

## Hospice Insights: The Law and Beyond



### Episode 43: Staying Prepared: Hospices and the False Claims Act, Part III – Success in False Claims Act Lawsuits

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#### 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. Hospices and the False Claims Act, Part III – Success in False Claim Act Lawsuits. In this final episode of the series, Meg Pekarske discusses the process and path of a FCA lawsuit with Bryan Nowicki, Jody Rudman and Brian Flood. FCA cases are a test of endurance as much as they require expert marshalling in the facts and law. In this conversation we provide an insider view of a FCA lawsuit, including how hospices and their attorneys work together to identify strengths and weaknesses, manage expectations and develop a winning strategy. These winning strategies can serve as a guide for what hospices should prioritize within their organizations to ensure they can put their best foot forward.

All right, well welcome, Bryan, Brian and Jody. Bringing the club back together here for our final episode, and I expect we will do other False Claim Act series or you know other False Claim Act podcast episodes, but in this sort of series that takes us through, you know how do you know if you might be the subject of an investigation, how do you deal with that investigation, and now we're going to talk about you are now sort of beyond the investigation, things are more active now and actually there's a lawsuit and so Bryan Nowicki, why don't you start with how do you know that the – you haven't essentially convinced the government maybe that not to intervene or that everything's okay. What happens now? When's the lawsuit?

#### Bryan Nowicki

Right and we have already talked about it in a prior episode about a couple of different pathways to a lawsuit. One of them being the



homegrown variety where the government itself has done data analysis or has received complaints or other information. So that it's the government, the Department of Justice or U.S. Attorney or the Office of Inspector General are really leading that effort, and then they may conduct some investigations to see if they have enough to actually commence a False Claims Act lawsuit. So you will have gotten civil investigative demand. There may be informal interviews and other contacts with the investigators. Once that investigation turns into a lawsuit or if it's heading toward turning into an actual court filing of a lawsuit, if you've developed that rapport with the government, that should not come as a surprise, you should be getting to those conversations and idea of where they're going. And then if they actually file the lawsuit, you will get notice of that filing. They'll be served on the defendant company, and that starts really the formal legal process through the courts which we'll get to in a bit.

The other pathway for these lawsuits is a whistleblower lawsuit. Whistleblower is a private citizen and assert the interests of the United States and actually file their own lawsuit against the hospice. With the whistleblower they don't – there are some protections in place so that they're not just filing these lawsuits all the time without any government supervision. So what will happen with the whistleblower is they will file a lawsuit under seal, meaning that it goes to the court, but a very limited number of people get to see the complaint or even be aware that it has been filed. They'll file that complaint, they'll send a copy to the government's attorneys, and then they trigger the government in doing investigations to determine whether the government wants to get involved with that lawsuit also. There can be – that investigation process can take years. So it's not unusual to have a whistleblower file a lawsuit in let's say 2010, and the investigation goes on for a couple of years and then that complaint doesn't become available to the defendant, the hospice provider until let's say 2014 or 2015 when it is unsealed because the government has concluded its investigation. So you could be dealing with allegations that are years old by the time that you actually are aware that your hospice or the provider is the subject of a lawsuit.

**Meg Pekarske**

So but obviously, you're probably going to have a heads up with all of the CIDs and subpoenas.

**Bryan Nowicki**

Right that'll be a big clue, and I was mentioned before, once we get those investigations I always ask the government is there a False Claims Act lawsuit out there, is a sealed complaint that you can disclose to us or maybe you can disclose certain portions of a sealed complaint. Often they say they're not at liberty to say one way or the other, but sometimes they will reveal portions of it if they think it's going to be helpful to their investigation. But yeah you should get a lot of clues that there is a lawsuit out there, but actually that legal process commencing and formally



beginning where the judge gets more actively involved in managing the case, it could be years after the complaint is filed.

**Meg Pekarske**

So Jody as a former prosecutor and then obviously you do this day and day out, so you've gone through that investigative process, the complaint is unsealed if it was a whistleblower, now there is a complaint, is this sort of the normal process that people are used to seeing on TV and dealing with sort of in other contexts, like a malpractice claim or is it very different? Tell me a little bit about what that process is like and what you're doing during that process as a lawyer.

