



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.

November 21, 2017

Joel Hamme interviewing Dennis Barry:

Joel: It is Wednesday, November 29th, 2017. I'm Joel Hamme, senior counsel with the Washington, DC law firm of Powers Pyles Sutter & Verville. And I have the pleasure of interviewing Dennis Barry. Dennis is currently an emeritus fellow of the American Health Lawyers Association and, as we will discuss, held numerous leadership positions with AHLA over the years. Prior to his retirement as a partner at King & Spalding, Dennis was one of the country's preeminent Medicare reimbursement attorneys. Dennis, it's good to talk with you, and good afternoon.

Dennis: Good to be here, Joel.

Joel: How and when did you first become involved in health care?

Dennis: I was out of law school looking for work in Houston, Texas, and had a couple offers down there for very traditional types of litigation, business, or real estate practices, and then I had this offer for this funky little four-lawyer law firm that had mostly health care clients. And I liked administrative law in law school, and this seemed to have a fair amount of that, and I decided to go with it.

Joel: And who was at that law firm?

Dennis: That was Wood Lucksinger & Epstein. It was Jack C. Wood, Thomas Lucksinger, and J.D. Epstein. Tom did some health care work, but it was Jack Wood and J.D. who were most involved in health care. And both of them were presidents of the American Academy of Hospital Attorneys, although at one point in its evolution, when it was created, it was referred to as the American Society of Hospital Attorneys.

Joel: Talk a little bit about how your career evolved once you went to work with this small, boutique I guess we'd call it, law firm that did mostly health law.

Dennis: Well, I always did a fair amount of Medicare work, but I also did just other work for health care clients. Sometimes it might be drawing up a lease or a contract, it might be advice on a bioethical issue even, or medical staff, but mostly it was regulatory issues. And it could be coverage, it could be payment, it could be appeals, it could be consultation. And it was right ... I started in 1975, and the Provider Reimbursement Review Board, which was the administrative panel that heard most Medicare payment disputes, not coverage disputes but provider payment

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disputes, was created by a 1972 statute, but it didn't actually start its existence until 1974, and it was not until the spring of 1975 when the PRRB had its first hearing. So we were kind of making it up as we went along, and the Board was very amenable to suggestions from those were practicing in front of it on how it ought to conduct its affairs.

Joel: And do you recall when your first hearing before the Board was? Was that early on at the time the Board started to get geared up?

Dennis: I think the first time I appeared before the Board, and I was a very junior associate carrying a briefcase, a document bag, was April of 1976. Later in the 70s, I had much bigger roles in hearings, and in '79 or so, I think I was doing hearings by myself.

Joel: Dennis, you mentioned that both Jack Wood and J.D. Epstein were very much involved with the Academy, or the Society. What was your first engagement with either the National Health Lawyers Association or with the Academy, if you can remember?

Dennis: I was asked to speak on a program in Houston, and I can't remember what I spoke on, and I can't remember what the program was about, but that may have been my first involvement. But over the years, starting in the early 80s, I suppose, I spoke fairly routinely at the Medicare and Medicaid Institute. And I probably did that every year for 30 years. I'm not certain of that, but I think that's accurate. I spoke on other programs as well, the annual program on occasion. There may have been others, Joel. I know there are others. Home health, even the Tax program. I'm not a tax lawyer, but there were some issues that came up which had reimbursement related to them and which we were working on, and I spoke at the Tax program a couple of times.

Joel: Yeah, and of course J.D. was the long time co-chair of the Medicare and Medicaid program, which coincidentally was both something that the Society and NHLA put on. So you really had a foot in both camps just based upon that. When did you go beyond speaking to some type of a leadership position in one of the groups, either the Practice Groups or the programs, with AHLA or one of the predecessors?

Dennis: I may be leaving out some stuff here, Joel, but I went onto the Board of Directors of the American Health Lawyers Association in 2005.

Before then, I had been chair, or co-chair and then chair and then co-chair again, of the Medicare and Medicaid Institute. And I did that ... I think between being on that committee and then chairing that committee, or being co-chair of that committee, I probably did that for nearly 10 years.

Joel: Do you remember who the co-chair was?

Dennis: I was initially co-chair with Tom Coons.

Joel: Okay.

Dennis: And when Tom went on the Board of the Association, I was the sole chair. And then I kept on in an elder statesman role after I went on the Board for just one year, and Tim Blanchard was chair at that point.

Joel: And you mentioned that you went onto the AHLA Board in 2005 and stayed on that for the two terms, which would have been through 2011. Can you describe what positions you held while you were on the Board, and whether there were particular accomplishments of which you were most proud?

