



Thanks to the extraordinary commitment and expertise of AHLA leaders, the American Health Lawyers Association continues to thrive and serve as the essential health law resource in the nation. The Association's strong foundation reflects a history that is vibrant, meaningful and worth sharing. Finding a way to preserve AHLA's history was especially relevant in light of the Association's 50th Anniversary, which was celebrated throughout 2017.

This transcript reflects a conversation between AHLA leaders that was conducted via audio interview as part of the Association's History Project. More than 60 of AHLA's Fellows and Past Presidents were interviewed. A video documentary was also prepared and debuted on June 26 during AHLA's 2017 Annual Meeting in San Francisco, CA.

February 23, 2017

Elise Brennan interviewing Len Homer:

Elise: Let me introduce myself and then I'd like you to introduce yourself. Then, my name is Elise. I have the absolute privilege to be doing this interview today. Len and I have been talking. He's absolutely wonderful with so much information. We're going to be hard-pressed to get it all in. Len, why don't you introduce yourself. Then, we'll get started. I'll ask some questions.

Len: I'm Len Homer with Baker Donelson, which we used to be Len with Ober Kaler, but we just merged into Baker Donelson. Why don't you go ahead?

Elise: Yes. You were telling me you're a litigator and you did a lot of Medicare reimbursement work. Why don't you give us a bit of an overview about your career and then maybe talk a little bit about some of the highlights in your career.

Len: Well, I started practice in 1970 with Ballard Spahr in Philadelphia. In 1973, I argued and won a case for Temple University in which the U.S. District Court took jurisdiction over a BCA provider appeals committee decision for the very first time. At that time, hospitals appealing reimbursement issues were represented by CPAs and consultants and not lawyers.

The CPAs, once the courts were going to start taking jurisdiction, CPAs became concerned that they weren't developing a record that was good for judicial review. That's how the lawyers started getting involved.

Elise: Actually, all the lawyers that do reimbursement appeals owe you a favor because they can do this work because you got a court to take jurisdiction of this and got the CPAs and the accountants out of the business?

Len: Right. That's the way it worked.

Elise: That's great.

Len: The decision then resulted in speaking opportunities for me at the American Society of Hospital Attorneys at their annual meetings. Then, later in 1975, I started focusing more on the recently formed NHLA, attending their annual meetings and Bob Bromberg's tax seminar for non-profit health care entities. That's what was happening then.

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The reason was that while the Society of hospital attorneys at the time, their meetings were collegial and the speakers didn't hold back on information. For instance, Jim Ludeman had published a paper for the Society containing sample hospital contract provisions that we all print from.

However, the practice at the time, the health law practice, consisted primarily of medical staff and hospital bylaws, contracts with the physicians, that sort of hospital-based positions and that sort of thing and real estate and bond issues.

Elise: That was the practice that the Academy was focusing on, you were telling me?

Len: Yes. What was going on at the time, the law firms were low balling the fees or not even charging for the medical staff work and that sort of thing but rather would make it up on bond issues and real estate transactions when they could because hospitals were considered a prestige client and you wanted to keep them.

At that time, there was Tom Berriman, who later was a president of the Society, was having meetings around the Philadelphia area anyway, urging the lawyers to bill for their work and not to be doing it free for the hospitals so it could become a full legitimate practice of health law.

Elise: I think that's another healthcare attorney that we all owe a thank you too also.

Len: Yes.

Elise: You were telling me why you made a switch from the American Academy of Hospital Attorneys or the Academy to the National Health Lawyers Association.

Len: Well, the reason was the sharing of information at the NHLA meetings was more valuable than the Society's meetings because the NHLA's membership wasn't limited to in-house and outside counsel for hospitals. The attorneys for HMOs, for nursing homes, home healthcare agencies, and physicians, pharmaceutical companies and even government attorneys for the Medicare and Medicaid programs.

When you start sharing information among a group like that, it's a lot different than just a hospital. Now, the reason that the Society was so limited was at the time, they were essentially a division of the American Hospital Association. As a result, they couldn't take attorneys from HMOs or nursing homes, that sort of thing. It was necessarily much more limiting.

Elise: You told me a little bit about how it started. I'm talking about the Academy, how there was a ... It started as a section of the AHA and then when it converted to the Academy, there was a little bit of concern. Can you talk a little bit about that?