**Jody Rudman**

Sure. Yeah so once the lawsuit is, you know, unsealed and is served on the defendant and made known, it really takes on a very similar complexion to just about any other lawsuit, you know that anyone would be used to. In terms of things you see on TV versus what really happens in real life, it probably is a good idea to sort of say at this point that these lawsuits, of course they're all federal in nature and so the federal court system operates very differently in several respects than the state court system, and in the federal court system there is a lot of formality, not only to the process but a lot of motion practice, which has to do with really arguments that you make on paper rather than, you know, standing up in courtrooms and convincing juries about things. So long before you'll ever get to the jury and have your Perry Mason moment, you are really litigating the case through the submission of various briefs and papers all along the way. Even before, for example, you as the hospice, if you're on the defense side of it, even before you would file an answer to the pleading, it might be appropriate to file a motion to dismiss the pleading in the first instance, because it just doesn't meet the pleading standards or perhaps it doesn't state a valid claim. And if anyone who is listening is aware of one of the two cases that folks in the hospice community are looking for the Supreme Court to weigh in on right now is the *Winter* case which is a California case, and in that case the case never went to trial, it never got that far, it was actually dismissed on one of these motions rights off the bat, and that's what went up on appeal and that's what the Supreme Court is now considering whether to take a review of. So there's a lot of, you know, pre-slugging it out practice. If that motion practice is not successful in the first instance, then you're going to move into the discovery phase of the litigation, and that's typical across a lot of litigation no matter what form you're litigating in. The difference here is that much of the investigation that the government did before the lawsuit was unsealed or served, is going to be brought to bear in this discovery portion of the lawsuit. You already have witnesses who may have been deposed under oath giving testimony. You may already have filed responses to interrogatory requests. You may have already produced documents. It's not going to slow down or stop that process from unfolding during the litigation, but you have to be cognizant of the discovery process and being consistent in your messaging and in your



production and in your responses when you are participating in post-lawsuit served discovery.

**Meg Pekarske**

Jody, can I pause you there for one second? So back to the whistleblower cases cause there's obviously a lot of activity on that front, so and this sort of harkens back to the earlier podcast. So you do this investigation and the government does it, you respond, government says, yeah I'm not going to intervene in this case. That doesn't mean that the whistleblower still can't go forward. Is that right, and then you have to be subject to this whole process that you're talking about?

**Jody Rudman**

That's 100 percent right. The whistleblower can take the reins and go ahead and litigate the lawsuit even if the government declines to interview, and often what can happen is that the government will make an initial declamation, the whistleblower will continue to develop the case, and then in comes the government at a later date and says, well this looks pretty good to us now, so we're going to jump in.

**Meg Pekarske**

So essentially, cause I know in the beginning phases of an investigation, I mean that's really what you're trying to convince the government cause there's likely a sealed complaint to not intervene in the case, and I know that there's been developments about whether or not the government should move to dismiss cases if they choose not to intervene, and there's been memos on that. Is there anything you know in terms of when you're at that phase, the government sort of says, yeah I'm not moving forward, that you would want to be advocating to get them to dismiss this case? Cause we talked about doing as you know the defendant, a motion to dismiss, is there opportunities to talk to the government about I know you're not intervening, but can you move to dismiss this case?

**Jody Rudman**

Oh yeah, absolutely. And Brian Flood might also have some comments on that, which I would be super interested in hearing but yes. You know we were talking in our last session about how you know advocacy needs to begin even when the investigation is ongoing. What you just pointed out is yet another opportunity for important advocacy long before we get to the merits of the lawsuit, which is nothing to see here, folks, no reason to intervene, go ahead and dismiss this, it's not worth anyone's time. So yes, and, you know, a lot of the strength of that argument is going to be based on the strength of the internal investigation that the hospice conducted while the government was giving its own investigation. You want to kind of be marshalling all your best facts and all your best evidence so that you can make a really good presentation about why this is just not worth anyone's time.

