



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.

October 12, 2017

Elise Brennan interviewing Phil Proger:

Elise: Hello, Phil. I think what we need to do is just get started and dive in. I'll start by introducing myself and then we'll introduce you. I am Elise Brennan, a Fellow in the AHLA and I'm delighted to be interviewing Phil Proger today. Phil, with that, why don't you start by telling us a little bit about your background? What I think is unique and fascinating is your involvement through AHLA came through ... You're antitrust attorney. That's who you are. You're an antitrust attorney that has done healthcare. Why don't you tell us a little bit about your background and how you got involved in the AHLA?

Phil: Sure. My undergraduate work is in microeconomics or industrial organization, so I always was interested in economics. To make a long story short, I didn't go to law school until after starting graduate school and then having that interrupted by the Army and then getting out of that and went to law school thereafter. When I was in law school my second year, I was organizing my schedule more not on what the content of the courses were, but in how it fit from a time standpoint, so I could work part-time. There was antitrust course and I took it and I found a way of using my antitrust. I ended up working for the Federal Trade Commission that summer. When I went out looking at jobs, I looked at jobs in the antitrust area.

Then I was a second or third year associate around 1975-76 and I was walking down the hall and a tax partner stopped me and said that he did work for a nonprofit hospital system and they had just recently been sued under the Antitrust Laws, wasn't an NHLA antitrust lawyer. He needed help. I got into that, and we were able to get the case dismissed under the learned professions exemption, and the fact that the hospital system was a not-for-profit.

It was just about that time in 1976 that the FTC began its assault on the health industry and professional associations not being subject to the antitrust. More and more matters occurred and even though I was relatively junior, I was the one that was the guy that had done one of these before when very few people had. I ended up getting a lot of that work. I always was interested in hearing what other people were doing and not being insular in the firm.

The tax partner told me about the National Health Lawyers Association and then what was called the American Society of Hospital Attorneys, which was part of the AHA. On

American Health Lawyers Association

1620 Eye Street, NW, 6th Floor • Washington, DC 20006-4010
(202) 833-1100 • Fax (202) 833-1105 • www.healthlawyers.org

his own, signed me up for both of those organizations and lobbied and let me go after the first society annual meeting that I went to, which was in 1976 or '77. That's how I got involved. It was pure luck walking down the hall at a particular point in time.

Elise: Seems the way many of us have happened onto this career. You told me about you established the first antitrust conference or seminar for the association. Tell us a little bit about how that happened.

Phil: I'm not exactly sure how he got my name and number. I think I know, but I'm not sure. I got a call from David Greenberg who was then the Executive Director and frankly the National Health Lawyers Association. It was run out of his apartment in Foggy Bottom, Washington DC, which is downtown DC basically. He asked if I would come over and meet with him. He had established at that point already, a two-day tax program, and now he was looking to add another program. I think he already had a general health program. He was trying to create the National Health Lawyers Association, which he had created as a spin-off when he left AHA because he had been the Executive Director of the American Society of Hospital Attorneys.

He asked me if I would draft up a two-day program in antitrust. I said, "Sure." He thought I was too young and junior to chair it, so he got someone else to chair it that year and that person actually never showed up at the program. I was listed as co-chair, so there was a chair and co-chair. Thereafter, I was always chair. We drafted it up and every day he would call me saying, "Do you think someone will come to this?" Of course, the registrations came in. He had the original one at the Mayflower Hotel in downtown Washington off of Connecticut Avenue. We had an overflow of more than 300 people and that was 1977 I think. It was pure David Greenberg; he had found out that I was doing some of this and called me and we put together a program.

Elise: You chaired that program for 25 years, is that right?

Phil: Oh yeah, even more. I've got a plaque that says I'm Emeritus. That program eventually evolved and got jointly sponsored with the ABA, which I fostered because I also chaired the section of antitrust for the American Bar Association in 1999. It is now a regular feature of the AHLA and the ABA jointly doing it together.