Len: Yes. Well, the concern was that because they were a division of the American Hospital Association, it was the American Hospital Association could basically control their finances and what went on. The feeling was that if they became an Academy, which was a little more independent than being a division, that they could do better and could be a little more independent.

The guy to talk to about that is Lee Vorchees. I'll just put that in as somebody you ought to call. I think he was the one who was involved when it switched from the Society to the Academy.

Elise: The other thing that we've talked about in your history would be the predecessors of the American Health Lawyers Association has to do with the fact that you started the Medicare Institute, which is a fairly significant program. Can you talk a little bit about that?

Len: Yeah. It was 1977, I think it was late '77, I drew up a proposed program on Medicare and Medicaid issues and presented it to David Greenburg at the NHLA. At that time, the only other free-standing program NHLA had was the Bob Bromberg tax seminar. They got the speakers. They had government speakers including the Inspector General's Office, a bunch of government speakers.

Shortly before the program was going to print, David presented it to the Society and asked if they'd like to co-sponsor it. They did and asked JD to be the co-chair. David explained to me that the purpose of joint venturing was to encourage a merger between NHLA and, I guess, the Society, but the real reason was that he wanted the Society to share any loss, if there was one. JD and I were co-chairs for the next 21 years.

Elise: That's a great story. I'm glad you brought up the merger because you also shared with me a pretty interesting story regarding the Academy and another impetus for the merger that happened as a result of the Academy meeting in Maui in '85. You want to chat about that?

Len: Yeah. That was the year I was President of NHLA. Coming back from a trip to Hong Kong with my wife, we stopped in Maui to go to the Society's annual meeting, which I did go to their meetings even though I was heavily involved in NHLA. The Society always had, or at the time, the Academy, always had a Saturday night prom, in which there was a dance band. People danced. It was very nice. It used to be tuxes and gowns.

At this meeting, they had the dance floor. There were about 30 to 40 tables in front of the dance floor and on all sides of it roped off with a big gold cord. Inside the gold cord were the [inaudible 00:12:02] and officers and board members of the Society and former officers and board members and favored people. Everybody else was outside the cord.

As soon as the music started or at the time the music started, they got the people inside the cord, got up en masse, and went to a private party leaving the empty tables with people that did want to dance to go around the cord and be there in front of all the empty tables.

A couple of years later, I don't remember when Bob Johnson was president of the Academy, but Bob was a client of mine for a while. I was explaining what this was and how it looked. He said that that was absolutely terrible and that cliquishness could not continue.

I think that's what got him going with the merger discussions with NHLA because with all the different types of lawyers involved in the NHLA, it was going to be very difficult to maintain that kind of cliquishness.

Elise: That's an interesting story. The president of the NHLA in '85?

Len: I was, yeah, but this was later. Whenever the Maui annual meeting was, I think that was '85 too. I was president in '85 and '86.

Elise: It's really interesting to hear the beginnings of the merger or the reasons for the merger and how this many ideas coalesced to make the merger possible. You also talked to me a little bit

about some of the highlights in your career. You actually argued a court case in front of the Supreme Court. Would you like to talk a little bit about that and about your Second Circuit victory also?

Len: Yes. Well, those are the two highlights. I argued Justice Kennedy's first opinion. At the time, I didn't know that the First Opinion, that new Justice, their first opinion, has to be unanimous. If that was going to be his first opinion, it had already been decided before I got up to argue and it was mine to lose. It was a pretty tough argument.

Years later, I met him at a reception and waited until everybody was gone and told him I'd argued his first opinion. He would say, "Oh my God! I couldn't believe it. They were asking you such difficult questions. It was supposed to be my opinion, which means that it had, in fact, been decided." He said, "It was very interesting that it went that way." The other thing ...

Elise: Can you tell us what the decision was? What was it about?

Len: The decision was jurisdictional decision over whether and whether one had to file a cost report claiming costs that you knew were going to be disallowed. Then, of course, it could be claimed as fraud so that you didn't want to put in obviously non-allowable costs in order to challenge some annual provision and have it plain that you put in a fraudulent cost report. That's what it went up on.

Later, and this is the same issue, a medical device litigation, there were a lot of group of appeals that I represented many of them. This was the Yale New Haven case.