**Meg Pekarske**

So Brian we're all with bated breath, what do you have to say about the government dismissing a case that it chooses not to intervene in? What have you seen?

**Brian Flood**

I have seen approaches goad the government to try to get them to use that authority, and the approach I've seen that works the best is just as Jody



described. Is you have to put together a presentation that makes it so obvious that the case is a waste of any government's time. It's actually a violation of the defendant, because it shouldn't have ever gotten filed and is generally an embarrassment, if you actually really think about it so that it becomes so painfully obvious that this is really just a shakedown not a lawsuit that you could get the government to intervene. And then that is a very high bar to meet. We have presented cases and sometimes they just don't want to take on that responsibility, but the best approach is as Jody described, in the beginning marshal the facts, organize yourself, get your themes together, stay on themes, stay on message and then present it to the government. The more clouded your facts can use your theme on and the more likely you're going to just have to do the whole lawsuit.

**Meg Pekarske**

So it sounds like, you know, first step is assuming this is a whistleblower case, or even if it's something that the government is pursuing on their own, is convincing them, yeah, you don't want to do anything here, but if you have a whistleblower that doesn't end it, I mean they could continue onward and so this idea of advancing to the government like you should move to dismiss this as well. And I think that, you know, it is an important consideration, cause as you said, these can go on for a long time, and I think, Bryan Nowicki, the sort of impetus behind encouraging the government to move to dismiss cases is, you know, the development of caselaw and things like that. I don't know if you want to say anything more about why the government might want to dismiss a case.

**Bryan Nowicki**

Yeah, there are some guidelines that the Department of Justice has put out about what are good reasons to dismiss a case, that it would create a bad precedent for the government. In other cases that it lacks merit. It's a waste of government resources to devote to that. So there's a number of reasons, and Brian Flood's comments about it's a very high bar are exactly true. I have explored with clients alternatives such as, well, we can move to dismiss the complaint. Or we can try to convince the DOJ to move to dismiss the complaint. And for us to try to convince the DOJ to dismiss the complaint we figured would cost a lot more money because we would have to put together a much more detailed and comprehensive review of the entire case to give the DOJ enough confidence to dismiss it. That for a fraction of that we could just, and we ended up moving to dismiss the complaint on its face in court and not relying on convincing the DOJ to do the same thing. And now we won that case at the court level, its up at the 11<sup>th</sup> Circuit and even with the appeal it's gonna end up being cheaper than preparing a whole dossier for the DOJ to figure out what it wants to do on that case. But that's a big opportunity you have and those kinds of decisions you need to evaluate.

**Meg Pekarske**

So something you said Brian I wanted to explore a bit. Because I want to leave people with something to do about this. Like the ounce of prevention type of thing. So when you're in the investigative phase or you're doing your internal investigation, I think what is key to that



process is your compliance program and what you were doing and what kinds of practices you had in place and how robust it is and what not. And Brian, if you want to talk a little bit about the kinds of things that can be part of and serve affirmative, like what is work when the government hasn't intervened and we explain this is a good hospice and these are the types of things that the hospice does and what not?

**Bryan Nowicki**

Brian with Y or with an I?

**Meg Pekarske**

I. Y, Y, Y, Nowicki. Now you're getting me all screwed up because you have two I's in your last name so it's getting very confusing for me.

**Bryan Nowicki**

I know. I know. So when we've tried to, what we have found works well in trying to negotiate with US Attorneys is to be able to really present the hospice's compliance program in a very favorable light. As being a very strong compliance program and to talk about that compliance program from the perspective of the government. And the Department of Justice has a document that they update from time to time. It's the US Department of Justice Evaluation of Corporate Compliance Programs. If you want to google that title, if you locate that, they last updated it in June of 2020, and it identifies the expectations that the department of justice has for compliance programs. Now if you look at that document when you're, for the first time when you're being investigated or sitting across the table from an US Attorney, it's too late. And so the thing to do is look at that document now before there's any kind of investigation and then reflect upon your own compliance program now before you do get any investigations with the government. Look at your compliance program like the government would look at it. And see if you can answer the questions that the government poses in that. And it's really organized into three main questions. Is your program well designed? Is it applied earnestly and in good faith? Does it work? And then it goes on in quite some detail about how the government will evaluate each one of those questions. So that's a good way to do a check on your own compliance program to make sure its effective. Hopefully the result will be you'll never be part of a government investigation, but if you are a part of the investigation, then you can show the government how mistakes happen, this is not fraud, we have a great compliance program per the government's own suggestions. But if something happened we'll own up to it, but this is not a situation where we were trying to defraud the government.