Elise: I mentioned to you when I told you how excited I was to be interviewing you, that I so much remember as a young lawyer going to your excellent presentations on antitrust laws. They were so influential and so helpful. For someone who failed to take an antitrust course in law school, but truly needed one, they were so wonderful. I wanted you to talk about ... You told me about one particular speech you gave once and that was pretty humorous. Could you tell me, what was your most unusual presentation you ever did

Phil: Well, the particular presentation you're talking about was a two-day conference that we started, and this was David Greenberg's idea, not mine, I give him the credit, he said that he thought a lot of the people signing up for this would be non-antitrust lawyers, but health lawyers. As it turned out, he was correct. He wanted us to put in an optional program the afternoon before for three hours on antitrust. I tried to sign up some speakers for this, it came late in the process, and failed. David said, "Well, you know

antitrust. Why don't you do the presentation?" I said, "Three hours?" He said, "Oh. You can do it." I ended up doing that and it became a regular feature of the program.

The particular incident you're talking about was at an AHLA. I think at this point, maybe we were the academy, but maybe still society. I forget one. It was an annual meeting in Hawaii and at that annual meeting, there was always the penultimate dinner dance, dinner meeting, that everyone attended. They had workshops. When you had the workshops, you had to do it three times, and they were an hour. You got assigned, I guess they were random times.

In any event, that night was the dinner meeting, the dinner, and I think it started at 6:30 or seven, and I had a 5:15 session. I thought, "Well, this is going to get canceled because everyone is getting ready to go." I show up and there's one person sitting in this little room and it had seats for maybe 30, 40 people. There was one person, Nathan Hershey. I said to Nathan, "Nathan. We got the dinner tonight. You don't need this. You're not going to make me do this just for you?" He said, "Yes." He refused. I think he thought he was being funny, but in any event, I ended up having to do the whole session, the whole time, for Nathan Hershey who, may he rest in peace, who refused to walk away. I'll never forget that.

Elise: I love that story.

Phil: For those people that remember Nathan and if you do, you remember him fondly, that's classic Nathan.

Elise: I love that.

Phil: I should add, I didn't tell you this, he spent the entire time asking me questions and disagreeing.

Elise: I love this story and I guess it should make people who sometimes have a bad time and show up to give their presentation and there's very few people there, they should just always need to remember when you gave your presentation to one person, Nathan Hershey. I think that's a classic story. I love it.

Phil: One person. That's absolutely true. He would not leave.

Elise: Can you tell me, you also have participated in the ABA. What has been your role in the ABA?

Phil: Well, so I started out and I've always been in private practice and always in the antitrust practice and always with a firm that has a big antitrust practice. Early on, I decided that I wanted to get other people's point of views. This is going to sound really stupid, but I figured that it wasn't worth spending a lot of time worrying about how I'd get in the firm because if I did well as an attorney, I would do well in the firm and if I didn't do well as an attorney, I wouldn't do well.

One of the first things that I did was ask to get appointed to the Antitrust Section of the American Bar Association. Believe it or not, in 1973 when I first started, you couldn't just join. You had to get someone to sponsor you and appoint you, which sounds crazy, but

that's the way it was. It was a formality if someone did it, but you had to have someone do it.

Elise: Interesting.

Phil: They did it and I got into the section and then I volunteered to work on a committee, which was the Section Seven Committee, which was the Merger Committee. I got, in 1974, the April of 1974, the firm paid for me because I was in Cleveland at the time, to go to my first annual meeting in the Antitrust Section. Eventually, I chaired that committee, the Merger Committee. I ended up chairing that and chairing the Health Committee and a number of other committees and became on the council and eventually was an officer, the Finance Officer. I was Program Officer in Publications. Eventually, I chaired the section in 1998-99 I think. Then after that, I was elected to the Board of Governors in the ABA. That was in 2003 to 2006.

Elise: You have been extremely active in the AHLA, the ABA. Tell me, when young lawyers are listening to this, what do you think the importance of these organizations are in terms of the development of a young attorney's career?

Phil: I think the popular belief is, you do this to enhance your marketing. One, that's wrong because the people in it are really people that provide the same service as you. They're not really the people that will hire you generally. If you really wanted to do marketing, do something else. I looked at it differently. I looked at it that the more I went on these committees and particularly, went in these committees to work on substantive matters. I worked on antitrust law developments, which is the definitive treatise on antitrust. It's a two-volume publication that the Antitrust Section puts out every five or six years.

I worked on that. I wrote. I was co-chair and wrote most of the monograph on Section Seven of the Clayton Act. I found them to be really great learning devices where you had to work with people. In doing that, I started working with Steve Axinn, and they were right in the beginning of the takeovers of all that stuff and got an entirely different perspective on how you did things. In AHLA and NHLA, I met a number of healthcare lawyers who really opened up my eyes to a totally different way of looking at the antitrust laws because I had my way of looking at it and the health lawyers frankly were aghast at a lot of the antitrust concepts and didn't think it applied to the healthcare industry, particularly to physicians in hospitals.

