

## Hospice Insights: The Law and Beyond



### Episode 55: Beyond Regulations: Hospice Business Contracts and Contract Disputes January 5, 2022

**Meg Pekarske**

Hello and welcome to “Hospice Insights: The Law and Beyond,” where we connect you to what matters in the ever-changing world of hospice and palliative care. “Beyond Regulations – Hospice Business Contracts and Contract Disputes.” Hospices’ unique regulatory and business environment impacts how they contract with hospices and relate to other private entities. In this episode, I talk with Bryan Nowicki and Jake Harris to discuss the many kinds of hospice-related contracts and dispute matters they’ve worked on, and how our clients have benefitted from their in-depth knowledge of hospices.

Jake, Bryan, exciting topic here.

**Bryan Nowicki**

Hello. Yes, it is, everybody loves a good—everybody loves a good contract story.

**Pekarske**

Yeah, I know, exactly. I won’t do total spoiler alert, but obviously we have to talk about EMR contracts, because those have been challenging and issues we’ve had to deal with. But, before we delve into different types of contract disputes, why don’t you tell me a little bit, maybe we start with you, Bryan, about what kind of contracts are we seeing and working on, what’s leading to disputes, do people really understand what they signed? In my experience, it’s sometimes, the first time someone reads a contract is when there’s a dispute, so-

**Nowicki**

There is a lot of after-the-fact perusal of those contracts, unfortunately. And, you know, most of the time, signing a contract doesn’t lead to a dispute. So you can kinda get away with that approach, but you get busted



once or a couple of times on that, and then you really start to become much more cautious about the contract aspect of the business of hospices.

So, before I became a hospice attorney, many, many years ago, this is going back more than 10 years, I did a lot of contract dispute law, and so, in my 25 years of being an attorney, I've litigated and analyzed all sorts of different contracts. And then, Meg, when I joined you and the hospice practice 10 plus years ago, I brought a lot of that experience with me. Because hospice is just like any other business; they have contracts with other parties, and so we're not talking about—in today's episode—about medical director contracts or facility contracts that really support services. It's more like the vendor contracts with the DME provider, EMR contracts, maybe transactional documents. Hospice, in today's world of a lot of mergers and acquisitions and transactions with hospices. Stock purchase agreements, asset purchase agreements. And each one of those kinds of contract settings brings a context with it that's a, it is important to understand as much as you can about hospices to make sure that that knowledge gets into those contracts, and that you're not surprised as those contracts are being performed with something hospice-specific that the contract, for whatever reason, doesn't address adequately. And so, what I've, kinda the experience that our entire group brings to these, as you know, Meg, and Jake is certainly a part of this, is that we have that in-depth knowledge of hospices, and so we can make sure that your vendor contracts, EMR contracts, transactional documents, and other sorts of things are gonna fit with the hospice business model. And at its heart, we take a very practical approach to all of these. A practical approach to guiding hospices in creating contracts, but when there does become a dispute, we want to be practical about resolving it. Just because a contract is breached doesn't mean you're, the next day you're in court suing somebody. Try to find a solution, you maybe want to maintain that relationship. Find something that works for everybody without racing to the courthouse. So, we are attorneys, you know, we are passionate about representing our clients in court, but that's really a last resort in our view. We want to find a solution short of that.

### **Pekarske**

I always chuckle when I was talking to a young lawyer and they asked, I asked them, you know 'why do you want to be a litigator?' 'Well, I want to help solve problems,' and I was like, well that's like the opposite of what litigators do, not to rain on litigators, because you're very needed, but I think a really important point you just made, Bryan, is I don't think you necessarily always start out of the gate threatening to sue someone, because that is a long battle. But, usually by the time people are coming to us, they've tried these other, you know, methods for 'hey, I'm not seeing things exactly the way you are seeing things.' But so--

### **Nowicki**

But it's a good point, Meg, you know, as far as there are ways to find common ground and Jake, this might be a good time to bring you into this,



because I know you're working on a case now where, you know, the parties have a few disputes, but there's also areas of common ground, and maybe you can kind of describe how we work through that situation.