**Meg Pekarske**

Yeah well and I think that in addition to compliance plans, and Brian Flood, you and I have talked about this, as just it's not about the paper; it's about how it lives within the organization. And it's very challenging if you bring out your book, and then obviously you're not doing anything that's in the book, or it's from the 90s or something. And it isn't really, you know, changing with the times and what the risk areas are the government lays out for hospices about what they need to be concerned about. I know you have some war stories about the challenges there with



compliance programs, because most people say, yeah, I do have a compliance program, and then you pick at that and maybe it's not what you would like in terms of the overarching goal of getting the government to not intervene. So I don't know if you have any thoughts, Brian Flood, on that?

### **Brian Flood**

So Bryan Nowicki is right. That June 2020 update is good to read because the DOJ or OIG or the attorney generals for the states are going to be asking you questions from that perspective. So if you're going in trying to say we're good people and we do right things and we're a good business partner with Medicaid, Medicare or whatever plan you're talking to. And you're trying to convince them all of those things and they turn to you and say, okay show me how you protect my program. Show me what you're doing to protect the dollars that I give you and spend them correctly. And if all you have is a smile, that's probably not going to work that well. Because you can't now demonstrate that what you said was true, and so you've lost all credibility with the government. I did have a client who did that, and we had the meeting and I was younger in my days and not as gray now, and the government looked at me and said, that's great; why are you here? If we had a compliance program that worked, we probably shouldn't be there. Cause what they discovered was easily discoverable by the client. Had they had an audit team and monitoring of their activities and they were looking at their claims and taking any type of view of them, they would have discovered what the government found. It was a pretty easy deal. So you don't want to go to the government on something that could have been discovered routinely and then try to convince them that you do everything right. Instead what you want to show is I have a compliance program, and this outlier event happened which was unlikely or undiscoverable in my compliance program. Now in that case now you can demonstrate I am a good partner. I'm a trusted business partner, and this outlier event happened or somebody just went rogue and we wouldn't have known it. And that way you can look at the DOJ's guidance for how they assess liability, which also has a bunch of measures in there, and you can start showing them how they should decline or decrease the liability based on those measures. Part of them is in prosecuting corporations. There's a whole set of measures in there, liability to be assessed and the H memo. The DOJ's guidance, June 2020. You could just look at those three documents so you'll know exactly how you're gonna be measured and what story you're going to tell. And if you don't have a documented compliance program, half your story just went away. You can't tell it.

### **Meg Pekarske**

Exactly, because saying you're good is not really going to get you anywhere if you can't really prove that, and I think practically speaking, you know, from the regulatory side of the house, is how do you show you have an active compliance program. I mean, I think it's, you know, that you're doing, you have an audit plan, and that changes based on what your risk areas are. You're reporting to the board and you do make



repayments to the government. So a lot of things we work on, we do sixty day repayment investigations, and sometimes you make repayments, and that's a sign of a healthy compliance program and that we actually do that. So we talk, cause usually when people make repayments are like, oh my god, is there going to be a flurry of activity and I'm going to be in trouble now? And it's like, no, this is exactly what is like document one, as to you're doing the right thing, is your compliance is active and, you know, when you think you shouldn't have been paid for something, you're repaying that, and I think the other thing that continues to be something that's really important, and we have in our episode notes link to the Plus Factor, as we always talk about the nucleus being eligibility for hospice or level of care for hospice. Who's making that decision as your physicians, and how well qualified are your physicians? What kind of training do they have? Do you audit their documentation? We spend a lot of time about nursing documentation and what not, but physician narratives and that they're exercising reasonable judgement, because all these cases that we're talking about all come down to physicians' judgement, and we want to say our physicians exercise very reasonable judgement and they are very learned. And so I think physicians play a really important role. And that they're part of compliance too. It can't be the compliance officer who's the only person responsible for compliance, because that person is auditing, not doing the, making sure we're compliant. Bryan Nowicki, I don't know if you have anything to add before we turn to back to the litigation side and being in a lawsuit.

