



American Society of
Anesthesiologists™

Residents In a Room
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VOICE OVER:

This is Residents in a Room, an official podcast of the American Society of Anesthesiologists, where we go behind the scenes to explore the world from the point of view of anesthesiology residents.

The things that I think an employer may be most willing to negotiate are the things that are addressable by money.

What things should be kept in mind for individuals who need some type of sponsorship.

You can approach the conversation in really a Win-Win direction.

Does that make a non-compete easier to dismiss in a contract?

DR. MOLLY KRAUSE:

Welcome to the Residents in a Room, the podcast for residents by residents ... usually. I'm your host, but I'm not a resident. I'm Dr. Molly Krauss. I'm an assistant professor of anesthesiology and the associate chair of research and anesthesiology at the Mayo Clinic in Phoenix, Arizona. Today, we're flipping the script, letting residents ask questions of me and my guest, Judy Semo. Judy is an attorney with CMO Law Group. She specializes in health care law and the representation of physicians in general and anesthesiologists in particular in business issues. We're recording this at ADVANCE 2022: The Anesthesiology Business Event in Dallas, Texas, in late January. Judy and I are here in the hot seat, but we're not alone. Let's meet our resident guests and interviewers.

DR. NUPUR DUA:

Hi, I'm Dr. Dua. I'm one of the PGY3 at University of Minnesota. I hope you all are having a good time right now.

DR. ERIC REILLY:

I am Dr. Riley, PGY3 at Beaumont Health in Royal Oak, Michigan, just north of Detroit. Happy to be here.

DR. RYKER SAUNDERS:

Hey, y'all. I'm Ryker Saunders. I'm a PGY3 as well, coming to you from the University of Kentucky.

DR. NATHANIEL SUGIYAMA:

Hey, there. I'm Nate Sugiyama, one of the PGY4s at Beth Israel Deaconess in Boston.

DR. ANDRES DE LIMA:

Hi, everyone. My name is Andres De Lima, and I'm also a PGY4 for at Beth Israel in Boston. Thanks for the opportunity of being here.

DR. KRAUSE:

Let's start talking about our topic today, which is contract negotiation. Does anybody have a question for Judy?

DR. DUA:

So we all move into our first job soon. In residency, we just took the office as they came, but now we'll be expected to negotiate the terms of our employment. What issues do residents struggle with when it comes to employment agreements? Is there a good way to respond to contracts that don't mention all aspects of the job or don't mention partnership structure and promotion, for example?

MS. JUDY SEMO:

There are a couple of pieces to your question. Number one, not all employers will be willing to negotiate with you on a contract, and there are many different kinds of employment agreements. Number one, you have agreements with private practice groups. Maybe they will be willing to negotiate. There are also contracts with large national groups or even large regional groups, and they may be a little less willing to negotiate, except as to some specifics relating to your position. And then there are

hospital employment agreements. And those often as well are pretty standard and hospitals aren't always willing to negotiate specifics. So that's one thing.

Another point is that when you talk about partnership or promotion, for example, many employers are not going to address that in a contract. Now, private groups in the past used to be more specific about what they would offer you. But the truth is, what you really should be focusing on, I think, is what is the job going to be? Are your duties relatively clear? And they're not going to specify that you're going to do OB anesthesia or you're going to be doing cardiac anesthesia or whatever your fellowship might be or specifics. But do you know where you're going to be working if you're working for a group that has more than one site, more than one facility, a health system, a private practice group that services multiple places, where will you be working? Understanding long will the agreement be in effect? So in some ways, the longer it is, that's that's great. But understand that if the compensation doesn't increase, the longer term can be a problem, right? So you don't want the agreement too short and you want to know who can get out and how quickly and under what circumstances.

And then when you talk about partnership and promotion and advancement and P.S., when I draft contracts for anesthesia practices, employment agreements for you people, for example, the most I'll say is at a certain point, you might be eligible to be considered and that's about all you're going to get.

But the question in this day and age is really, will that be the same group in two years? I don't know. There is so much consolidation and affiliation, so private practice groups might join with another private practice group. They may become employed by the hospital system. So they're not going to make promises where they're going to be in breach to you. So I think focus on what the job is going to be.

DR. REILLY:

So what items are negotiable, and I mean, are there common wins or losses for people looking for that contract? You know what is really worth negotiating for for residents just getting started in their careers?

MS. SEMO:

It's a really good question, so the things that I think an employer may be most willing to negotiate are the things that are addressable by money. And it also depends on workforce. In the old days pre-COVID, if you wanted to have perhaps a week more vacation that's addressable by money. Nowadays, people are so short staffed they may

not be willing to give you an extra week vacation. But that's the current circumstance. So things that are addressable by money they may be able to do.