I didn't always agree, but I thought it made me a better lawyer learning other people's views, other people's perspectives, and hearing other people and how they did it. Sometimes, I thought they did it better than the way we did it. I could use that and introduce that and it gave me additional ideas. I'm one of these crazy people that think that the way to succeed in the practice is to be the best lawyer you can be. You need a little bit of luck and I got it by walking down the hall to get a cup of coffee and having a tax lawyer stop me. The way to succeed I think, is by being as good, as complete, as well-prepared attorney as you can be.

I think joining these professional associations help you there. I mean, don't just attend meetings. Volunteer and get on a project. You know, I wrote books. I put together seminars. I helped draft legislation. You may not know this, but the legislation that is currently pre-merger notification in the United States, the Hart-Scott-Rodino Antitrust

Improvements Act, the ABA testified on. As a young pup, I wrote part of the testimony for Eleanor Fox of Simpson Thatcher who testified for the ABA on that bill. I did that in 1974 to '75. I have a real good understanding of the legislative history of Hart-Scott-Rodino because as a young volunteer, I was working on that with people that were at the forefront of it.

Elise: That's fascinating. That is just such good advice for young lawyers getting involved and being able to know a subject matter well enough to teach it. It means you really know it and that makes you a better lawyer and that's how you build your practice by becoming a better lawyer. I love that advice. Tell me, what do you think about the future of healthcare law?

Phil: Well, I think so it's important to distinguish between healthcare law and providing legal services to the healthcare industry. There is a body of law that deals with healthcare and to me, that has a lot to do with Medicare, Medicaid, reimbursement, hospital bylaws, medical staff, and certain physician issues, quality assurance, malpractice. I group that as healthcare law. Then there is a body of law, it can be tax, it can be ... it can be antitrust, labor, that deals with providing legal services to the healthcare industry because the healthcare industry is the biggest industry in the United States.

I think both of those are really good career paths for young lawyers because I think that the healthcare industry is not going to disappear obviously. It's going to grow and grow as our population is aging. Technology is making healthcare more valuable from the absolute sense, making people live longer and providing more services. Drugs are growing. Technology is growing. It raises all kinds of issues from what I just talked about, the bioethics, et cetera.

Being someone in the healthcare law field is one that is going to be around for a long time and provides a lot of opportunities and is diverse. You don't do the same thing every day. Being someone who may have an expertise as an antitrust lawyer, well if you're an antitrust lawyer, given the regulatory nature of the healthcare industry, it's important to understand that overlay of regulation and uniqueness of the healthcare industry if you're going to practice antitrust law. That's going to be a rich environment.

Same thing for a tax lawyer. You're going to have to know the tax exempt, the not-for-profit rules, and understand that. That's a body of tax law as applied to part of the healthcare industry, that is the not-for-profit part of it. Either one, I think, offers a long-term opportunity to have an interesting practice with a lot of different and diverse issues coming up with a lot of different and diverse clients.

Elise: I agree. Well, I thank you and that's so well said. With that, again, I just can't tell you how excited I was to get to know you a little better and hear about your background because you are truly a giant in our profession and have done so much for the development of healthcare in the antitrust area. As we end this Phil, is there anything else you'd like to bring up that I haven't mentioned or you think would be valuable for folks listening to this down the road to hear?

Phil: Well, I think 'giant' simply means you've been around a long time, but in any event. No, I think if people are listening to this, I think that I was really fortunate to get involved in this. I met a lot of people that turned out to be people I wouldn't have met that turned

out to be long-term friendships that I value. I learned a lot and I got a lot more than I gave.

When you score things in life, I think that that speaks highly of getting active in AHILA and getting active in other professional associations that will get you a chance to meet other people and get exposed to new ideas and not be insular in your own corporation or law firm or professional association, wherever you're at. I, for one, really highly recommend it, so I think it's really important to do and to do so for the sake of, when I say the learning. Too many people, I think, approach this as a marketing thing and if you do, I don't think you're going to get the real benefit of it.

Elise: I agree. That's so well said. Well, thank you very, very much for your time. I've totally enjoyed it. Thanks so much.

Phil: Thank you. Have a good day.

Elise: Take care. Bye, bye.

Phil: Bye, bye.