### **Bryan Nowicki**

Yes, just to build on a comment you made, Meg, about repayments are to be anticipated, not necessarily feared. I've had clients say our compliance program is so good we've never made a repayment and we've never received any complaint. And that's not a good compliance program. If you're never making any repayments and you're never receiving any complaints or nobody's ever issuing concerns. It's likely that your lines of communication are all screwed up. Because to reach that level of perfection is really not rational to expect, and the government will not think that's a great thing that you've never received complaints of that sort. So there are a lot of tools out there to help you build your compliance program, look at it from the government perspective. Brian Flood, we talked a little bit yesterday offline about the Healthcare Compliance Association having a very robust document that goes through a compliance program in much greater detail than the government does. That gives a very practical approach to the kinds of things you can implement in a compliance program that will make it more effective. Bringing in third parties to review your compliance program is another way to make sure you have a check on that. Get the compliance ducks in a row. That's the best thing you can do, the best ounce of prevention so you're not ever in the False Claims Act situation.





**Meg Pekarske**

Yeah no. I think that's really important, and I think involving your board in that and the sense that they get reports about what you're doing from a compliance perspective and it really lives within the organization. So I think for CEO's, it's incredibly important, even though sometimes it's less exciting work. I think that people understand that at the end of the day as a CEO you're responsible for things that are going on in your organization. And one of those things is you need to know about your compliance program, and it doesn't mean that you're doing it day in day out, but you need to have a really good handle on that. But turning back to so we tried to tell this positive story that Brian Flood has said about we're very good people, here's all of our proof. Unfortunately we haven't been successful, the lawsuit is unsealed we're now in court. We tried to move to dismiss this. That's been unsuccessful, you know, blah blah blah. It's like everything has failed to date. So now I guess where are you now? Because there are so many cases that settle, which is why I think these cases going to the US Supreme Court are fairly interesting, because prior to sort of recent times nearly all the hospice false claim cases, they all resulted in a settlement with the government and people did not go to litigation. It sort of seems the tide is changing a bit, and so I guess, Jody, what do you see here? So you've been unsuccessful to date. How many cases get settled versus how much do you push forward, and what's involved there?

**Jody**

There are so many factors involved in that. And sure, the vast majority of cases somewhere along the way are going to settle, and that's across the criminal system and civil system alike. You're just not going to litigate only, all but a small percentage of cases. But in the False Claims Act arena, there are so many areas of litigation with things that might shape the decision about whether we do settle this or whether we go ahead and litigate these issues. And sometimes the decision to settle or the advice can be just economic in nature, because litigating these issues is a long and very, very expensive slog. A lot of it takes expert testimony, experts are very expensive, and of course all the lawyers and legal teams that are involved to do this. You know that costs a lot of money. And it's an enormous drain not only financially on the hospice or whoever is the defendant in a lawsuit, but also on everyone's stress level and emotional and mental well-being. It's a very heavy hammer that just lies above the head for a long time. But while the case is unfolding, you know, the three really big issues, these are not the only legal issues that are important in a False Claims Act case, but the three biggies are was there falsity in the first instance? And there's just a whole body of law and very fact-driven questions about whether there have been false claims. Are the false claims material to the payment decision? And this has a whole other body of law and a whole other fact-driven analysis. And then the third is, did the entity that submitted the claims act with the requisite knowledge? Again another whole body of law and another very fact intensive inquiry. So there's a lot to it as you're developing these themes



and theories. Eventually, you know, as the discovery process unfolds and maybe you're going to mediation. You know, maybe you're having these pauses along the way to sit down and say, is this a good opportunity to try to negotiate settlement? What should we be talking about? What can we all live with? But if those little pauses along the way, you know, don't lead to settlement. Then the next thing before trial is gonna be a motion for summary judgment. And that's where the Care Alternatives case, which is the other big one that the Supreme Court is considering taking. That's where that one found itself ending. In that you marshalled all the facts and you've marshalled all the law and then here is your next opportunity to put it all on paper in front of the judge and say, before we go and have a full blown trial, you can decide this on the basis of these briefs and on what the record to date shows. And that again is an enormously expensive but incredibly important moment in the litigation because it may stop the lawsuit from actually going to trial.

