bring that up. You know, let's not discuss that. I really want people to like this idea, so avoid bringing that up because that will quickly, you know, tank the opportunity immediately or really tank that conversation." If you're really worried about flow of information, then you obviously need to help them be in a constructive way to learn how to better communicate. But you don't ever want to start quieting or creating opportunities where people aren't exercising their fiduciary duties to give that full input, you know, to the board or the executive meeting. You basically start silencing people and I've had people, you know, leaders tell people, you know, "Let's not have you talk during this part. You know, I want you not to bring up your viewpoints." It's like, "What? I'm sorry, I have a fiduciary duty to communicate. You want me to not communicate?"

You know, it's one thing if someone's a divisive person and not communicating effectively and maybe having them coached. And I think as a part of that, too, you have to wonder, Why is the silo occurring? Is it appropriate? It is substantive based or is it just, you know, questions on procedure and process and flow? Or, is it meant to divide? Is it meant to maybe try to pre-persuade people to your vantage point before the full opportunity? You really should not be pre-deciding these things unless there's a sensitive issue or a legal issue, or whatever. And there are full-on opportunities where you should have those things decided in advance. But, generally speaking, the substance should be reserved for the full meeting.

So, the silos can be innocently done by people who've never run a meeting before or just don't know better. But sometimes it's often just a matter of gossip, wanting to pre-decide, wanting to pre-package or create those blocks of people who are going to pre-vote. And all of that threatens the independence that's really inherent in those fiduciary duties and why they're, why they're there in the first place.

Meg Pekarske

So, and I think that there's a difference between "I'm the executive committee"... And I shouldn't say "committee" but, like, "I'm the CEO. I'm the CFO. We are preparing together for this board meeting to present information." That's one thing.



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Stephanie Kaiser	Truly.
Meg Pekarske	<p>And I think what we're talking about here is, like, perhaps you touch base with some board members before the meeting to talk about whatever issue. And I think your point is really well-taken that you're modeling behavior because as we're going to, you know, further discuss, I mean, you get into these situations where your board members start doing that between one another, right? And so, like, you know, because as you're describing this – and you come from a compliance bent, too – I always think, Well, what is the root cause of this, right? Why is someone doing this? And I think, you know... And probably there's a common theme in a lot of these, which is control, right? I want to control the outcome. I want to control the discussion. And, you know, a sense of, you know, control isn't always a bad thing, right? If you're a leader you want to have a sense of "I'm in control of the organization." But there's a fine line between control and then freedom of discussion, and especially as that relates to, well, what are duties that you have? And so, I think that's really important that, you know, if I'm the CEO, that I don't do that. Because if you do that with your board members, then they're probably going to do it with one another and suddenly you have the habits propagating and then, you know, then essentially it leads to the opposite thing. Now you don't have control because you have all of these side conversations. You mention the word "pre-meetings," and the silo and the pre-meeting probably run together. But, you know, I think there can be natural connections that people on boards or an executive may have with the board member and they just feel more comfortable with them and like, "Oh, let me bounce this off of you." And then you end up having the pre-meeting. And so, I don't know if you want to say a few things about the pre-meeting and how you see that play out a bit. And then, what do you do about it? Like, is it just being conscious about, "Oh, I've got to kick myself under the table because I'm doing this?" Or, "I've got to stop the conversation?" But, you know, sort of other things you can do to not fall into this trap.</p>
Stephanie Kaiser	<p>No, I think... And what you just... Absolutely. What you just said a second ago is a really important distinction. So, if you can – I'm a very visual person so I always visualize things – and if you can kind of visualize the agenda... So, let's say you're finishing up an executive committee meeting in November. You're planning for the future executive committee or board meeting the following month. Okay, what's on the agenda next month? What do we need to cover next month? And you're kind of figuring all out. And let's say – whether it's an executive meeting or board meeting or regardless – let's say there's certain reports that need to be prepared. Let's say I'm the general counsel and I need to be getting with a chief compliance officer to decide how we're going to present next month's training. That's okay all day long. I mean, obviously we've got to</p>