### **Jake Harris**

Absolutely. I think that's an important point to emphasize, which is that every situation is different. Every business relationship is different. And so, sometimes clients will come to us and they'll say 'we're at the end of our rope and we,' you know, 'the relationship is, has completely soured, it's irreparable. We just want to get out of not only the operative contract, but also the business relationship entirely.' And then there are other situations where, you know, a client will come to us and say 'our relationship has hit a snag, we don't feel that we've been treated fairly under a contract governing this aspect of our relationship, or this period of time, but in general, going forward, we want to continue doing business with (whomever the vendor or third party may be),' And so, those are the kinds of questions that we would ask at the outset to kind of take inventory of, okay, where is this relationship headed and accordingly, how should our approach be dictated or modified by that? So there are situations where, you know, a discussion either with an in-house lawyer or, if this dispute has ripened to a certain point, outside counsel, can be useful. There are situations where we'll kind of ghostwrite communications on behalf of a client, and then the client can leverage their relationship with third party and try and smooth things over that way, without even necessarily knowing that lawyers are involved. So there are a variety of different approaches we can take—and do take—depending on the status of the business relationship.

### **Pekarske**

Well, and I think that's a great lead in to talking about EMR contracts. So, top of my list of contracts no one reads, it's on. Because, I think these, you know, my feeling is these are very difficult contracts because they're so one-sided and we have had to deal with, you know, a number of significant repayment investigations related to problems with EMR and then, you know, you look at the contract and there's no indemnification, there's no, really, protection other than griping. But I bring that up, and I think EMR contracts are an important place to start because, to your point, Jake, is you don't essentially want to terminate that relationship just because it hit a snag, because moving to a new EMR is so laborious and difficult, and that you do want to try to work that out. And maybe, Brian, you can talk about some different EMR disputes and how we've sort of seen our way through those, and, I mean, this could be a whole podcast series because sometimes you run into they want to keep your information, they hold it for ransom, too, when you're trying to get out of a contract, and just a whole lot of different stuff. But why don't you tell me, sort of, what you've learned in dealing with these EMR contracts and how to resolve them.

### **Pekarske**

The issues you suggest, Meg, really come up quite frequently when hospices do get to the point of having a dispute with an EMR provider.



And that is, the EMR didn't operate in a way that a hospice would want it to. It didn't have, operationally, the ability to make sure every necessary blank was filled in, or dates were included, and there was no provision in the contract, or it wasn't negotiated in a way to make sure that those kinds of hospice-specific requirements would be part of the contract. And so you're left with rather general performance requirements, and then the EMR provider's going to limit their liability. A lot of times they'll limit their liability to whatever amount the hospice paid the EMR provider for the service. And that might be a monthly fee of a few thousand dollars a month. You know, whatever it is, it can be far less than the potential overpayments that a hospice is gonna encounter if the EMR fails to properly complete claims, or require the completion of documents, which results in hundreds of thousands or millions of dollars of liability. And so, that's what we've come across a lot, is that limitation of liability and trying to navigate through the limitations, provide the proper notices of some sort of defect in the EMR, or failure to troubleshoot an issue, and be responsive and timely with a fix. So, this is kind of after the fact when we're given a contract to try to find arguments for, that's what we look for. What are the dispute resolution provisions, how do we get the notices out there, how does the limitation of liability impact it, are there any indemnification obligations, and importantly, if we're thinking of a switch, how do we continue to access our documents even if we want to terminate the contract- you know, declare a breach and terminate. Do they get to hold on to our documents? For how long? What kind of access do they provide? So we're constantly troubleshooting those kinds of issues, and that has led us to have a lot of experience to help clients on the front end of these negotiate EMR contracts that anticipate some of those issues and try to avoid them by having more reasonable limitation of liability provisions, making sure there's an obligation to, you know, work within the hospice world, and the hospice requirements; make sure they cannot hold hostage the medical records of a hospice as a way to gain some sort of bargaining advantage. So, those issues have come up where there, in circumstances where the EMR provider or a hosting service for an EMR provider has been hacked, we cannot access the EMR as we need to, we've gotta go to a paper file- you can imagine the amount of resources that would be devoted to that work-around, or the EMR, you know, allows copy and pasting when we don't want it to allow copying and pasting, and that leads to problems. Those are the kinds of issues we're dealing with pretty regularly.

## **Pekarske**

Yeah, and I think the, obviously more like to talk about prevention, and I do think when, early on, when the courting is beginning, of making sure you have legal counsel look at that EMR contract, because I just, I rarely see that they were ever negotiated, they were just signed, and then it leaves you in this difficult position. But to your point, Bryan, when you said earlier about, I think having, so let's say, let's use Jake's word "snag," the relationship has hit a snag. And I think it's best to call counsel right away



and look at, given the snag, how strong of a position do I have under my contract and understand the contract, I guess, that you signed in light of the snag that you're experiencing. And it doesn't mean that you come out of the gates and write a nastygram letter, but I think understanding how, because I really don't think most contracts are living and breathing, so no one pays attention to them until there's a snag, and then thinking about 'okay, how does this contract play out given what we have at stake here?' And so I think even if things can be resolved, you should still get counsel, because I think you want to understand what leverage you might have and whatnot. So, maybe Jake, just moving away from EMR contracts, because you're dealing with a number of these right now, is other vendor relationships and you talked about what's your goal, do you want to terminate the entire relationship, and obviously we just talked about how EMR vendors, they're very entwined into everything you do every day—tell me about some of these other vendor contract disputes and how you've had to navigate those, because they do sometimes relate to patient care.