I got the Second Circuit to declare that the medical device manual provisions disallow or denying coverage for any care using the medical devices, not any medical device, I mean investigational medical devices, that they were arbitrary and capricious and thus void, which is always satisfying to a decision that some government provision is arbitrary and capricious.

Elise: Those are certainly ... Your practice has just been amazing. Those truly are career highlights and things to be very, very proud of. You were telling me ... Your expertise in Medicare is such that you have a lot of really interesting thoughts on some unintended consequences from the passage of the Medicare program. Would you like to talk a little bit about that?

Len: Yeah. The beginning of the Medicare program, they were basically with hospitals were using the Blue Cross cost reimbursement approach. With the hospitals, this was cost reimbursement and the hospitals would want to build a new wing or a new building somewhere, they were getting part of their costs paid by Medicare. It would be paying Medicare's share of the interest and depreciation.

If they had a high Medicare population and Medicaid was the same thing, it would allow the expansion and building of hospitals that may not have occurred had they not been on a cost reimbursement mechanism. That was one driving force of increasing costs.

The States responded ... Some of the States responded to what was the Certificate of Need process, where hospitals had to justify why they needed the new wing or what have you. The other thing that drove up costs was how physicians were reimbursed. There, they were reimbursed the lesser of the actual charge for the physicians' customary charge or the prevailing charge in the community.

The unfortunate thing is, in terms of what the physicians' customary charge was, they used data that was either 16 or 18 months' old. That meant if a physician wanted to get paid more, 16 or 18 months ago, they had to raise their fees now. That just kept an escalation of fees going on. Then, the government imposed economic limitations on it after a while, but that's how it all got started with the continued rising of fees.

Elise: A lot of the laws that have developed subsequent to the passage of the Medicare program, some of the kickback false claims, funding requirements and so on, a lot of those have all been the result to fix some of the unintended consequences from the Medicare program?

Len: Yeah. That's right. That's how the RV system came into effect. They got rid of cost reimbursement. Now, something that needs to be talked about and I never did any of it, was corporate restructuring because initially there were individual hospitals. Now, there are hospital systems. That all started, I think, in the early '90s.

The people you should talk to and I'm putting this on the record so you'll have it, is Ross Stromberg did a lot of it. I think Jack Wood. JD would know that. That was a very big thing in the health law practice other than the Medicare and Medicaid.

What happened with the Medicare and Medicaid that made it even more important is that the Department of Justice realized that billing errors now could be called fraud and they could get treble damages. At that point, all of a sudden, you didn't have the reimbursement disputes as much as you did an investigation on the allegation of fraud, which then they would offer to settle for treble damages and just an agreement to behave yourself.

That changed the game. Some of my litigation was aggressive litigation challenging rules of that sort of thing so that it would pull the pins from under the fraud claims.

Elise: You have such an incredible perspective and background, what do you think about the future of healthcare law?

Len: I think that, particularly anything to do with payment, is going to get even more important unless they go to a one-payer system because we have an aging population as the baby boomers start to become eligible for Medicare. We've got a lot of people on Medicaid. It's going to be even more important that law firms get involved with representing hospitals on these technical payment issues.

That's where these issues like the firms should send young associates to the Medicare/Medicaid Institute so they have some familiarity with what the payment issues are.

Elise: That's where it dovetails into the last question I wanted to ask you is, "What advice do you have for young lawyers starting out in this area?" [Crosstalk 00:22:38] Medicare/Medicaid Institute.

Len: Yeah. I think, I don't know, there used to be the fundamentals of Medicare and Medicaid, whether they still give that program or not. If they do, that's the first one that the young associates should go to. Then, the requirement would be the Medicare Institute itself. The issue is that some of the sessions in the Medicare/Medicaid Institute are pretty technical or fairly abeyance and they leave a young associate wondering what had happened.

Elise: I know I attended the Medicare/Medicaid Institute several different years. It has added so much to my career and helped me so much even though I don't do reimbursement disputes. Just in general, it just added to my practice. Gave me a lot. I now know who I have to thank for that seminar. I didn't know until you called that that was you. Thank you for that.

Len, this has just fascinating. I could talk to you forever because you have such, such experience and knowledge.