

## Hospice Insights: The Law and Beyond



### Episode 56: Who's Watching Me? Addressing the Second-Guessing of Hospice Patient Care

January 19, 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.

“Who’s Watching Me? Addressing the Second Guessing of Hospice Patient Care.” Providing hospice care to vulnerable individuals can embroil hospices in a variety of unwanted situations. The emotions surrounding the death of a loved one can cause families and caregivers to question the kind of care provided. These sensitive circumstances can also lead to disputes between family members, between family members and other non-hospice facilities, and between other parties in which the hospice gets stuck in the middle.

In this episode, I speak with Bryan Nowicki and Jake Harris to discuss what hospices should do when confronted with these situations.

Jake, Bryan.

#### Bryan Nowicki

Hey, Meg.

#### Jake Harris

Hi, Meg!

#### Meg Pekarske

In the past, we’ve talked about trying to problem solve in these situations when there are disputes about patient care. Can require definitely some fancy footwork in terms of trying to dial back what can be difficult situations.

But sometimes – and maybe the best place to start, Bryan – is the record request and trying to figure out if you’re actually really the focus of what is the dispute.



Because I think really, nine times out of ten, oftentimes all of the situations that we're talking about today, the hospice is actually not the focus. But they are – because we're bearing witness to the situation, we might be in the best position to discuss whether or not someone was competent at the time they were saying certain things or whatever.

But Bryan, why don't you tell me about the different types of requests that we get and how we're sometimes not the focus?

**Bryan Nowicki**

Sure. And the two main categories that these requests fall into are requests you get from the government and requests you get from non-governmental parties. And they can have certain similarities to them, but there's also some important distinctions. What we deal with and help hospices through quite a lot is they will get a subpoena for medical records. Maybe it's a subpoena that requires someone to produce documents or to show up at a hearing or to submit other records to the government, submit records to a private party. Maybe that's a family member, the attorney for a family member of a hospice patient. It could be a Medicaid fraud control unit at a state level. But you get these kinds of requests in many, many different forms.

And so the first instinct of hospice is, I think – in my experience in talking with them – is well, let's respond to it. I mean, it looks like a formal document. It looks official. We've got to respond to it. But those hospices I think are jumping the gun a little bit. Because it's important to find out the context because if you have that knee jerk reaction of just responding, you could be getting yourself into a little more trouble or exposing yourself to more risk than you would care to take on.

And so as you had alluded to, Meg, one of the very first things that you do is try to figure out am I being subpoenaed, or am I being targeted with a request because I'm the target of an investigation, I'm a potential defendant? Or am I a witness? Does the hospice just have information that relates to some other dispute between other parties? You know, the family members of a hospice patient are angry with one another or something like that. Or a facility provided poor care to a patient who was also a hospice patient. And so the government is trying to go after the facility, but we have information that's helpful.

And so finding that context is critical, and one of the first things that Jake or I do when we get those kinds of requests, we of course talk about it with our client and get some background, but then we reach out to the requester and find out who are you, who do you represent, what's the purpose of this and straight up, we ask them, is the hospice a target or a witness in this thing?

And private parties will often be apparently candid with you. You know, you call the attorney who issued the subpoena. They tend to be much more freer with information, because they want to get you to cooperate and there's some voluntariness to that. The government, however, is much more tight-lipped.



They may tell you target or witness, but otherwise they don't disclose much about what they're doing.

But once you're armed with that information, that kind of sets the context for how you devote resources to this. And you don't necessarily just take those people's word for it. If you get a subpoena that's attached to a case, it should have a case number on it, the court that it's venued in. And you can go and, you know, I've pulled complaints and looked at okay, what's this lawsuit really about, and is there anything that suggests the hospice did something wrong? And so you kind of figure out – go right to the source, figure out what you can from them about it, do your other due diligence to lay the other context around the request. That's how these things begin.

### **Jake Harris**

I would just add that the other advantage to taking that approach is it might save you a whole lot of work. So Bryan talked a little bit about fighting your instincts. And the instinct, of course, when anyone receives either a civil investigative demand from the government potentially or a subpoena from, again, either the government or a private party is, 'I want to comply. This is an official-looking document. I'm a little bit intimidated. I also kind of want it off my desk and so, you know, I'm going to take a very literal approach and look at the categories of documents that have been requested, and then I'm going to do a diligent, thorough search and I'm going to find absolutely everything and I'm going to turn it over without once interacting with the other side.'

But if you just take a step back, try and make contact either directly or through counsel with the requesting party, find out what's really involved. Find out what they're most interested in. You can save yourself and your staff a whole lot of searching and reviewing and redacting and all of the other kind of unpleasant, time-consuming tasks that come with responding to one of these communications.

### **Meg Pekarske**

And these don't necessarily come to the CEO out of the gate. Oftentimes they're directed at medical review, especially subpoenas when there's a family dispute. Those are oftentimes coming to the custodian of medical records. So I think just like we talk about with audits, those kinds of things should get elevated to leadership so then they can make some judgment calls.