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get together to make sure we do a great job, you know, putting together the right report needed for that time of the year under a policy or requested, or whatever. Those things are totally separate from the pre-meeting discussion and totally separate from the silo issues because they're getting together to put together their report that is then going to go on the agenda. So, once that agenda is in place, and once the board packet or executive committee packet is in play and it's out there for everyone's review, that's when you start having those kind of pre-meeting threats more often. It can obviously happen before, but those silo opportunities can happen in those pre-meetings. So, it's prepping and preparing a report and making sure you're coordinated on a presentation. That's fine all day long, you know, if that's the goals of your communications. But those threats – the pre-meeting threats and the silo threats – can really come out when you've got the packet or you know something is about to be presented. It's like, "Look, I know that so-and-so is going to present this. Here's the issue. How do we want to address this? You know, how do we want to respond? What do we do to kind of minimize this, you know? Hey, I don't want you bringing that up because that could tank the deal." Those substantive conversations, especially when they could lead to a deprivation of independence – when they start threatening someone's ability to have a voice – that really is the larger concern now. Efficiency, obviously, I think we talked about in one of our prior discussions... There's consent agendas and then there's your regular board meeting and what have you. There are certain items that at a board meeting that if it's on a consent agenda – and I'm going to use that as an example... Consent agendas, by a quick refresh, are those things that don't need to be decided on a one-off basis. They are kind of "everyone review." They're sort of an "FYI only." You know, that absent someone having a particular question or concern, you know, "Hey, look at Items 1 through 10. That's on the consent agenda. Everyone had an opportunity to review it. Anyone have any questions? Okay. Can we, you know, does the board now want to move to vote on the approval and the acceptance of those reports? Or, you know, any time for discussion?" Okay, whatever. That's one thing.

But let's say you have that person who – they just don't get the concept of a consent agenda and they want to stop and go through every single sentence of every single report. That's not what that time is really meant for. And so, if you're a board chair or if you're the CEO leading an executive committee and you always have that person who just doesn't get it and they want to sit and parse through every piece, it's a really... That's, there's one thing to redirect and say, you know, "Thank you so much for bringing up those points. This is on a consent agenda. If you think that you have more concerns or questions for the full board or the full executive, that maybe we need to bring it off of the consent agenda and we need to start taking it on a more substantive review, let us know. We can pull that



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off.” And generally, you know, when you have a few coaching moments like that you’ll be fine. And it’ll stop it. But that’s just an example of you can lead without quelling the discussion, you know? And there really is a point of educating and coaching. There are some people who just need to be kept on track and make sure their thoughts...

But then, Meg, to your point, too, when you mentioned some of those questions and thoughts... There are times when good boards will make sure that they really know to have sufficient discussion on an item for purposes of a meeting – whether it’s, again, executive or board. And that you really need to make sure, you need to gauge the room. And from a CEO or board chair perspective, what I’ve seen some really good leaders do is obviously bring up the topic that’s going to be decided on a non-consent basis or discussed and say, “Hi. You know, on agenda item No. 11 we have this report. Did everybody have a chance to review it? You know, John, why don’t you present that report and tell us, you know, your thoughts on that?” And then John starts presenting the report, you know, for the board’s review under this hypothetical. And then he’ll say, you know, “Sally, did you have any questions or thoughts about that?” And kind of start polling the board in the full meeting context. And making sure everyone is kind of called out. And start inspiring confidence and discussion unless someone’s volunteering and jumping ahead. Making sure you illicit all those comments. Making sure you don’t leave anyone out and rush the discussion. And sometimes there are people who just kind of park and just keep talking. And once, you know, you’ve reached the end of their full thought process you can say, you know, “Thank you so much. Those are all great points. I think we kind of... Anybody have any questions? Okay?” There’s one way you got to keep moving that along.

But to me, again, back... The good board chair, the good CEO, the good leader of that discussion knows to kind of call on people. Make sure they’ve got the inputs that they need. Make sure that everyone is actively participating. And then, importantly – this isn’t required; this to me is just a good tip – I think I like it when I see the leaders talk last. You know, kind of wait until they’ve got everybody else because sometimes people will just jump on the bandwagon. They’ll kind of blindly defer because they don’t want to step on the leader’s toes whether that’s a CEO, the board chair, audit committee chair – whoever it is. They kind of stay quiet, and I really like it when the leaders kind of sit back and get everybody else’s perspectives and make sure that those are all fully thought. Because, one, the leader could change his or her mind and they could be informed by that process and it really should be the time for the full vetting because, you know, sometimes when the “proverbial boss” speaks, everyone else gets quiet. And that’s not what that should be.