Dennis: I was on the Professional Resources committee, and while I was doing that, we got the, and it was mostly a staff effort to be perfectly candid, but we got the Health Law Archives up and going, which I think is a very valuable resource. It's an incredible wealth of knowledge and wisdom in the work that's been done from AHLA programs and other things that have been written for AHLA, either in the *AHLA Connections* magazine or in the *Journal*. There may have been other things as well. And that's all in the Archives. It was huge. We experimented with a health law Wiki too; there was a lot of effort there, frankly it wasn't used as much as we had hoped. And we-

Joel: Does AHLA still have the Wiki?

Dennis: I don't know if they do, Joel. I'm not certain, but I don't think they do.

Joel: Okay. I don't remember ever using that. I used the Archives on a large number of occasions, and it was very helpful, just to echo your point about how valuable that was. You really find these papers and articles written by people who are experts. It's just so helpful.

Dennis: And I think every area of law has its little quirks which are not published. You can't read a regulation or read a case and get didactic training in everything you need to know to practice. There's lore, and particularly when you're dealing with an agency, "Well, I was on the telephone with this civil servant, and they implied that..." That's very intangible stuff, and not the sort of thing you want to base a legal opinion on but knowing how the agency thinks about things, or knowing comments that members of an agency tribunal such as the Provider Reimbursement Review Board said during a hearing, while it may not be reflected in the decision, it tells you something about how they're thinking. That's the sort of thing you can pick up from practitioners who have done a lot of this work, which you just can't get anyplace else. It's just not available. And that's one of the reasons the Association presentations at programs were so valuable.

Joel: Well, just to reinforce that particular point, a couple weeks ago, one of my partners asked me a provider-based question that dealt with leased employees. I pulled out my handy-dandy three-ring binder, which included a number of different presentations done on provider-based over the years at the Medicare Medicaid program, one of which was one that you had done on what was really sort of advanced issues on provider-based. So I was able to go back to this individual and tell her that, "Well, here's what Dennis Barry says about it." She was sort of flabbergasted that I was able to come up with something on that and say, "Well, here is what Dennis's reasoning was in terms of how you would approach an issue like that." But it does really underscore the point that those Archives are very valuable, as are all of the papers that you collect over the years. You don't end up getting the easy questions that you go back to a regulation and say, "Well, it's right there in the regulation." It's more the interpretational types of things, where you have to sort of understand what's been done either by the agency or other provider groups in the past.

Dennis: And also, knowing analogies. There may be something in the condition of participation policies that have some bearing on how to interpret a reimbursement question, or vice versa.

- Joel: Yeah, and that's the sort of thing that comes with experience and with time, and that's why these programs are so very valuable to members, and specifically to younger attorneys. Talk a little bit, if you would, Dennis, about the attributes, the strengths of the Associations over the years, and of the American Health Lawyers Association now.
- Dennis: I think where AHLA shines is in how freely its members share valuable information with each other, either in programs or in one-on-one contacts. In my experience, and watching my partners over the years and other practices, some of that information, much of it would have been treated as confidential. And I don't mean attorney-client confidential, but I mean it would be kept close to the vest, thinking that it gave the lawyer a competitive advantage to know it. And in the health law community, lawyers shared information very freely and generously, and there was a lot of collegiality, which in my experience was unique to the health care field.
- Joel: Yeah, there isn't a lot of secret sauce. Most people are willing to share their experiences and to talk about how particular cases or matters were handled, without of course revealing any client confidences. But that is a very important hallmark of the Association. It speaks to one of the reasons why it is so collegial; people rely upon one another and relate to a network with one another. Anything else about AHLA that you'd like to mention or talk about?
- Dennis: Well, the organization tries very hard to be open and to provide speaking opportunities, writing opportunities, other volunteer opportunities, to all of its members. And in the years that I was involved, from the Medicare program on through being on the Board of Directors, so that's very roughly a span of 15 years, and what I've observed both before and after that is this active outreach to everybody. Soliciting presentations, proposals to present at programs, soliciting folks to participate in committees. And to keep it open, to keep fresh ideas coming in. And I think the organization has done a pretty good job of not letting itself become ossified. There are times when folks who have not had their proposals accepted, or for whatever reason they feel excluded and complain that the leadership is clique-ish, and you need to be part of an in-group, I've heard those complaints. It has not been my experience, and I never felt like part of an in-group. And I know that when I was involved in making decisions, we were striving hard to get new people involved, and to hear new voices.
- Joel: Yeah, and I think it's important to emphasize to people that making one or two stabs at something if you don't get your proposal accepted the first time, chat with people about what they're looking for. Make another effort. Usually those additional efforts will be rewarded, because you are correct that the Association is looking for new blood, new voices, diverse voices, etc. And that is one of the strengths of the Association. And that is something that they have to sort of balance with the fact that there are long-time practitioners who are extraordinarily knowledgeable in these areas, where you're not going to knock them off of a program or off of a particular topic, since they know so much about it.
- Dennis: Well, when I was chairing the Medicare and Medicaid program, the way we would deal with that is we'd have an informal term limit. And it might be three years, it might be four years, and there were two exceptions that I can remember. But it wasn't that a person had to go off the program, because there were some extraordinarily talented and well-informed speakers on that program. We did not want to lose their participation so would move them from topic to topic. And we'd talk to people about it; it wouldn't come as a surprise. We'd talk to people about it, and solicit what else they were interested in talking about, and that sort of thing. And that's one of the ways we tried to keep it fresh.