Because I think one thing that gets overlooked is HIPAA and when a patient's deceased, the power of attorney for healthcare doesn't have authority to release records any more. So you could – even if you weren't initially the focus of the investigation, it's a family dispute, suddenly you disclose information, medical records, to someone who really didn't have legal authority because some of these subpoenas that we're talking about, it looks really official, but it's actually what we call 'attorney subpoena' as opposed to a court ordered subpoena and, at least in our home state of Wisconsin, those have different standing in how



they relates to HIPAA, and an attorney subpoena isn't the same as a judge subpoena.

So my two cents is, if you get a records request from an outside third party of any sort, it's probably best to get counsel involved right away so they can hopefully cut it short in terms of what you're saying, Jake.

But let's sort of delve into where family disputes have led to other types of government investigations. Because I think, you know, as this is titled, you have family members who are distraught and then they complain to a state survey agency and, you know, abuse and neglect gets investigated and what not and so sometimes there can be licensing actions and there can be other things. So Bryan, why don't you walk us through sort of what some of these record requests were that actually we were the focus of the review. So it's not like oh, the nursing home provided bad care, I just want to see your records. This is we've already discerned, and now the hospice is the focus.

**Bryan Nowicki**

Right. And that can be generated, as you say, by a family member complaining to a state authority. It could be just the government's own investigation, finding some reason to investigate a hospice, which can start with a subpoena or a request for records. It can come in many contexts. It can be that abuse and neglect investigation. They might report this to a licensing agency. So now the nursing – whoever administers nurse licenses in your state, they might be sending a request and it's not necessarily directed at the hospice, but at some of your staff. But, again, it's important for the hospice to be aware of that.

And a lot of the same beginning steps that Jake and I described are important. Get that open line of communication with the government, because you can find out a lot about, you know, how interested are they? How aggressively are they going to pursue a request? What do they think about the requester? Do they have any credibility issues or concerns about the family member who might have generated these kinds of requests?

You can get potentially more time to respond, and you can focus the requests. A lot of times with a family member complaint to the government and the government is sending out a document request or subpoena, they don't know a whole lot about hospice specifically, so they may be asking for all sorts of information that is irrelevant to what they really want. And so I've been on the phone a number of times with these investigators saying tell me what you really want, and we'll be transparent and we'll provide it to you. And it turns out what they want is far less than the very, very broad written requests that they provide. And so we're able to narrow the requests, maybe get a little more time to respond to it and we begin our advocacy. And we will have done our due diligence with our client to figure out what our side of the story is, and we begin advocating for that through all our communications with the investigator, pulling on facts and law and everything we can to really make sure the investigator is not just



getting a set of documents, but is getting a set of documents in context which shows what the hospice's position is.

And that's important to get all of that context and begin the advocacy process right away, especially when you're the target and especially when it's the government who's coming after you.

**Meg Pekarske**

Well, and I want to focus more, because government investigations are so complex and sort of their own animal. But let's talk about sort of the step-down a little bit more.

Over the last year, I feel like we've been dealing with a lot of different kinds of these requests. And I'm trying to just think of all of the different buckets that they fall into. Because we have – sometimes it's about money, right? There's a dispute in the will and now there are money issues. But sometimes it's the California – I always call it the California family member – who hasn't seen mom in years, and now can't believe she's dead and what happened. So why don't you tell me a little bit more about those types of requests? Because, you know, those can be difficult to navigate through.

**Bryan Nowicki**

When it comes to private party requests, you're right, it's a different set of interests than the government may have. You're getting into more of the emotional component of those. And trying to respond to somebody or, more likely, to their attorney, with information that we really want to deter them from proceeding against the hospice in any way. And trying to demonstrate to them what the weakness of any case they might have would be. But we try to – you've got to do that in a way that is not coming out guns blazing and hyper-aggressive, because that just tends to entrench people in what they want to do.

So, again, our approach is we try to be compliant with the request and transparent about that, but always being very reasonable and as accommodating as the law requires and include that advocacy throughout. So in dealing with a private party, we're going to be talking about more things than just complying with the law. It's going to be, you know, is this really going to lead to a lawsuit, is that really what the best result is for anybody involved? And trying to find, again, solutions to whatever the problem may be that the family member is encountering.

And a lot of times what we see is that immediately after a death, that is prime time for these kinds of, I think, emotion-driven requests to come about. And as time passes, the heat of these diminishes over time. And so being able to withstand the initial kind of aggressiveness of unhappy family members in a very professional, polite way, is a way to make sure these things don't snowball out of control.

And a number of times, it begins with the hospice itself. They're the ones who are fielding the angry calls from family members before we're ever involved.



And if you're able to deal with those professionally and try to nip the issues in the bud, great. Sometimes that doesn't work, and we can get involved if the family member takes a more formal approach by hiring counsel or submitting complaints to the government.

