



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 27, 2017

Tom Fox interviewing Jane Conard:

Tom: The date is February 27, and my name is Tom Fox: I am a past president of the American Health Lawyers Association, and this morning I have the pleasure of interviewing Jane Conard. Jane is a former AHLA board member, and a former chair of the AHLA, ADR Service Task Force. She's been a frequent speaker at AHLA programs, and speaks and writes on mediation and conflict management. Subjects which I'm hopeful that we will cover. Jane, I want to thank you for taking the time to share your thoughts and recollections with us today, but why don't we just begin with when did you first become involved in health law?

Jane: When I was in law school I wrote a law review article -- back in 1975 -- on health care for indigent, undocumented aliens, and that's still a problem. It was a big problem at the time in California where I was going to law school. I graduated from UC Davis in 1976 and began my career in the legal office of the California Health Department. I was one of the five new attorneys hired in the fall of 1976 after the passage of the California Certificate of Need Statute, and that was one of the early laws that created what has been called full employment opportunity for health lawyers. I also worked in the legal office of the California Department of Mental Health after the California legislature mandated the breakup of the California Department of Health into five separate agencies because it was so large. So, I certainly got an overview of health law and got into a certain extent on the ground floor I think.

Tom: Jane, the paper-

Jane: By early-

Tom: Yeah. The paper you mentioned. My gosh, that's timely today. Yes?

Jane: Yes, it is, and it really has changed very little because undocumented persons are not eligible for Medicaid for the most part. Although there have been a few -- shall we call it loosening of regulations -- but by and large I expect it will become a big issue in the next few months because back in that day the INS, Immigration Naturalization Service -- now ICE -- did not want to hear from hospitals until patients were ready to be released. That's why hospitals got stuck with the bill, but these days it appears that there's going to be requirements to report to ICE immediately. It will be interesting to watch and see how this might change. Anyway-

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- Tom: That's amazing. Anyhow, I just wanted to get that down. To me, that's, I guess, one of the amazing things when we start interviewing people such as you who have been so involved in health law. We find just some of the amazing experiences that people have. Yeah. Please proceed. Go ahead.
- Jane: Well, by early 1982 after I had been in public health in the government sector I realized that there were many opportunities in the private health law sector, and I felt like the learning curve was flattening out a bit, and I wanted to use my health law expertise elsewhere. I realized that there was a good market for health lawyers, and subsequently, I was recruited by Intermountain Healthcare which is an integrated healthcare system headquartered in Salt Lake City. At that time it was a hospital system, and Intermountain was setting up an in-house legal department, and I was the second attorney primarily because of my certificate of need experience. At that time, as I mentioned, I was the second attorney, but now there are over 15 attorneys in the corporate legal department along with attorneys in other corporate units. Since Intermountain now has physicians, hospitals, healthcare insurance, and it's quite a large corporation. It was one of the-
- Tom: Jane, was at the time when the hospital systems were starting to develop, I'd say, more of an in-house capability than maybe they had in the past?
- Jane: Yes. Exactly right. One thing that I found that was very helpful to me was the development of the in-house counsel section within the ... Well, primarily I think that was within the Academy of Health Lawyers, but also within NHLA. That was important for keeping up on continuing legal education because that sort of resources are not available in Utah. It could have been more so in California, New York, Michigan, Ohio, some of the larger states, but it certainly wasn't in the smaller states because most of the private health law firms didn't focus that much on healthcare unless they had particular cases or, of course, medical malpractice. So, that was an important linkage to me to other lawyers.
- Particularly, I have one incident I would like to describe. I joined the National Health Lawyers Association. Actually, was member of both as a predecessor organizations with the NHLA back in 1982, and then in 1986 I attended the annual meeting in San Francisco, and there was a breakout session that I attended. I heard Brent Henry, who is an AHLA Fellow, describe the challenges that he had had representing -- and he was in-house counsel in Boston, and I can't recall the particular hospital -- at any rate he was describing with outside counsel that he retained the challenges that the IRS had raised in regard to their physician recruitment contracts, and he represented a not-for-profit hospital.
- The issue was whether the recruitment inducements given to the physicians -- for example, low or no interest loans, or housing assistance, other financial benefits, and so forth -- constituted private inurement. Since Intermountain had already been through litigation relating to its entitlement for exemption as a not-for-profit, and of Utah state property taxes, I paid close attention to this presentation. Became more and more uncomfortable as I listened to it because I was in charge of physician recruitment contracts.
- After the session I called back to my office and asked them to put a hold on a few physician recruitment contracts that were ready for implementation in early July so that I could do another review to make sure that we wouldn't be in trouble because the hospital administrators, of course, negotiated most of these contracts, and in a large system -- I think there were two dozen hospitals -- sometimes there isn't the level of communication that you

would desire. Particularly because Intermountain had a lot of rural hospitals that were always desperate to recruit physicians, it was important going forward to organize and standardize the physician recruitment process.