Joel: This is a good segue, Dennis, into what advice would you have for younger attorneys, attorneys either fresh out of law school or maybe making a mid-career change or getting involved in health care for the first time? What would you recommend that they do?

Dennis: Well, I think you need to figure out, as a young lawyer, what you want to do, and what you're good at. And you're usually not good at things you don't want to do. Oftentimes, when you have a real passion for something, it helps you get really good at it. So figure out what it is you want to do. It's a highly regulated area. So if you don't like reading regulations, it may not be for you. You may want to go into the transactional side of it. Develop a niche, or develop many niches. I'm not saying define yourself very narrowly, but you need to have an area or areas where you feel really comfortable, and where you're really good.

And there's really no substitute for excellence. You're not going to grow as a lawyer unless you make some mistakes. You just have to hope none of those mistakes are really bad. But you have to try really hard to get it right, and there is always pressure, time pressure, particularly with rates where they are now, to get things done quickly, to get back to the client quickly, to have good client service, and not to have too many hours run up. But there's just not a substitute for getting it right, and sometimes that means you're charging more than the client wants you to charge. And if that's the case, you may very well be eating part of your bill. You may be getting, as a young lawyer, heat from partners, saying you spent too much time on something. But far better to spend too much time on something, than to get it wrong.

Joel: Yeah, I think your point, that people need to do a deep dive and really master a particular area or areas, hopefully more than one, because you do need to have some flexibility in terms of the types of issues that you deal with, but then also to realize that there's no harm in perhaps having too many hours on something, where you can cut the bill. You don't want to be able to do that consistently, but there is something like startup cost, where you're going to incur some additional time and effort at the beginning of learning a particular area, or mastering it. So that is to be expected.

Dennis: Other things I think all lawyers need to do is get along with the clients. I have seen lawyers, even young lawyers, be rude to clients, or not return phone calls, not respond to emails. That is not acceptable. Calling a client and saying, "I don't know the answer yet," calling a client and saying, "Well, I told you I'd have it done by Friday, and I don't. I'm sorry," is just way better than ignoring the client. Clients do respect diligence, they respect commitment, they respect excellence, and they're smart enough to recognize it. The hospital clients I've dealt with really were very sophisticated. And they taught me a lot.

And that's actually something else, is part of understanding this industry is not just reading the regulations and doing all that, it's learning the clients' business. A lot of the clients just love to have you ask them questions about their business. And there are going to be some things where they're going to expect you to know it. Perhaps there is such a thing as a dumb question, but for the most part, clients like to talk about their business, and clients were incredibly generous with me in teaching me their business, and teaching me about accounting, for instance. Sure, I took a little bit of accounting when I was in college but they would run me through how they were accounting for things, and the applicability of generally accepted accounting principles to various situations. I learned a lot from my clients just by asking them questions.

I think that a lot of lawyers out there do not identify themselves as being potential rainmakers. They feel they don't have the personality for it. I don't think you need ... matter of fact, I'm proof

positive you do not need to be a glad-hander or especially socially adept to develop a base of loyal clients. You need to be good at what you do, and you need to let people know that you're good at what you do. And you can write, you can speak, you can volunteer. There may be social media opportunities out there, which, frankly, I don't participate in, posthaste when I needed to know about it. But whatever is good in your particular niche, you need to be visible in that niche.