**Meg Pekarske**

And when you say there are bodies of law on those three components, I mean boy is there in how complex this can be.

**Bryan Nowicki**

Meg just, this is Bryan Nowicki here. But just to talk about, you had referenced how a lot of times, or sometime ago there was not a lot of hospice activity in the courts because there were so many settlements. And I think that really changed with Aseracare. And it changed because of the stakes that were at issue. The government in Aseracare was seeking two hundred million dollars in damages from Aseracare, and so when you define well, can we settle, is it worth it to pay attorneys? I suspect that Aseracare made the decision that they would just as soon pay two or five million dollars to their attorneys to fight the case rather than settle at 50%, because 50% is still a hundred million dollars. So I think the government just started putting hospices in the position of really having no choice but to take their cases through court, through trial, through appeals as expensive as it is. And then I think it was a good thing for hospices that Aseracare, happened because now that's useful for other hospices. But we see similar high stakes hospice cases now coming on. Care Alternatives is another one that are going to continue to push hospices to make the investment in litigation as expensive as it is, and it is terribly expensive, but just to keep making that push, and we're gonna see more case law to add to these huge bodies of law that Jody mentioned that do involve almost every aspect of a False Claims Act case.

**Meg Pekarske**

I think that's really important, Bryan. And I think that data analysis is becoming more and more important to the government and it's easier to identify targets, and I mean we know we talk about whistleblowers driving the docket of prosecutors a lot. But there's also a lot of interest, whether it be OIG or otherwise, and understanding data analytics, and the more information they require on hospice claims forms, the more information they're gathering about what a hospice is or is not doing. And so I think it's, you know, connecting dots through data, and I think



that this is sort of in the bucket of ounce of prevention, is I think understanding your own data and getting more sophisticated about how you use that as part of your compliance program and how you would look at it from how the government would look at you. And I think while the pepper report is helpful, I think that what hospices find is they scratch their head and say, well, you know the government saying I'm an outlier, but my pepper report says I'm below the 80<sup>th</sup> percentile on all these different ways and I'm very good, and so it's clear that the government is using many data factors that are not part of pepper and other things and I think it's really, data analytics is becoming an increasingly important tool for the government but also needs to be for our own compliance program in being able to take it to the next level. Because while length of stay continue to be important, and I think common data factors that the government looks at is how long have patients been on service. I think they're also looking at, you know, other information potentially, like referral patterns or other commonalities between patients and what not. And I know I mentioned this in another podcast, but you know there was a settlement in a case in Texas about hospice medical directors and essentially paying for referrals or sham arrangements, and they were referring a lot of patients there. So I also think there's a lot of scrutiny of marketing incentive programs and what hospices are doing in terms of marketing their program, and so I think when we've gotten these document requests, CID subpoenas, whatever they may be. You know, they are pulling in a lot more information than just about your length of stay and stuff. I mean, there are really like, you know, tell me every dollar you ever spent at a nursing home or you know how much do you pay your physicians and lots and lots of things in addition to claims data that they're going to be pulling. So I don't know, like you said, Bryan, I don't know if these cases are going to subside at all. If anything, I think they'll continue to be bolstered. You know, fingers crossed that the US Supreme Court, you know, takes one of these cases, and that could be very helpful to the healthcare industry at large. Obviously depending on the decision. But, I guess, any closing remarks here as we conclude this series? I know that something that's on my mind is the provider relief funds, and it's not, you know, what we just got done talking about, but the federal False Claims Act is so very broad it really deals with any type of payment that you get from the government. So there's significant expectation that the government is going to throw a lot of resources at monitoring and policing the billions of dollars that were paid out to healthcare providers. So I think more to come on that in future podcasts, but any closing thoughts? Brian, Jody? Bryan with a Y?