I worked with the beginning of a physician division to write a Physician Contract's manual that included example contract languages -- formats and so forth -- as well as a primer on IRS tax exemption requirements, and in the concept of inurement not being a tax lawyer I stuck pretty close to the language that was in the general counsel memoranda and the private letter [inaudible 00:11:46], and put that language into the contract's manual. Four years after that the effort of the contract's manual proved to be very valuable to Intermountain because the IRS came calling in 1990 to do its first comprehensive tax audit of an integrated healthcare system. There were many issues involved, and I should say that Intermountain came out very well and ended up that the IRS paid Intermountain some money back, but at the time -- and it took 18 months as I recall -- the physician recruitment contracts were a major issue.

I will never forget spending one very tense afternoon explaining to T.J. Sullivan, who is now an AHLA Fellow, that at that time a special IRS agent, how Intermountain used the guidelines outlined in the 1986 physician ... Or how Intermountain used those guidelines in my contract's manual to assure compliance with the IRS rules and regulations. I explained and did storytelling more or less about the need to offer the inducements for specialty physicians in particular in rural areas. For example, the need in Wyoming for an OB/GYN since otherwise an expectant mother could expect a 100 mile trip to Salt Lake if she needed a C-section, and that area had a very high birth rate compared to the national standards, or the need for a cardiologist in a college town also more than 100 miles from Salt Lake City, but it was in a mountainous region that was accessed by a two-lane Highway that wound through an area that was called Sardine Canyon.

Mr. Sullivan apparently was convinced by these stories, and the influence of the contract's manual in our process, so he asked if he could take a copy of the Physician Contract's Manual with him at the end of this tense afternoon. Then several months later I was quite surprised when the CFO came to me -- the Intermountain CFO -- and said you need to look at the organization in outline of materials in this new IRS field audit guidelines publication. Sure enough, for good or for ill, the IRS accepted the Intermountain approach. I'm not sure that it was necessarily the best writing that I had ever done, but the fact that it incorporated so much of the IRS materials it seemed appropriate apparently for the IRS to include that. That incident is probably the best evidence that I could cite for the importance of the continuing legal education that NHLA and AHLA had provided at that time. It certainly was the best evidence for Intermountain to justify the funds that were necessary to send our in-house counsel lawyers to conferences and maintain membership, purchase publications, and so forth.

Tom: Well, that is a great story. As you say underlines how lawyers like you involved in the programs, and things which developed out of those educational programs had much broader benefits. T.J. Sullivan was on the board at some time. Do you commiserate with T.J., and tell him you're glad that he was smart enough to use your materials?

Jane: Oh, we have maintained a friendship over the years from a very inauspicious start. We have, as I said, developed a good friendship and, yes, I look forward to seeing him at the annual meetings. I have attended all of the annual meetings. Haven't missed a one because it is that important to me for my career, and as I mentioned I developed a great friendship. I have friendships with a

number of other lawyers that date back 25 years or more, and so I think that social [collegiality 00:17:14] and camaraderie is a very important aspect too.

Tom: Yeah. You know what? It does show the importance of ... I know on the programs of bringing in the government officials. I mean, I know Len [Homer 00:17:28] on the Medicare and Medicaid. The motto he followed was whenever he had a subject he'd have somebody in private practice, and then he'd have one of the ... At that time HCFA, now CMS attorneys, so that was ... You know, it goes to the point which you've made. Well, Jane, what I want to also just sort of transition to ... I know you had a lot of involvement in the ADR process with AHLA. That was sort of after my time, and I can remember reading about, I guess, it would be emails from David on when AHLA started, and what would be its purpose. Maybe you can help this morning fill in the history on that if you could?

Jane: Certainly. Based on my in-house counsel involvement, and I'd like to mention that I was chair of the in-house counsel section just after the two organizations merged to become AHLA, and we became, I think, one of the leading sections. I'm proud of the fact that I created the war stories competition, and the Golder Ferret 00:18:46] award for in-house counsel because you can't write these things, you can't make them up, but there are fascinating incidents that occur in hospitals and in healthcare facilities. At any rate, based on that experience I realized that a lot of times during my career I was doing mediation because you have a particular problem or a new regulation, and so there were people within the hospitals who had different perspectives if not objectives, and they didn't always mesh together.

I can clearly remember having the medical director, the nurse administrator, and the finance officer of one of our large hospitals sitting in my office, and they couldn't agree on how to implement a particular program that was newly required. They came to the legal department and said, "You tell us what to do. Whether it's the law," and one physician thought it was one way, and the nurse administrator was saying, "No. That's not going to work with our staffing and so forth," and the financial officer, of course, didn't want to spend any money on it. That's a perfect situation for a mediation. Asking each to describe their particular views and problems, and arriving at a plan to meet a time and objective.

At any rate, in 2007 when I was on the board, and I was liaison to the ADR service that had been established probably in the mid-90s I think because there were with the increasing consolidation of hospitals, physicians, and insurance functions. There were more and more stresses in the business relationships, as well as the day-to-day healthcare operations. As I mentioned, in 2007 then the Joint Commission added a new guideline requiring hospitals and medical staffs to establish conflict management policies and procedures. I was liaison to the ADR task force. I took the lead with three other ADR committee members to rate pretty much as a service for in-house counsel, but for other lawyers as well, to rate the AHLA Conflict Management Toolkit.