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Now, full functioning, full boards or committees, they keep talking no matter what the leader says. But it's nice when those leaders show that they really want everyone else to participate. They help draw out the best of everybody else, leave no person behind, and then they kind of contribute their thoughts at the end, taking it all in. That really does so much good for everybody: letting everyone know that their voice matters, giving everyone an opportunity to have a voice. If we're taking good minutes, making sure the minutes reflect that sufficient discussion. But then also knowing when it's time to kind of wrap it up when you've kind of beat that dead horse. You've wrapped that up and now we need to move on. Again, not in the sense of quieting. And then sometimes knowing that, "You know what? We had that on the agenda to decide. There's just too much going on here. Let's go ahead and revisit this, get more info and put it on next month's agenda" – or a special meeting between now and next month or whatever your time frame is. So, those are some tips that I think are really good for meeting flow, that are distinguishable from the silo concerns that I have, and really can help a good function at your meeting to make sure everyone's doing their best in their fiduciary duties, which is what is in the best interest of the company, too, to make sure you get good inputs.

Meg Pekarske

Well, and I think that that leads into the silencer. And how you manage for the silencer is, I think, if you're calling on people to talk, right? If I'm the leader of the organization, board chair, CEO, I know who the silencer is, right? The really strong personality who, like you said, people are going to go with whatever they say because, well, they must know. And it doesn't allow for diversity of thought and expression. And I think that your technique is a way to minimize the effect of that silencer because you can talk, you can call on someone who's not that person who, you know, because I think that... You know, you and I went to law school. We called them the gunners – the person who was always raising their hand, being like, "Call on me! Call on me!" That might be the silencer, you know, because it's like, well... And again, not that the silencer doesn't have, you know, valuable things to say, but... And sometimes the silencer maybe doesn't even try to be the silencer. It's not like I'm trying to strong-arm anyone. They could be very passionate people – whatever. But I also think, you know, it is sort of when you think about it, the first person who speaks may sort of set the tone for everything else.

Stephanie Kaiser

Right.

Meg Pekarske

And as a leader, knowing that and sort of being thoughtful and maybe more deliberate about how that conversation happens. Not the content as much as like, you know, facilitating the discussion as opposed to just letting it maybe be a free-for-all. So, I don't know if you have thoughts on that. But it just struck me as the silencer was on my list and this is a way to sort of



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neutralize that effect, too.

Stephanie Kaiser

No, Meg, you're right. And, you know, let's say you have seven people in a room and you have that really strong, passionate person – the kind of expert who really feels strongly about certain things. And the way that they communicate – whether their tone, whether their content, whether the words that they choose, and their mannerisms – it really can have the opposite effect of maybe what they intend because they're so strong. And everyone's like, "Oh, not going to touch that with a 10-foot pole." And everyone just kind of gets quiet. If we know we have those people in a meeting, then I think that the leader really needs to kind of take that in. And I'm going to put it on a shelf for a second, There's a good way to handle that, too. Then you kind of do start getting from the quieter folks or the persons who are going to respond in a quiet way to the silencer. They're going to start being silenced by them. Draw on them first and start, you know, doing it.

But even, too, how you sit in a room is really important sometimes. Not all the times. High functioning boards, high functioning, you know, executive teams and other teams: Where you sit doesn't matter. But sometimes if it's like the high school cafeteria or the lunch room mentality, everyone kind of sits where they – or church – where everyone sits wherever they sit. And then they kind of form these little pockets, these little pods. And whether they realize it or not, they kind of start just talking amongst themselves. And, really, I learned a long time ago that I like it when you have random seating or when someone pre-assigns people and they shift it around every single time. It always forces you to be independent. It always forces you to be a contributing member in your own right and not as part of a pack, you know?

Meg Pekarske

Yeah.

