



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 Kelly Clark:

Elise: I am Elise Brennan and I have the good fortune to get to interview Alex Clark, goes by Kelly and he is a true founding father of our organization, really knows about the beginnings of the Academy and what then turned into the AHLA. So, Kelly, could you start off by telling about, a little bit about yourself, how you got into healthcare law and then how you got involved with the Academy?

Kelly: Sure. Be happy to. Number one, I graduated from the University of Virginia back in 1966 and my first job outside of college was to become the insurance officer for the University of Virginia Medical Center Clinic. The main task of which was to help organize the academic faculty for the medical school into a group practice so that they could enroll in Medicare. It was a whole new concept, you'll recall, 1966 was the first year of Medicare.

A year after that I was off to law school, and upon graduation or being near graduation was talked into interviewing with Ed McEachen at a firm in Omaha where I have practiced now for almost 48 years. Ed, when I interviewed with him, I recall, was very high on the idea that health law was going to become a specialty in its own right. Up to that point in time, health law was just the representation of hospitals like another business, with everything from zoning to antitrust to collection issues. But Ed painted quite a picture of where health law was likely to go, was convinced that it interested me, it was something that I had a little bit of background in from my one year at postgraduate. And so I joined the firm and have been here ever since and have been pretty much working on health law ever since.

Back in 1970, when I actually joined the firm, there was no American Society of Hospital Attorneys. And in fact, there was really no representative body like we have known for so many years, but when I think about what's different then and now, what occurs to me is we have such a common starting point today. With the education provided everywhere from our fundamentals program, through the AHLA, through the American Bar Association and many state bar association equivalents. But if you go back to 1970, '71, '75, there was no common understanding of what health law was. Or no two people would start at the same place if you had a peer review type of question, or an antitrust in the healthcare field type of question. And I think the origins of the American Society of Hospital Attorneys as it originally was known, were intended to address that shortage. It was quite a different time than it is today, and it's very hard for people with the luxury of what we have available, of resources from AHLA now to even think back and imagine what it would've been like back in the 1960s and '70s.

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Elise: You know, a couple things, you've said on this call and told me before when we talked, that really struck me. One, is I think how a lot of people at that point in time ended up in healthcare, it was just sort of an opportunity when someone with some vision saw where things were going and directed you in that way, which, I've heard this from many different people that I've interviewed. But the other thing that I recall you told me when we previously talked, that I'd like for you to sort of discuss is how at the beginning stages of the Academy, the way... When the attorneys involved came together, why they came together, and I think you used the word in terms of a counterbalance, why they felt the necessity to come together to learn from one another.

Kelly: Sure. I'd be happy to. That is an interesting story and again it's some of the difference between then and now. When I joined in 1970, there were already some of the foundations for the society laid. What had happened is, that in the period since Medicare was started, in 1966, the American Hospital Association had sponsored several programs on law. And so, lawyers who represented the local community hospital or medical or center had gone to those programs and between programs they had begun talking to one another. I suspect a little bit of wine was consumed in the process. And the general effect and the general impression that I had from talking to those individuals was that both they and their clients felt like the healthcare industry was suddenly being picked on from all sides. The Joint Commission was more active, there were new cases coming out on things like informed consent, end-of-life or withholding care determinations, medical or negligent credentialing. I mean, we could go through quite a list of issues that still exist but they're secondary to what we work on today.

But the net result was that these lawyers in this group honestly felt like the industry was being picked on, there was no counterbalance to this weight of plaintiff or government or agency or accrediting body pressure that their clients were feeling. And it was the genesis for going to the American Hospital Association and suggesting that these lawyers who would meet once in a while at AHA programs, ought to form something which they were permitted to do, under the wing of the AHA, called originally the American Society of Hospital Attorneys. It was very much originally an attempt to create something that could have equal weight to the pressure that clients locally were feeling.

Elise: And then your career, your involvement in creating this organization, you had a significant involvement in helping this organization, which eventually merged to become part of AHLA, you did a lot to make it grow. You want to describe a little bit about your background, what you did and your history with the Academy and then the AHLA?

Kelly: Sure. Be happy to. Number one, I was lucky to join a firm with Ed McKeechan who was right in the middle of this group of lawyers, many of whom are names that we revere at this point in time, who also were like-minded in wanting to help form the American Hospital Association. Or excuse me, the American Society of Hospital Attorneys, later became the American Academy and all of that. But, I had the opportunity and the advantage I guess of being introduced to a lot of the other people who had been thinking about this and working on it for a period of years.