If you want to work in a certain location, they might be willing to say that your primary location will be facility A. But they're never going to say that they're not going to assign you to other facilities.

I know this sounds basic. Start dates are very important. And sometimes they're specific things that people request. But for example, if the entire group or meaning all physicians, all anesthesiologists working for the practice, have signed the restrictive covenant the not, what I call a non-compete, that for x period of time after the contract, you can't practice somewhere. They're not going to change it just for one of you.

And the other question is in terms of your negotiating leverage. What skills do you have and what does what does the group need? So, for example, if the group is working in doing a lot of orthopedic cases and you've just done a regional anesthesia fellowship, you may have a little bit more leverage, right? Because they really want you or your pediatric anesthesiologist and they're at an ASC where the ASC wants to have a pediatric anesthesiologist. You know, you may have a little bit more leverage.

I even had a group come to think of it, a private practice group. I couldn't believe they did this, but they really wanted a pediatric anesthesiologist they were interviewing. And she, her position was, Well, if I come to join you. How do I know you're going to be a private group in X number of years? And what if you sell out? This was several years back when there were a lot of sales of anesthesia groups to national companies. And she said, Well, what if you sell out and then I'm just an employee? What leverage will I have? And they agreed to give her a certain amount of any purchase price they got, depending on how long she had been there. I couldn't believe they did that, but they really wanted her. So that's very unusual. I don't think that's the kind of thing you normally are going to get, but I'm pointing out sometimes you have leverage because of the facts and circumstances.

DR. SAUNDERS:

My follow up question to that in terms of seeing what is and is not negotiable is the issue of red flags. What really should we be looking out for in these contracts that seem alarming? You know, I'm wondering if there are some common missteps that we make as residents or, you know, things that we should never miss in a contract. What would be those things? What things do we need to keep in mind?

MS. SEMO:

Number one, you never sign a contract without reading it, without understanding it. And it may be at the end of the day that it's not negotiable, but you should at least understand how it can work against you. That's really important.

So it's also important to make sure you have all of the exhibits that are referenced in a contract. Sometimes you say, Well, this is what I was given and I think it's the whole thing and you look at it and it says your duties. Of course, I'm taking this from a contract that a resident was finishing her fellowship and she was going to sign the contract, and she gave it to me to review and it said, your duties are listed in Exhibit A. And there was no Exhibit A. You needed to understand what Exhibit A is because Exhibit A probably had something about call it had other things about her duties. You need to make sure you understand that.

If you're talking about red flags, you need to watch for an employer's ability to change the contract unilaterally, meaning without your agreement. So a couple of ways they can do that. Number one in the list of duties, it might say at the very end of that exhibit of your duties, you know, the employer reserves the right to change this in its discretion. That's a problem because you don't know what that means. Can you be assigned to another facility? I guess so. Number two, can they change the compensation unilaterally? So there are different types of compensation. So, for example, extra pay for extra call that can be, I've seen exhibits where it says, you'll get, here's the schedule of what we will pay for extra pay for extra call that you take. And this is subject to change. And so one thing you might get as an amendment is provided that it won't be below these rates. That would be a kind of edit that I would want to have in there that that might be something you might be able to get.

But some other changes to compensation that I worry about and that I see, especially with, for example, hospital employers, they're nonprofit, they're very focused on fair market value and reassessing compensation based on the market. So often there will be something in there, not just with hospitals, also with, for example, large national companies, that says that we will examine the compensation we've promised you based on whatever market forces or market values or surveys, et cetera. And sometimes it's framed a little bit more ambiguously. The point is, if they can change the compensation, you're not going to stop that, but you want to make sure that they give you advance notice and you have the ability to terminate before that change in the rate becomes effective. If that's not clear, you can probably get that kind of change.

And then another red flag is where there's a provision - either party may terminate this agreement on 90 days notice, you know, without cause terminate, without cause. That's generally great. I mean, it's not great if the contract is good and you can be terminated

on 90 days notice. But what you need to watch for is, in some contracts, I can't believe this, it says, Well, we the employer, no matter who terminates you, get 90 days notice but we can move up the date of termination at whatever date we want, and we don't have to pay you for the full notice period. I think that's a really raw deal. I don't like it. In fact, I won't write it in my client's agreements because I just think it's not right. I mean, I do try to listen to my clients, but I don't think that that's appropriate. I think absolutely an employer could move up the date of termination. You may have to give 90 days, they may have to give 90 days notice. And they may say, thank you, you're out of here tomorrow. But they have to pay you for the 90 day notice period. And so a red flag to me would be if they don't, if they have something in there that they don't have to pay for that.

DR. SUGIYAMA:

Judy, what happens to the call schedule of members of the practice quit or are fired? Do contracts address that? And do they include compensation for increased call shifts?