**Jake Harris**

The other thing I would add to that is that as litigators, we've been on the other side of these private party subpoenas and requests. So, on behalf of our own clients and lawsuits, we issue subpoenas all the time to third parties. And so, what that does is, when we're representing you as the recipient of a subpoena or a document request, we can sort of think, 'okay, if I were on the other side of this, what kind of responses would satisfy me? You know, what would I accept? What objections would I say yeah, okay, that is objectionable?' So, I think our experience on both sides of subpoenas and document requests, both as the proponent and as the responder, you know, give us some good experience to be able to draw on when we're in the responding position.

**Meg Pekarske**

Yeah, and I think that's a really good point, and I think, too, as hospice has matured as an industry, I think that we are being put into different positions and getting different requests, and so I think 15 years ago, the kneejerk response was, 'oh, I'll just take care of this and give the records,' and a level of maybe naiveness fell over, like, what could happen, because it's fairly rare that hospices are getting sued for malpractice and things like that, so I think what both of you said about 'well this is very official, it's a subpoena, they're asking for records,' or 'the police are asking me for records,' you know, 'I must give this,' and it doesn't mean that you're not gonna give it over, but I think talking to counsel is important, because you want to be – and we talked about this a lot on the podcast – ten steps ahead, right? So, you want to be thinking about stuff before you just have a conversation and do some of the – I don't people to leave this podcast like, 'oh, well I listened to this and now I'll just go talk to these investigators or the police myself,' without, sort of knowing, you know, what are the, what's the framework of the law. And Bryan, you were gonna jump in?

**Bryan Nowicki**

Yeah, I was gonna just say, in my experience, I've encountered this not infrequently, where there's this tendency to just take it off your desk, respond, especially in a private party matter, not a governed investigation, when doing that is inserting the hospice even more into the problem, because the person who wants the records – of course they want the records, it's the daughter of the deceased – but you don't know that the wife of the deceased absolutely does not want those records to be disclosed to the daughter. And so if you disclose them to the daughter, now you're gonna have the wife, the widow, and her attorney coming at you, saying that was an improper disclosure, you violated HIPAA, and now you're really in it. So, with these private things, we talked about doing your due diligence, you want to make sure that you're not satisfying one party and only, you know, getting yourself in the doghouse with another party.

And then, to have HIPAA in there as well, where, you know, now that you've done something that was inappropriate, now you've gotta make a disclosure to



HIPAA about that. You know, a thoughtful response, considering all of the risks that are out there, that Jake and I kind of walk clients through whenever we get this, is really critical to making it possible to – for a hospice to extricate itself from a situation at the earliest possible moment, and that’s where we want to – what we want to accomplish.

**Meg Pekarske**

Yeah, and I think too, something to avoid is sort of what’s another kneejerk reaction is, you know, we are interdisciplinary professionals who are used to dealing with emotionally-charged situations, right? Being at the bedside and witnessing death, I mean, it’s one of the most intimate things that we do as humans, and so, I think sometimes our staff, if there’s an issue, might want to have that difficult conversation, because we’re used to guiding difficult conversations, and I think knowing when that might dig you into a deeper hole, like, I’m going to try to settle the situation down by talking to the daughter, because I’m gonna be able to fix this by talking, and again, I’m not saying that there isn’t a place for, you know, family meetings when you, in the middle of a record request and all these other things, but I do think getting, you know, a second look and some advice from counsel about how to deal with some of those sticky situations, because what makes hospice great is I think we can have difficult conversations and deal with some of the emotional charge around these things, but we’re also human, too, and I think can get defensive and sometimes we can say things that can actually make things worse if someone is sort of personally attacking you, and things like that. So, sometimes I think people try to deal with the stuff on their own, and so, I think what you all said about calling whoever issued this to find out, I really think having counsel do that is better than even the most skilled CEO or whoever doing that. But, well, any closing thoughts as we sort of talk about dos and don’ts here, about when you get these record requests?

**Jake Harris**

I think the big thing is just, upon receipt, try and fight your instincts. You know, try, you want to respond, you want to be cooperative, you want to get it off your desk, and that can sometimes lead you to produce documents that are totally unnecessary to be produced. It could lead you to do so in a timeframe that is, you know, also unnecessarily early or prompt. You know, don’t panic, forward the request to counsel, talk through it, try and collectively make contact with the requesting party and figure out, you know, what’s the minimum, in terms of production, that we can make while, you know, satisfying the requesting party, but also not exposing the hospice to either liability or just further requested efforts.

**Meg Pekarske**

Yeah, it’s like life advice, Jake, there. Fight your instincts, right? Because I think that goes a long way in terms of whenever we’re dealt difficult situations, sometimes taking that pause, whether it’s the deep breath or, you know, holding off on that response, I think is good until you can get your head on your shoulders or, you know, talk to you, Bryan, or you, Jake, or me, Meg. So, but anyway, thanks for the time, I think these are, unfortunately, I feel like these situations, the number of subpoena issues you guys have been involved in with



our hospice clients over the last year has increased quite a bit, so I'm glad you could share some of your wisdom today, so thank you.

**Bryan Nowicki** Happy to do it!

**Jake Harris** Thank you.

**Meg Pekarske** Well, that's 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](https://huschblackwell.com), or sign up wherever you get your podcasts. Until next time, may the wind be at your back.