For me, personally, that opened up a new area of law. I had previously had some AHLA training in mediation, but, as I said, then I began to do more writing and teaching. I was on the panel for arbitrators and mediators, and that, as I said, opened up a new area, and after 2008, and I had the opportunity to qualify for a pension and retire from Intermountain due to a combination of age and my 26 years of service there. Then I went on to set up a private legal practice with emphasis on mediation and arbitration of healthcare business disputes, insurance issues, and medical staff matters. I believe that that appears -- ADR -- appears to be yet another quote "full employment opportunity" unquote for healthcare lawyers because it's difficult with change to

implement required changes from government or other sources because people resist change and then there's conflict.

I have been advocating for ADR among my healthcare colleagues based on the promise or objective to achieve a quicker, quieter, and cheaper means of dealing with conflict. ADR can be faster than litigation because the parties are in control of scheduling. Mind you, it can take a year, but it's up to the parties about how fast they want to proceed. It also can be confidential, and that's very important when you're dealing with hospital-physician relationships. If the parties can agree to have confidentiality agreement, and probably most important the decision in arbitration, won't establish precedent as case law might. Finally, it can be less expensive depending upon the parties desires as to the extent of discovery or the number of days to hearings. It can be expensive. I can't deny that, but, again, the parties have more control over that, so particularly-

Tom: You know, Jane, I remember when AHLA started to establish that service that I believe we were all reminded and we probably did it, is that we had suggested contract language, right, that we wrote into our contracts? It says I guess-

Jane: Absolutely.

Tom: ... that'd be ADR provision in, and that you've selected the American Health Lawyers as the arbitrator I recall. Something along those lines.

Jane: Right. You're absolutely right, and I put that language into all of the physician contracts and other contracts that I previewed or negotiated for Intermountain Healthcare for a good 20 years. One other incident where that value was demonstrated is that Intermountain Healthcare had a situation with its most highly compensated individual within the whole corporation. He was a super subspecialist whose salary was greater than that of the CEO of the corporation, and he had a great ego that went with it. When his contract was renewed, we put in what the arbitrator later called a sui generis termination provision. At any rate, there was a big blowup. The physician marched out after the administrator said, "Well, this is what the contract says. That's is how it's going to be. Do you want to resign?" and he wrote, "I resign," and signed it, but later said that he was pressured into doing that.

There was an arbitration. It went to the Utah Supreme Court, but Intermountain prevailed because the arbitrator said although no one could be sure what had happened in the confrontation, the contract was clear. He was required by the language of the contract, mandatory arbitration, and there was also mandatory attorney's fee provision. I just thought of that incident now. Again, I think because of the processes, and procedures, and basic information, and continuing legal education that in-house counsel had available, it was very important to the employers or the private law practices in terms of how to best represent their clients. It's something that's been part of my career to be involved in both AHLA and its predecessors, and it's made me a better lawyer for sure.

Tom: Yeah. Great career. Say, let me ask you this. Again, trying to get some perspective for what we call the future, and that when you are on the board what were the issues that the AHLA board was facing at that time if you recall?

Jane: Well, the ADR service was one of the issues because it was difficult to maintain its success financially, and there are always financial pressures. Actually, about the time I was leaving the

board, there were big changes that were made in the ADR task force -- the governing part of it in the service itself. Another major issue that was not business related but there was discussion about, how to ensure the quality of the publications, of the presentations, and so forth. So, there was a quality committee that was established, and more administrative guidelines to ensure success of the programs, the webinars, and so forth. I expect that those are still issues that the board is dealing with, and at the same time, we were trying very hard to maintain the collegiality and in the outreach. I think that AHLA has done a marvelous job in terms of inclusion and development of public service because that too was an important issue while I was on the board which was from, I think, 2002 to 2008.

Tom: Well, Jane, maybe ... We always have the concluding question here, and that is looking back upon your career we've got this continuing new generation of young lawyers coming up, and what advice would you give them in terms of a career in health law and how they might approach it? Obviously, be interested in your comments on that.

Jane: Well, I know that many young lawyers have told me that they're frustrated because they're interested in health law but there's no way to get in -- to get that first job -- because all of the requirements are for two to three years experience and so forth. I would like to emphasize ... And I know Almeta Cooper, who's a good friend, former president, and board member started out in public health government agencies as well. So, I want to suggest that that's a good entry point. Working for the state, Department of Health board, certainly working in Washington, is a very good basis for then going on and working in a private firm or rising through the levels of a corporate health department.

I think that health law is a terrific career because there's so much growth, and change, and challenge in it. Healthcare represents 18% of the GDP, so certainly there's going to be growth and a lot of change coming particularly in 2017 I suspect. Also, I think that for young lawyers it's important to have linkages with other lawyers in the field because you can certainly get good tips and good advice just by picking up the phone. Otherwise, I would wish them luck, and I hope that they find challenge and interesting career in health law.