MS. SEMO:

That's a good question, and you know what happens? The people who are still on deck end up taking more call generally. But, it depends, it depends on the practice setting.

So often the the employment agreement is not going to get down to those kinds of details. But let me again, I go back to, I think it's important to understand the nature of the practice where you're practicing. So if it's a private practice, I don't think you're going to see specificity about call, there's going to be some estimate about not in the contract, but you will be told your call is one in seven calls, whatever it is. And again, please understand you folks need to ask questions without sounding like you're cross-examining the employer. Is that first call? Is that second call? How many layers of call do you have? What's on site? What's offsite? Blah blah blah. All those things you really important to understand. But it's not all going to be in the contract.

Now, with a hospital employer, I often try to negotiate -- so understand hospitals, that includes hospital affiliated medical groups. Usually, when they've been, those contracts have been negotiated, there's something about the frequency of call and some specificity for extra call pay. I don't know if it's common, but I would say I see it quite frequently that you're expected to take X number of calls, and I usually want it to be at least per quarter, maybe every six months. But I don't, I don't want it to be bunched. Oh, you know, we're short staffed, so you're going to do all your call in this month or this quarter. I really prefer on a quarterly basis here as the control, month is too short,

quarter seems just about right and you want to have a breakdown of what the frequency of weekday callers and weekend call.

And again, the question is, is that something you can get it? You may need to ask around at the practice before you ask for this. But when you see the contract, if they have it in there and then it may say these are the rates for extra call. So that is something where you may be able to get that kind of protection. I usually don't see it in national practice agreements, meaning national groups. And I usually don't see it in private practice groups. Because private practice groups are governed by your peers. And so if they're getting too short staffed, they're trying to make decisions about what they do. And truthfully, in this day and age, there's such a shortage of anesthesiologists, even if they're trying to hire, it's really hard to do that, and it's really hard to get people in right. It takes at least, you know, 90 days or so, depends on the institution to credential people. So even once you find someone, you can't get them on board fast enough to deal with the pain of the call.

DR. SUGIYAMA:

That was very helpful, thank you.

DR. DUA:

We hear about non-compete clauses, but what are the basics that we really need to know about them? How enforceable are they? Are there any strategies to get out of them or anything we should look out for when it comes to those clauses?

MS. SEMO:

Yes, you should look out for those clauses and they are very common. But, my question to you is, where are you going to practice? So for example. If you're practicing in California, they don't allow noncompetes in employment contexts. There are some other states that don't allow non-compete, so I'm not going to say offhand because I don't want to make a mistake, but there are some states that restrict them. And this is a very changing area. So, for example, I believe it's Oregon, just this year in 2022 has a statute that's a, meaning, they passed it last year, I think it's effective January 2022, that says that non-compete can't be longer than a certain time period, and I think it's something like not longer than 12 months. Don't quote me on the specific, but the point is there is a restriction. There may be a difference for employees versus owners, but that kind of state law is becoming very, I don't know that it's very common, but we are seeing more and more states enact laws relating to non-compete.

So even in states where they enforce them, you need to understand how they approach them. So, I'll just say there are different ways that courts look at it. So some of them, the non-compete stands or falls just the way it's written. So if it's too broad, it's not enforceable, for example, Virginia. There are some places that say, Well, if it's overbroad, we, the court will simply not. We will enforce it to the extent that it's reasonable. So you need to understand how do courts in general approach noncompetes in that state. By the way, you can contact the State Medical Association in that state and get a read on how non-compete clauses are enforced in that state, meaning you don't necessarily have to go to a lawyer to get at least that general perspective.

But to generalize, non-competes, if they're enforceable in a state, they're usually enforceable if they're reasonable in terms of geographic scope and the time they apply. So five years is probably too long--of course, it depends on the state--and 12 months is probably enforceable. And how broad is the non-compete? So if it applies to the facility where you worked, probably absolutely enforceable, not in California, but probably enforceable. But if it applies to an X mile radius around every facility, which the employer provides services, even if you didn't work there, that probably is too broad.

So another risk one thing you don't see going back to my earlier comment, you don't know how your employer is going to change over time. Let's say your employer remains just the same. It's still ABC anesthesia group, and it provides services at location, right now at Mothership Hospital in that area and maybe another hospital. But down the road there may be more sites. So if a non-compete has a radius around multiple sites where the employer works, that can change over time. That's particularly true, any of you residents out there listening who are in pain practices, they multiply like bunnies, right? So maybe that could be a real problem on a non-compete. If the practice affiliates with, for example, a national group, well all bets are off because many more sites know it's not going to be national. I don't think anyone's going to try to do a national non-compete because it's not going to stand up. And in general, courts don't like them, even in states where courts will enforce a non-compete, they're not wild about it, so they want it to be reasonable and they want the employer to be able to demonstrate a protectable interest, which basically means what do they have to protect? So you anesthesiologists aren't, with all due respect, you're not going to be pulling patients away from the employer. And number two, if the group loses its contract at Mother Ship, or its main or only site of service, what protectable interest does it have to try to stop you from working?