Stephanie Kaiser

And so, I really think that's good. There was one time when I was working with some folks years ago when I had this brilliant person that I was working with. And they were newer to their role. So, they hadn't – they were definitely an experienced person in their own right, but they were newer to the role of this particular group. And so, I mean, they hit the ground running. And so, as soon as they got into a meeting they would just immediately with their passion start communicating all these things in a very strong way – not realizing, yes, we want to hear the content, but you've really got to be a little bit more diplomatic about how you communicate that. And people immediately started getting their feathers ruffled, you know, in these meetings and then it would lead to all of these post-meeting, you know... And I could just count that every single meeting my phone was going to blow up, you know, afterwards. "We've got to



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make that person stop!” You know? And I finally decided, Okay, here’s what I’m going to do. And I got permission in the right way and then I went and communicated with the passionate new member. And I said, “You have so many wonderful things that you bring to the table. Here is your expertise. Here’s the resume things. You’re bringing all of that. And what’s unusual about you is some people who are new, you know, wait 12 to 18 months to start becoming active members, or six to 12 months. You hit the ground running and that’s amazing and that’s exactly what we wanted you to do for this group.” And just say, “From my vantage point, you know, there’s a couple of things if I were you that I would like to see you do, even do more enhanced, which is to make people hear you better.” And then I would give them a few tips like, you know, try not to be the first person that speaks, but do contribute your thoughts. Do, obviously, focus on your words. Don’t be alienating with the language that you’re using to where it’s an “all or die” kind of thing. And so, and let people kind of come to you as the expert. Let them invite that out of you. Clearly, you have a fiduciary duty. You need to communicate what you need to communicate, especially if people are going off the deep end and in a wrong direction from your expertise. But just be sure that you leave room for discussion and don’t shut it down with the words – almost like a funnel argument in court. Don’t make it so final that they think that there’s nothing left to discuss.

And I as a lawyer have to worry about that, too, because sometimes if I speak first people think, “Oh, that’s it. That’s the legal option. We have nothing else, nothing else...” No. No, no, no, no. And so, sometimes I’ll go first in a meeting if people like, for example, need to know the law before they, you know, need to go next. And, okay, whenever you all start discussing just know that these are the only swim lanes we have. And so, whatever you all want to do within those swim lanes is fine. Sometimes the board chair, or whoever is leading the meeting, will say, “Stephanie, can you give us a little bit of background on what we can do here?” Then I’ll do that and then I’m going to quickly stop talking after that moment in this hypothetical because I want them to then discuss within those swim lanes and only come in as needed in that particular kind of scenario. Same thing for the expert on the board or the expert on the executive committee. If what your inputs are needed so people can properly frame their thoughts that’s one thing. But if your communications are such that you’re giving people “there are no other swim lanes, there are no other choices,” then just be mindful of your role and be mindful that what you say could quiet people down in a negative way. And just kind of know the balance and, frankly, the harm of your expertise. You don’t want it to... You want it to contribute to someone’s good decisions and not be their decision. And so, I think that there’s a balance there.

So, I think having those good kind of coaching sessions with people,



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especially if you're a leader or an expert on a board or on a committee – just watching the new members. Helping them to gravitate to making sure they contribute in a good, effective way – effective being the key word here. And then also, too, if you're in a company and you notice these things, don't just let them go unspoken. "Well, that's just how John is. That's just how Sally is" – or whatever. Really think about your onboarding of new folks to the team. Think about: Is there some training or conversations we can have? Is there some coaching opportunities to tell them how they can best contribute their knowledge, expertise and opportunities? We are all different communicators. We all have strengths that we bring to these meetings and these discussions. Let's make sure that those shine through and that some of maybe our weaknesses either get improved or don't tend to override some of these things. So, there's a lot of things that leaders can do, especially with new members or especially with new teammates, to make sure that, whether it's the order in which they're called, whether it's having counseling sessions about the best way to communicate, whether it's training them.... I think all of those things are effective ways to kind of help the silencer. Now, if you have someone every single time who's just going to be abusive, that's a different conversation that, you know, that the leadership needs to have and consider. But if you really are just thinking they're not trying to be abusive, they just don't know better, then, of course, those are opportunities for improvements. And that's what we all have for each other to do.

Meg Pekarske

You know, that's really helpful. And I think, again, just listening to this, it's like human nature, right?

Stephanie Kaiser

Yes.