By 1975, I think I had my first speaking opportunity. It was at the Del Coronado at the then annual meeting of the American Society of Hospital Attorneys. As I think I mentioned to you, it was on end-of-life decisions, it was the year of Karen Ann Quinlan. And that seemed to go well, I was terrified, I was in a room with about 200 of my senior partner's closest friends. But it seemed to go okay, I wasn't run out of the room. And I probably ended up as a result of that, speaking at pretty much every program for the next 25 years or so. Somewhere along the way in

the '90s, became involved in part of a committee structure. Some of it was American Hospital Association committee structure, some of it was American Society of Hospital Attorneys committee structure and bit by bit of course, the American Society, and the Academy, broke away from the AHA and became independent and freestanding.

Somewhere along the line, became a member of the board and enjoyed that. Again, participated on some of the board committees. Went through the chairs and became president. Was responsible for the Toronto annual meeting many years ago. And then thereafter, probably for 5 years, I would guess, handled the year-end review, first with Bob Miller and then later with Jack Schroeder.

So, I mean, I've had a lot of involvement and gotten an awful lot out of that involvement personally and professionally. I'm a big advocate of becoming as active and involved in the now AHLA as one possibly can become.

Elise: Did you mention you started the year in review?

Kelly: No, no, no, the year in review had been going on for a period of years. I simply stepped in when somebody else was worn out, it might have been Nate Hershey, who was, had been doing it for a while. It might have been somebody else, I can't remember, Eric Springer, perhaps. But I stepped into a program format that already existed and did it for my four or five years and then I stepped down. Jack Schroeder, his little engine that could, he's still going and he's been at it now for probably 10 or 12 years.

Elise: So in your career, you have seen true changes in healthcare law and in our healthcare systems. What do you think about the future of healthcare law and our healthcare system in general?

Kelly: Well, it's a bit broken. You can make a public policy case for all of the Stark and the anti-kickback laws that you want, and for HIPAA and so on. They all have a good basis and a good intent, and I think they've probably all prevented some harm from occurring. But you can also make a pretty strong case that they are not keeping up with the dynamics of the healthcare marketplace, the healthcare delivery needs of the country. So, number one, I think we're going to have to have some fairly substantial moderation or change if you will, in what are some of the limiting, well-intended, but limiting legal principles that overlay what our clients try to do at this point in time. And that just presages a lot of change.

So if somebody is getting into health law at this point in time, it's probably a great time to do it, because I think you're on the cusp of multiple changed models for delivering care, for reimbursing care, for gathering consumers into groups to buy care, for gathering providers into groups to sell care... I mean, I just think we're in for a wholesale remaking of the marketplace. It's going to be herky-jerky, it's going to have a lot of false starts, but I think it's going to be an absolutely fascinating field going forward. And that's just the payment and medical delivery side of things, you're always going to have all of the operational issues. Everything from the consent to the peer review and so on. So, I mean, without question, it's one heck of a career going forward and it has been for a lot of years for many, many of us. Put a lot of kids through college, I will tell you.

Elise: Yeah. Yeah. Well, what advice would you give to young lawyers that are just starting out in their healthcare law practice in terms of... Or even better, what advice would you give to people that

might be interested in this practice who are going to law school or thinking about going to law school?

Kelly: My view is, I'd almost give some advice to some law firms as well, who are hiring people to do these things. My own view is that someone interested in pursuing a career in health law, with a small firm or a large firm, as a new lawyer in the firm or as a retread from other areas of practice, ought to become as conversant in as large a part of the core healthcare law practice as possible.

I mentioned to you that we have for our associates, I think 13 or 14 of us in the health law group here at Baird Holm right now, but we have a multi-page, eight or nine page associate skills checklist that we go through, because before any of our lawyers become specialists in a couple of the subareas of health law, we want them to have a very strong, fundamental, core understanding of the important parts of health law. Everything from writing medical staff file laws to resolving HIPAA complaints.

So we put people through many years of fairly grueling checklist activity, where they try to do many things. We try to make sure that they are getting the experiences necessary, that they can work their way through the checklist, become conversant and then ultimately they can specialize. But when they specialize and when they go to the client and they're sitting there giving advice in a given area about a transaction or a complaint or a situation, they can draw on this much broader knowledge about what the healthcare field involves, or what other areas of law or practice or industry practice might bear upon or have a role.