## Harris

So, one such category that we've been doing some work in would be medical supply agreements. And, you know, I think just kind of a general principle for a lot of these vendor-hospice relationships is that, you know, most vendors, if the relationship really has hit a point where one or both parties are dissatisfied, most vendors don't want to continue doing business with a dissatisfied partner. And so sometimes there really is some room to, you know, negotiate an exit strategy, again, if the relationship gets to that point. But I would say, both in terms of medical supply contracts, contracts with EMR providers, and other relationships with vendors and third parties, that there really is some significant opportunity at the front end to, you know, kinda take a look at the contract with an eye towards what happens if things do go south? And it's a little bit counterintuitive, right, because at the outset of a business relationship, everyone's happy, everyone, you know, no one's anticipating problems down the road, everyone thinks that it's going to be a productive and successful working relationship. But some of the things that we've seen in our experience, you know, long contract terms; contract terms that automatically roll over unless one party or the other gives, in some cases, really significant notice that they don't wish to reup for another term of what could be five or 10 years; contracts that don't contain all of their terms within a single document, but instead refer you to like a website of the vendor or some other, something else that you would need to access, in some cases on a periodic basis, in order to even see what the terms of the contract between you and your contracting party would be. And so, these are all things to, you know, that can sometimes be contained in the standard boilerplate contracts that the vendor uses, but they're issues that should be raised at the outset. You know, don't just think that 'well,' you know, 'this is what they're presenting to me and therefore this is,' you know, 'what we're gonna have to be bound by.' Don't hesitate to engage counsel to review some of those provisions, advise you as to the risks and



benefits of potentially agreeing to them, and you really can prevent a lot of problems down the road.

**Pekarske**

Well, and I think that, for working with hospice as long as I have, we had vendor contracting tool kits, and facility contracting tool kits, which, you know, have been wildly popular and sold many copies, it's a best seller, these tool kits! But for some reason, no one wants to give us contracts for other types of vendor relationships, and I think do, exactly what you said, is 'I'll just sign it, it's not that big of a deal.' There are, I'm sure, certain contracts where it's not that big of a deal, but I do think having legal counsel take a look at your contracts, especially if they're significant and if something did go wrong, this could have liability for me, as you said, Bryan, with overpayment, or, you know, I'm gonna be tied up in this for a very long time and I'm not gonna be able to get out because it's an exclusive relationship and I'm paying, you know, per patient per day sort of rate, and to try to get out of that's gonna be difficult, and all the stuff. Which, you know, so I do think I'd rather spend money on the front end than the back end. Yeah, Bryan.

**Nowicki**

And Meg, I think what counsel can do and what Jake and I, and I know, Meg, you do this too, is I think we're very good at finding alternatives for clients who think they have none. They might be in a situation with a contract where they think they're sunk—they owe a lot of money, or they're gonna get terminated, and when you have counsel really dig into something, we're really good—I mean, this is what our training and experience is all geared toward—what are the alternatives out there? And so even these kinds of contract disputes, a couple of examples where we get involved, we were brought into a contract situation, client thinks they have no options, they think they owe some money, but you know, we examine the relationship and realize, 'hey, this whole situation is really governed by a contract that's 10 years old. It's not some new arrangement that the other side is permitted to just charge you whatever they want. They're bound by something earlier than that, that a lot of people had lost sight of.' Another example is, you know, the terms and conditions that the other side is claiming permits some sort of termination. Well, those aren't the terms and conditions that govern the contract, because if you go back to when the contract was formed, it was a different set of terms and conditions, and they have different provisions. And it's just the kind of thing we do in investigating the facts of the circumstances—of the situation and also digging in to the law and some legal principles, we find those alternatives.

**Pekarske**

I'm chuckling because you're trying to tell me that litigators are problem solvers again, so.... But, I'll let you remain delusional on that.



**Nowicki**

Well, litigators are problem solvers are problem solvers. I think a lot of litigators, though, see court as the only way to solve a problem, or they take that step much, much too quickly. And that's not our approach at all.