Meg Pekarske

And our own work environment. I mean, these things play out. And so, you know, probably a well-functioning organization – as you said, their board's probably well-functioning because things flow down and whatnot. So, the last thing I wanted to touch on – and this is, I think, a challenge since in the hospice space we have a lot of community boards so we are of the community we serve. And when there are sensitive things that are going on, or it's a small community, there's a tendency to – and I'm going to put gossiping and, like, confidentiality lapses together because oftentimes gossiping happens and, yeah, it can be counter-productive, but may not necessarily bleed into a fiduciary duty problem – but when you start having conversations with others about things that are very sensitive, obviously that can lead to larger problems. And so, this is something that crosses my path often and when we talk to boards – because usually if I'm talking with a board there's something fairly serious going on, whether that usually involves a lot of money or reputational harm or, you know, something. And so, giving some information on the front end now, oftentimes what



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we're talking about is attorney-client privilege, but also more general confidentiality of, you know, you shouldn't share this out of the room. I know you talked last time about, "Look to your right. Look to your left. These are the people you can talk to about this." But anyway, I think even with those statements at the front end of conversations you can still have this problem. And I know one thing we do as a technique is, if you do want to pass out information, you collect it back. Like something that's really sensitive that, you know, perhaps people don't have, you know, a shredder at home or whatever that it would be really, really horrible if this ended up in, you know, a dumpster and then flying off on the highway or something, right? So, we as lawyers think about those parade of horrors. But so, written work product of trying to protect that – I think there's ways to do that, and especially with technology. But I think the things that are, you know, greater concerns – and maybe it gets into some of the post-meeting and the gas-up and some of these other buckets of categories – is just sharing confidential information with others outside the group or even with the group and resulting in, sort of, these side conversations. And so, I guess, tell me a little bit about your experience in trying to solve for this problem because we can give the disclaimer on the front end, but we are humans, so how do you deal with that?

Stephanie Kaiser

Oh, gosh, there's a lot there. But now I'll try to, you know, hit some of the highlights because there's so many issues. You know, clearly, I'm a lawyer. Clearly, I do consulting work and I serve other functions for clients where I'm kind of a trusted adviser. I get phone calls from people with permission of the company in that role and so I know when I have to keep my confidences and when there are times when I have opportunities and requirements to disclose in certain other scenarios. And so, I'm always thinking about these things – about when I can disclose and whatever. We always have to think about these things.

But for the board and the executive meeting – especially at those really just very excitable moments and those very excitable reports, gossip-worthy discussions... You know, going in, where I've seen some leaders do a great job is when they say, "Look..." – especially if it's an executive session – "if it's an executive session, just as a quick reminder, that means it's sensitive. That means no one should be really hearing about this and talking about this in addition to things that happen in regular session. But this is the super-sensitive stuff." And so, when you have those moments and you pass out those reports, what I've seen some good leaders do is kind of remind everyone, "Look, obviously we're about to talk about a personnel matter. I want to quickly remind everyone and myself that this is sensitive. This is someone's life. We cannot discuss it out of this room. We can't hint at it." And even giving them talking points: "If someone asks you about it, this is the only thing that we can say." And they'll go,



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“Stephanie, isn’t that right? Can we say anything else?” And then they’ll say, “This is it and we’ve really got to do our part to, you know, to make sure that we don’t do anything to contribute to this circumstance.” And so, and they pass it all around and then when they’re done having their discussion, especially if it’s one of those things that, you know, you might not have a unanimous decision on. You could have a split, like a 4-3 or a 5-2 in our hypothetical seven-person board or meeting group number. And let’s say, you know, it’s going to be – it’s not going to be unanimous or it may not be. You know, people are going to have polarizing feelings about this. And then when you’re done – you know, especially those effective boards who are mature and who have worked together or who just get it – at the end of it, you know, you can say, “Look, you know, we’ve had discussion. We’ve taken the vote. Thank you all for putting the time and the thought into it. Even though we may not all agree, we’ve got the decision. This is now the board’s decision and this is the only decision. The four doesn’t matter. The three doesn’t matter. This is it. This is it. So, when we leave this room, how we got to the 4-3, and that those are your...”

You’re now a director. That one decision that just came out is the decision. And so, kind of reminding them that once it’s done it’s done. And it’s not, now, if we need to revisit it six months down the road or a year down the road because that’s appropriate, fine. But by the time you get to the point of taking a vote, all the discussion should have been had. All the opportunities for questions should have been resolved. Assuming you have, you know, an effective, good discussion, it should all be done. And everything is on the table. Don’t leave anything off. Kind of remind everyone, “This is it. We’re about to take the vote. Is everyone ready to go?” You have your motion. You have your second. You have your vote. You’re done. That’s it. No more talking. That is the discussion. We’re not going to talk about the four versus the three. We’re going to... This is it. And those good reminders – you can only do so much. We can’t insulate people from themselves perfectly. But those good reminders are, you know, now we’re done. We’re done. And again, the taking up of all those papers if you need to. Reminding everyone not to distribute the oral or written information given, is always nice reminders. Reminding everyone we’re a board. We’re not always going to agree 100 percent, but that’s why we have multiple members is that we want everyone’s different input. We encourage diversity of thought to make sure we get it right. And once we’re done, we get that decision. Not everyone is going to love it, maybe, but that’s the decision. That’s what part of being a part of this group is about – is at the end of the day it’s one decision. That’s the best you can do.