I would say, so number one, whether it's for the law firm or whether it's for the individual, I would say get that core base built first and then specialize after that. All of us here in my group, even though we're all generalists at heart, we all have our specialties, so some people do some things, some people do other things most of the time. But I think we all have a strong presence when it comes to being able to sit down and guide a client through a transaction or a situation, just by virtue of knowing as much as we do about all the various laws that affect us.

I would also say to somebody who is starting out in the practice, it really pays a lot to become as involved as you can become. I just think back to my own career. So much of my learning was by doing and by doing I mean by speaking, by writing, by becoming involved in volunteer Bar Association activities, even community projects where they might have been trying to write living will templates or other activities for the general public. The more you do that type of activity, the greater appreciation you have for the various constituencies that are affected by healthcare and the various areas of law and practice that are available.

So, become involved and that applies, certainly, to anybody who is at the entry point for the American Health Lawyers Association. We have, and this is not a sales pitch, but we have myriad opportunities for young people to participate, or new people to participate, young or old. And boy, do I strongly encourage people to make every effort to let their interests be known and participate to the maximum extent they can. It really pays dividends in professional satisfaction and career down the road.

Elise: Now it's... I've done many of these interviews and that is a consistent comment that folks who have developed these fabulous healthcare careers over time, they all say the same thing, and they talk a lot in terms of not going into participation with the idea of generating business from

the participation, but just going into participation for the purpose of becoming a better lawyer and being able to really bring depth and breadth to your practice. And I hear this...

- Kelly: That's absolutely accurate, Elise, I second that completely. That certainly has been my experience and I think if you were to circulate the questionnaire among people here in my firm, you'd find that was pretty much unanimously felt.
- Elise: So as we come to our end of our time, Kelly, is there something else that you might like to add for this tape that will be around forever, in terms of your ideas about future healthcare law or advice you can give or just anything that strikes you as important regarding your experience in this field for what, over 45 years, I think I heard you say?
- Kelly: Well, coming up on 48. A little older than...
- Elise: That's great, that's wonderful.
- Kelly: But be that as it may, yeah, there is something, I hadn't thought about this before you asked the question, but I guess would ask people who are thinking about a career in law, or are midpoint in their career, to think back upon why it was that they chose to become a lawyer. I know, speaking for myself, it was because I grew up in an era, particularly the era of a lot of civil rights turmoil, and it always struck me when I would sit out on the porch and listen to the radio news report at the end of the day. So often solutions or laws or positive steps that were made, somehow involved lawyers at the center. That lawyers became policymakers, they fought in a particular way, they were essential to the process.
- And right now, we're about to have, I think, a significant, major transformation in our healthcare delivery system. And I believe lawyers are going to be at the center, if you will, of many of the key policy decisions and changes that take place, and that the next generation of lawyers is going to have a very significant role in shaping the next healthcare delivery system, shaping expectations, limitations and communications about what it's all about. So, even if you're thinking more in terms of public service, this is, I think, a fabulous time and a fabulous opportunity to become involved in health law.
- Elise: I appreciate that, that's a very interesting perspective, and I must ask, just out of curiosity, is your thought that the major transition in, I guess in delivery models, in reimbursement is resolved of what the Affordable Care Act has put in place? Or do you think it's something else out there that's going to come at us from some of the turmoil involving the Affordable Care Act?
- Kelly: I think more the latter, I think more it's industry forces, it's demographics, it's fiscal considerations. The present system is, whether the Affordable Care Act fixed up or anything else that's being discussed at the moment, you know, 50 different state solutions, none of that offers much promise as a long-term solution. And I think it's going to be more industry forces and just the ability to come up with a solution that people can afford, whether it's single payer or whether it's something else that's going to drive the train.
- Elise: Very, very interesting. There's room for you and things you need to be doing for the next 48 years of your practice.
- Kelly: Well, the next few at any rate. We'll settle for a few at this point, Elise.

Elise: Well, geez, Kelly, thank you so much for speaking with me, I really, really enjoyed it, and again, you have added so much to our profession and to our organization, the AHLA and its predecessor organizations. It just was a real treat to get to talk to you. Thank you very much.

Kelly: You bet, thank you, Elise. I appreciate being asked.

Elise: Yeah, take care.

Kelly: Bye-bye.