**Pekarske**

Yeah, no, absolutely. I'm glad that you're on my team. Thank you, Bryan. I just need to razz you a bit. So, I want to conclude this, because we could talk for hours on contracts, they're very exciting, but I think we're doing a ton of transactional work and so some of the contracts that we deal with are, you know, the contract that comes out of selling a business or buying a business, and it's, and again, I think our deep knowledge of hospice and how things work, and the kinds of liabilities hospices could have makes us really good advocates and advisors on hospice transactions. Because one of the things that's coming up more and more is 'how is audit liability handled in the purchase agreement,' and Bryan, I know you've dealt with this quite often, and I think sometimes when you have corporate counsel who doesn't really understand some of the liabilities that can come back and bite us, there could be some missed opportunities, I think, in terms of who wants to control the defense on things that happened under, you know, if you're the seller, you know, you probably want to control the defense for things that essentially you're liable for through an indemnification provision. But why don't you tell me a little bit about your experience in this area?

**Nowicki**

Jake and I are currently kinda knee-deep in this kind of a situation, where we've had to untangle a lot of grey area that was found within a contract—a transactional document. And if any hospice has been through an audit, you know the complexities of that process, with recoupment or halting recoupment, and appealing, and how long it takes to appeal and what goes into that; there are just all sorts of moving parts that cannot be addressed in a transactional document by a line saying 'okay, upon the sale, buyer now takes over the defense of an audit.' It's not that simple, especially when you're talking about trailing financial obligations, and who ultimately pays for liabilities that may have been incurred years ago, as we know audits often look at time periods years before they commence. And so, Jake and I have been dealing with this, we've had to really work with a document that did not at all anticipate an administrative appeal process, it did not anticipate recoupment of overpayments and how those are refunded, which led to disputes and led to attorneys having to engage in negotiations, all of which could have been avoided had that contract been a little more precise about liabilities, how they would be handled, how responsibility would be transferred from seller to buyer and from counsel to counsel and, you know, who's going to retain control over that. Thankfully, you know, as happens a lot of the times and as we've talked about, we found some practical solutions to that. We didn't go to court, so I mean that was good to be able to resolve that in a way that I think everybody believes to be fair. But those are the kinds of areas in transactional documents that, you try to work through that grey area, better



off to have the hospice people involved up front so you don't have to negotiate things in the context of a dispute, you negotiate them in the context of a transaction and making sure everybody has the same expectations going forward.

**Pekarske**

Exactly. And again, we could do a whole session on, you know, liability under purchase agreements, because it does get fairly complicated given exactly what you said, Bryan, the tail end of claims, given that hospices are so highly audited and right now there's a lot of TPE going on, and so dealing with that, trying to close a transaction and who's going to be responsible for this, and whatnot. Because, obviously if you're buying something, you don't want to give, you know, the seller all this money, because your indemnification is only as good as there's any money to go after, and so, I mean you get why both sides are sensitive to it. And so, as we close out here, any final thoughts on—obviously you're a problem solver, Bryan—

**Nowicki**

Well thank you.

**Pekarske**

You know, undisputable. But, I guess, any other closing thoughts, you know, in term of top five, it sounds like: pay counsel to maybe review your contract on the front end, because you're probably going to have the most leverage, because everyone's excited about the relationship. I guess other things that we should be doing?

**Nowicki**

Well, like you said, Meg, an ounce of prevention is worth a pound of cure. So, having counsel review at the front end is gonna avoid problems down the road, where the stakes could be much higher when you're dealing with, you know, inability to use EMR, and documents being held hostage, and, you know having to go to court to sort out who's responsible for what audit and all that. So, that ounce of prevention with a knowledgeable hospice attorney, that's the key, because they're the ones that are going to be able to make sure your contracts have the right provisions to preempt problems. If you're in the situation where you have the problems and you're dealing with them, there's probably more opportunities and alternatives than you believe there to be. So, an attorney can maybe illuminate some additional legal alternatives, but also, we know hospices well enough and how they operate on a business level that we can even jump in and start thinking about business strategies that work within a legal context. How do you troubleshoot this to achieve your goal without disrupting your business? And it might not be a legal solution, you know. We rarely go to court on these things, and that's by design. You know, we want to find the solution that allows you to keep operating without sinking all your money into legal fees.



**Pekarske**

Yeah, absolutely. Well, wise words, Mr. Bryan. So, thanks for your time, and thank you, Jake, and we look forward to next time.

**Harris**

Thank you.

**END OF RECORDING.**