Now, the post-meeting. We talked about the pre-meeting. It’s the post-meeting now. And now you’ve got – everyone leaves the room. Everyone understands that, yes, you’re not allowed to talk about it. They’ve given



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their written report. Hope to gosh they didn't retain any part of it and that their notes, by the way, aren't in a discoverable form. And maybe their notes are all turned in or whatever it happens to be. Now they want to go and go, "You know what? I really didn't agree. What just happened?" And now they get themselves in a post-meeting lather. That shouldn't be happening, either. You really need to make sure all of your feelings and thoughts are put on the table during the discussion. And then afterwards you have to be prepared in a mature sense to walk away from it. You have to be prepared to walk away from it.

Now, if the full discussion opportunity wasn't given there or if you had a tainted review – let's say someone didn't recuse themselves when they should have and the process is tainted – that's totally different. I'm talking about a full functioning, effective meeting where everyone had the right opportunities, the decision was made, etc. But what's really scary is when you have those circumstances where you have tainted decisions and you have people who have lingering feelings afterwards. Those are harmful and those are dangerous. And so, you've got to make sure that's why only people who have no conflicts of interest should be making decisions. That way you know that whatever the outcome is it's the true outcome of non-conflicted persons and that that is the right decision that can be made. Right or wrong, that is the decision.

So, the human nature piece of it is hopefully giving people the inputs on the front end to know the importance, giving them the understandings from their fiduciary duties – and not just for fear reasons for fiduciary duties, but why that's important. You know, why everyone's independence is important. You don't have to agree. And it's sometimes best if you don't so there's no blind deference going on, you know? Or it reduces the blind deference. But once everyone's given their contributions, and once everything's done, they need to know that to continue to talk about it, one, is a waste of everyone's time. It can be horribly counterproductive. No. 2, those disclosures of confidential information or sensitive information can invite those threats and harms to others. However well-intentioned or unintended, it can invite harms that now you're going to have to address. It's going to keep going on. And that risk of harm is too great to invite and does invite personal responsibility and liability. Why? Because there's no business judgment reason for it, you know? Business judgment gives us the defense and a presumption of a defense only if we make a vote and act in an informed basis with our fiduciary duties and in the best interest of the company based upon the information provided in a good faith and belief that what we're doing is right. But if we then violate that by failing to maintain confidentiality or discretions, we've now invited a new risk. And now you've put the spotlight directly on you as a director or management member when you've now disclosed it outside the room or taken it in a



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	<p>different direction. And that kind of scrutiny is something everyone should want to avoid.</p> <p>You know, it's funny: My kids always tell me, "Mommy, you're a lawyer; you have to be, you know, nosy." I'm like, "No, I don't have to be nosy; I have to be curious." And so, to do my job effectively, I'm going to be curious, and thinking through things is going to help me make good decisions, well-informed decisions, I hope. But being nosy is dangerous. And being nosy, to me, the way I define nosy, is harmful. And we don't want to be nosy. We don't want to... Frankly, if you start getting nosy that's where the gossip comes in. You should, frankly, want to avoid gossip at all cost. It's not productive. Good discussion happens in the right setting, and after that it's done. And then, frankly, you should find other things to talk about. So, that's a long way around the barn, Meg, and that's a whole lot of soapbox. But it really is just true. You have to have a desire not to want to gossip, to lather people up. There's no productivity that can be generated. And there are much better non-liability threatening reasons to not have those discussions and better things to talk about.</p>
Meg Pekarske	Yeah, well, and I think that these are not single solvable problems or probably, like, the constant reminders. And I think, you know, an awareness that, what behavior – coming back full circle – are you modeling, right?
Stephanie Kaiser	Right. Sure.
Meg Pekarske	And whether that's a C-suite person or on the board because that's how culture's created.
Stephanie Kaiser	Correct.
Meg Pekarske	<p>And so, if we're trying to create a culture of compliance and engagement and, you know, good business decision making – like, coming back to that. And it's very hard because I think in organizations, you know, a good board member is someone who cares about the mission of the organization. And so, as part of my Innovators Series where I talked to CEOs and other leaders about what they're doing to prepare for the future, one of the things I'm going to be asking in 2021 to those folks – and I did this with Bill Finn and the conversation that we're going to release in January – was: What are some tips and tricks you use to manage your board? And something that he shared – and that I won't, you know, share all of it – but just connecting your board to the mission of the organization is incredibly important. But as with everything else, being so invested in this that you can't get distance from it, you know, of being a fiduciary, you know, and the care and loyalty and obedience, you need a level of independence and know when you</p>