Now, it may have an interest in trying to protect against in a request for proposal situation, or let's just say when things get nasty, when the when the when the heat turns up, the group may want to try to keep its folks in line and not allow other people to have

access to them. Why? Because they're trying to protect their negotiating position with the hospital. Hospital contract negotiations are very tough. That's not our subject today. But the point is it does affect how how groups deal with their non competes so generally enforceable, but it depends where you're practicing.

DR. SAUNDERS:

So, Judy, I have a follow up to that too. And I think you alluded to it a little bit ago. So anesthesia is very different from other specialties, right? Because you said it, we don't take patients with us when we go from one location to another or a group from one group to another. Does that make a non-compete easier to dismiss in a contract or to negotiate out of a non-compete in a contract, knowing that we're not going to take a massive amount of patients away from a practice?

MS. SEMO:

Nope.

DR. SAUNDERS:

Short answer, No.

MS. SEMO:

In other words, if the employer may still want to to have some protection for the workforce and they are restrained, but you know they're giving you a job, and part of the deal is they don't want you jumping ship because somebody else is going to give you a week more vacation or give you the point eight schedule that you may want to work or do something that it's not willing to do, and it's investing, training in you. And so it doesn't want you to necessarily just jump ship. So that's one reason people have them.

They also have them to try to preserve their negotiating leverage, as I just mentioned, vis a vis the hospital.

But I do have to say that the landscape is changing, and I will tell you that the Biden administration put out an order in July of 2021 directing that the antitrust agencies, the Federal Trade Commission and the Department of Justice look at non-compete not just for physicians non-compete and do they unduly impede worker mobility. And so, I just think we're going to be seeing some change over over the next few years. I don't know that there's going to be a massive change right away, but I just we are seeing I told you about the states enacting legislation to try it within their states, saying that, you know, we don't want non-compete longer than this or that. Or, in some states, I believe Texas

and I may get this wrong. But as I recall, Texas has a provision that says that a physician has to be able to buy his or her way out of a non-compete. But it's so high that that's almost not useful for you because it's too expensive. But not every, not every state enforces them, and I think we're going to be seeing changes in this area. But for now, you're probably going to be faced with it. Just because you're an anesthesiologist isn't going to give you any leg to stand on to try to fight it.

DR. DE LIMA:

I want to jump back again to contract negotiation and just ask you if you have any specific recommendations for contract negotiation for individuals who have any specific visa needs. When when it comes to negotiating the contract, what specific recommendations should be or what, what things should be kept in mind for individuals who need some type of sponsorship?

MS. SEMO:

So you need to know, where are you going and what are the what are the requirements for each visa and whether or not, which one fits and what are the requirements and you as the employee want to understand what you think is going to work best both for you and the practice? And I said it that way because how long do they last? How long is the visa in effect? And are there any special requirements for each one that may be harder for you to establish or easier to establish? Right. So that's why you want to do some of your own research.

DR. DE LIMA

So the reason I brought it up is because the process is far from being standardized. That's what I've experienced going through it myself. And I know there's plenty of folks out there who are also they're going through the same process right now, and I thought it would be helpful just to clarify what sort of items are more important when negotiating a contract when the specific issue of a visa is needed.

DR. DUA:

I just have something to contribute. I did my own little research and ran as an immigration lawyer, but for that reason. Every country has a different policy as well for switching the visas. That's what makes it even more complicated because at immigration law, it also needs to know which country you're coming from and how their visa policy is changed by treaties. Yeah, and that's what many people who are dependent visas from their spouse. But you have a visa from your institute, which is

research visa. Some institutes provide work visa. I was able to get H-1B H1B, which is different from J-1. That's where it gets really complicated.

MS. SEMO:

Immigration is an area that I don't practice in. I will tell you occasionally I do have clients who do want to hire someone who needs a visa or needs whatever it is. And there are a couple of different kinds, I think, for the cover professionals. And it also depends if you're working in a work shortage area. So that's another wrinkle on the whole visa question. But if I were making a recommendation, I would say two things. Make sure you understand what you think is the probably the best visa for you and for the practice. Have some of that information in advance and tell the employer: this is what I think. You know, we should check it out and let's get this done.

DR. DE LIMA:

Excellent. Thanks.

DR. KRAUSE:

Great. Thank you, Judy, and thank you to our residents for great questions. I know Judy shared some valuable information. Thanks for joining us and thanks to our listeners for tuning in to residents in a room the podcast for residents by residents. Please give us a review and a follow and join us again next month for more of our conversation.

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