And finally, I think you need to be vigilant about your practice setting. Health care is a growing area. Many firms see it as a very large part of the economy and say, "Oh, we should be in health care." Then they get in health care, and they start learning that there's a lot of fee resistance on the providers' side of the business, and a lot of competition. And some of the super large firms may be disappointed that the hourly rates cannot go as high as they go for, say, private equity work, or other types of specialty work. And I think there are ways to run a health care practice efficiently, where you can have flat fee billing, perhaps contingencies, perhaps bonus arrangements, perhaps other arrangements with clients which are risk-sharing, so that you can make a ... I mean, I was able to make a health care practice work in two Am Law 100 firms. But it takes some effort. And I think lawyers need to be vigilant as to whether or not the firm they're with continues to be a good place to be practicing the brand of health care law they're practicing. And if it isn't, maybe they need to move on.

Joel: That brings us to another point that I think is relevant here. What challenges do you see? You've talked a little bit about practicing health law, especially in a bigger firm, and some of the challenges that go with that. But just other challenges that you think that health lawyers have, or health law in general has?

Dennis: Yeah, I think like just about every aspect of the economy, it's becoming more competitive and more price-sensitive. I think all lawyers, not just health lawyers, need to figure out how to make technology their friend, so that ... You can't have cookie cutter memos necessarily, because if it's a cookie cutter problem, the client probably doesn't need you in the first place. But, there are issues that recur, and having the ability to recover your own work product efficiently, whether it's in a notebook or notebooks on your book case, more likely it needs to be electronic, but you need to have that efficiency. And if I were practicing now, I retired three years ago, but if I were still practicing, I think I'd be focusing a lot of my attention on how to make the practice more efficient, so I don't keep rewriting the same sentence.

Joel: What challenges do you see facing the American Health Lawyers Association? We've talked about what your advice to younger attorneys would be, and what the sort of obstacles and hurdles are for health law and for health lawyers, but what do you think ... I know you've been off the Board for a while, but just generally speaking, what do you see the challenges for the Association itself?

Dennis: Well, I think it's going to be competing for dollars, always having to justify that the dues paid are a good value. I think it's going to be competing ... a lot of what the revenue from the Association is from programs and intellectual property, and more and more of that is available for free. Law firms, for example, are doing a bunch of programs themselves, where they will invite clients or anyone who wants to come for no charge or a nominal charge. That's going to be a challenge for the Association. Technology is going to be a challenge for the Association. Keeping it fresh. There are supposedly younger people in the country who are not as interested in joining organizations as your generation and mine, Joel. I think there's some truth to that, I'm not sure that it's quite what it's made out to be. But continuing to be relevant and to offer value to its

members when information flows ever more freely through technology is going to be a challenge.

Joel: I think the point about competing against free is a very difficult thing to do. And if you're going to do that at all and either survive or succeed, you've really going to have to be able to add some value to that, and to add perspectives, viewpoints, or other things, that are not going to come out of, say, an individual law firm. So if you're putting a webinar on, for example, about a new regulation, the Association may need to consider, "How do we have governmental viewpoints on this? How do we have the viewpoints of private firms or private clients? But what are the perspectives within the health care sector, too? Are there divisions within the health care industry about the regulation?" So offering something that is a more full spectrum of viewpoints, as opposed to perhaps a law firm where you might get a unified opinion about what the regulation means or should mean, or how it will affect clients, is something that really is important to be done, if the Association wants to compete on those grounds. At least in my viewpoint.

Dennis: I agree.

Joel: But anyway. Anything else you'd like to say about your history with the Association, or the Association, or the practice of health law?

Dennis: One of the things that's ... I was going to say new, it's hardly new, but it came into existence after I got out of law school, is programs at law school or courses in law school on health law. There weren't any that I'm aware of when I came out of law school in 1975, and since I wasn't looking to go into health law, it wouldn't have made any difference to me anyway. I think those programs are fine. I actually taught a class at the University of Virginia Law School on Medicare coverage and payment. I don't think a lawyer should feel intimidated if he or she did not have a background in health law in law school. It's really a specialty to the client. There certainly are a lot of areas, facets of health law that are unique to health care, but it can be learned while practicing it, and that's really how most of us in fact did learn it. So I'm not trying to disrespect any of the programs that are out there, but I don't think somebody should feel intimidated if they didn't go through one of them.

Joel: Well, I will again sort of echo that same point. The two major areas that I practiced in during my career were health law and professional responsibility, and I did not take a course in either one of those in law school. Professional responsibility was not even mandated at that time, because it was pre-Watergate. So I think that point is very, very valid. Do not be intimidated. If you know you have an interest in something while you're in law school, that's great to take the course or courses that are offered on it. But success in a particular area isn't going to be based or premised upon, very likely, what you took in law school, because you're going to have to deal with particular client matters and the clients themselves, as you said, who have a lot to offer to you in terms of education and experience. Well, Dennis, thank you very much for agreeing to do this again.

Dennis: Okay. Joel, thank you.