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really can't be that way anymore. So, I mean, I think as with anything, good attributes can turn bad if they're not, you know, sort of, there's not mindfulness around the blind sides of, you know, your strength. Because obviously having board members that are very invested and want to talk is really important.

Stephanie Kaiser

You know, Meg, something you just said there I think is really important and I want to hear what y'all end up saying in one of your other podcasts. That sounds really awesome. But, you know, one of the things I was kind of inviting in that last comment I made is it's easier to comply. You have fewer gossips. You have fewer post-meeting issues and what have you if people kind of get it and that maturity and that mission connection that you were talking about. But really what I'm talking about is if you have a mature, productive and effective board, if you've done your work and put in your time to develop a very good board where you allow for appropriate communications, where you do all the things that we've been talking about in the last, you know, couple of sessions or even today... If you set yourself up where people, you know, aren't afraid to contribute and people are inquisitive, even those new members, and ask all those good questions – even, you know, running the risk of feeling stupid, but asking anyway... There is no stupid question, especially when you're new to a board and new to an executive team member. Ask those questions. And especially if you're allowed in a mature, effective, productive way to participate in a meeting, then I definitely believe you have fewer opportunities for any of the risks that we've talked about, you know, from time to time – the gossips, the breaches of confidentiality, whatever – because people will get it. And if they know, if they feel the pride in that company, they are going to want to do what's best for the company if they buy into the mission. But definitely a mature, effective, productive board. If you have those leaks, if you have turnover, if you have people who are just abusive and if they don't contribute well – or if you have those leaders who always put their stuff out there first and that quiets the rest of the meeting – all of those things, frankly, are symptomatic of a non-functioning board or a non-, you know, mature version of itself board or meeting. And then you've got to go break it down and go back and make sure you set it up correctly. But once you have things set up correctly, and people get it and they've got good training, and good people want to do all of those things in support of the mission, I definitely think you're going to get the best out of that group, and those risks go way down.

Meg Pekarske

Yeah, no, this has been such a great, great series, and learning from you has been really helpful. And, hopefully, people will get from this not just the horror stories but really, like: How do you do better or, you know, as you say, swim lanes? And there's something that's practical, I think, that we've talked through. I'm interested as I talk to, you know, leaders in the



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	<p>Innovators Series. You know, what are their tools that they use to communicate with their board? Because as with anything it's a learning experience and I'm sure the newer CEO versus, you know, the longtime CEO who has, you know, made mistakes and weathered storms as we all do. The older you live the wiser you get, hopefully, if you're reflective. And so, I think that will be a good carry-through to have the vibrancy of this conversation continue on into the next year or so. We probably have not solved the governance problems of the world, but maybe we've aided someone and given some nuggets to folks to – something resonated that they can apply in their practice. So, I really appreciate you sharing your time with us over these last three sessions. And it's been fun getting to understand your perspective because obviously your experiences with boards are a bit different than mine. And you do a ton of it day and day out. It's been fun learning from you. So, thanks for your time and thank you.</p>
Stephanie Kaiser	<p>Well, thank you, Meg, for having me. I've really enjoyed working with you on this, too. I do hope it's helpful. The big... The last plug I would make is put time in the front to make it function best. Train, organize, and then you'll do best.</p>
Meg Pekarske	<p>Terrific. Thank you.</p>
Stephanie Kaiser	<p>Thank you.</p>
Meg Pekarske	<p>Well, that is it for today's episode of Hospice Insights: The Law and Beyond. Thank you for joining the conversation. To subscribe to our podcast, visit our website at huschblackwell.com or sign up wherever you get your podcasts. Until next time, may the wind be at your back.</p>