**Bryan Nowicki**

Sure, Meg, and this kind of goes back looking at a False Claims Act lawsuit from the big picture. Because it's important to keep these things in perspective and make these strategic decisions along the way that make sense for your organization given how much is it going to cost to have attorneys defend you. What are the settlement opportunities? What's



the potential exposure if you take this all the way and lose? And all that comes into play. And to look at it from the whistleblower or the government, let's talk whistleblower perspective for a bit. Where do they see the winds in their efforts? If they get the government to intervene, that's a huge victory for them. Their bargaining power, their leverage goes way up because if the government intervenes, the government's going to sink its resources into it. It's going to cost the hospice a lot more money and increase its exposure. If the government, if the whistleblower gets beyond a motion to dismiss, you're talking months and months of discovery that's the highest cost part of any lawsuit. That's a huge win for them. You'll lose a motion to dismiss, and the whistleblower attorney will call you the next day and say, why don't we settle now instead of everybody spending half a million dollars on discovery? And then if they get to trial we lose that motion for summary judgment that Jody referred to. Then you'll get a call the next day after that motion is denied, and they'll say, you want to roll the dice with the jury or why don't we just settle for a million-five now? And so you kind of look at how the case evolves over time and try to get those victories for yourself at those key moments. And understand how to win at each level and how to fully evaluate them. It's the kind of work that Jody, Brian and I do all the time. And so we're happy to bring all that experience to bear to help you make sure you find the right solution for your hospice. Whether it's trying to get out of this quickly maybe at a premium or fight the battle until the bitter end because it's the right thing to do.

### **Meg Pekarske**

Well I guess there's no happy note to end here. I'm trying to always be the optimist, but I mean I think, and this is why we had the bent of an ounce of prevention, because obviously this is things you all do day in day out. But the number of hospices that are in this situation are not, you know, hundreds and hundreds all the time, and I think that many good people are doing excellent care and making a huge difference in the lives of patients, and I think that getting not only the right compliance teams so you know you're handling compliance appropriately internally, but I think knowing when to see those clues or pay attention to the clues, so the clues could be your own data analytics, but coming back full circle to record requests, and the government considers claim denials to be education and they look for patterns. So I think the more common things that happen to hospices really can play into whether or not you could be in the category of a False Claim Act case. So I think taking ADR serious TPE you pick requests as Brian Flood talked about before that those could lead to other things. So I think seeing that often times things don't just start with a hospice false claim case. There's usually something that's alleged, like you should have known this earlier or what not, so I think there are a lot of clues as you guys have been talking about that hopefully you can do discovery and deal with issues before they lead to these kind of situations. And I think you said it early on, Bryan Nowicki, of about whistleblower complaints are really driven by 'I tried to deal with this in



my organization and they weren't resolved to my satisfaction.' So I think there's that whole HR component of trying to manage complaints internally and making sure people feel heard and what not, because if they don't feel like the hospice took it seriously that's oftentimes where they go to, the government or someone else. But anyway I think this is incredibly important information and really high stake stuff that I mean your skills and talents in this area are really remarkable. I'm really glad to be part of the team and that I have you to rely on because you are the litigators. I'm on Brian Flood's side of things. Like you, Bryan with a Y, and you, Jody with a Y, are part of our team, because it's high stakes stuff and we need someone with your talent sort of leading the charge. So thanks for taking the time to share your knowledge and wisdom and insight with the audience. I think knowledge is power, and so I think understanding this as opposed to sort of saying this is too much for me to understand. I think healthcare professionals sort of need to understand what can become issues so they can avoid them ultimately. Anyway, I appreciate your time. I guess, any closing thoughts from anyone?

Until next time, I guess. Til we have something else to talk about which might be our Supreme Court case. So that we're recording this in February of 2021, so nothing yet has happened, but there could be news to come. So thanks, and have a great day everyone.

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](http://huschblackwell.com) or sign up wherever you get your podcasts. Til next time, may the wind be at your back.

