



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.

December 13, 2017

Bob Leibenluft interviewing Jeff Miles

Bob: This is Bob Leibenluft, and I have with me Jeff Miles, who is senior counsel at Baker Donelson. I work in health care antitrust, and I can tell you Jeff is probably the dean of the health antitrust bar. He writes a treatise that he keeps up-to-date, which is sort of the go-to place if you're doing health antitrust work, and he has practiced in this area for quite a long time and has had a distinguished career both in the government and the private sector.

So, Jeff, why don't you tell us a bit about how you got started doing your practice and its relationship, maybe, to health law? I don't know whether you'd call yourself, at least when you started, a health lawyer, but give us a sense of how you started and what your career path has been.

Jeff: Okay. When I finished law school, I started private practice at a small firm in Roanoke, Virginia. Pretty soon after I arrived, an antitrust matter came in and I was the only one in the firm who'd even had an antitrust law course, so it was handed to me. I knew I was not competent to handle it, so I pulled in a guy from Richmond named John Shenefield, and we handled the case together. I became very interested in the antitrust field, and then when the federal government passed seed money for state antitrust programs, I applied to start the Virginia attorney general's state antitrust program, and I was accepted and did antitrust.

From there, I went to the antitrust division in Washington. This was about the time that health care antitrust enforcement was just really getting off the ground, and I was assigned to the section of the division that handled health care matters. That's where I started doing health care antitrust almost exclusively. I was with the antitrust division for about four years, and then I went out in private practice. I've been in private practice ever since. My practice is limited to antitrust law, and about 97% of it, I would guess, involves the health care sector.

Bob: When you said ... Give us a sense of that time. What year was that where you were saying health antitrust was becoming more important, that you started?

Jeff: That would have been around 1979 when the antitrust division really became interested. You might remember that in 1975, the Supreme Court made it clear that there was no learned professions exemption. And the next year, it decided the Rex Hospital case, which indicated that even a local hospital was sufficiently engaged in interstate commerce. Around 1976, I believe,

American Health Lawyers Association

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

the Federal Trade Commission set up what became the health care shop. The antitrust division did the same thing with the Special Litigation Section.

Bob: Health care task force, was it?

Jeff: That was at the FTC. I was very fortunate, I think, in that I really got in on the ground floor of the application of the antitrust laws to health care many years ago, as you well know.

Bob: What would you say were some of the more significant matters that you've been involved in with respect to health care and antitrust?

Jeff: I think, probably, the most significant one was one about 10 years ago down in Arkansas where a specialty hospital sued Blue Cross and a general acute care hospital for excluding it. We got that thrown out on a 12(b)(6) motion, which the Eighth Circuit affirmed. Then I guess the most interesting one was a case down in Georgia where a company had invented a magnetic chair that supposedly cured female incontinence, and they went to the AMA and they wanted a code for it. The AMA denied it, so the company sued the American Urological Association and the AMA for antitrust. We got that one thrown out on a 12(b)(6) motion, too, and the Eleventh Circuit affirmed.

And then a number of hospital merger matters. I've not litigated a hospital merger case, but I've been involved in a number of investigations and, certainly, in this day and age, since that seems to be one of the focuses of enforcement at the agencies, just a number of situations where I've had to either just analyze a transaction and advise on it, or the transaction was investigated and, in some cases, we had to ultimately abandon a transaction.

Bob: Have you seen any change when you're dealing with agency staff over time in terms of their receptivity to your arguments or sophistication or how they interact with you?

Jeff: I think the thing that impresses me the most is the fact that so many people degrade or undervalue the components of the staffs at both the FTC and the antitrust division, and at both places. Most of my work has been at the FTC, but these are very, very talented, sophisticated people who I frankly enjoy dealing with. They're enforcement-minded, certainly, but I can't think of any situation where I thought that a client of mine or I were treated unfairly or in an inappropriate way. I'm very impressed with the work they do.

Bob: Tell us a bit more about some of the advisory opinions you've got for those who've practiced in the area for a long time. We were talking about the Mid-South clinical integration advisory opinion and then there were some others as well. It seemed like you or your protégés were involved in probably getting the most important of those. How did these come about, and was it a good idea trying to get that kind of ... the semi-formal advice back from the staff?

Jeff: The Mid-South one was the first advisory opinion on clinical integration, and I frankly cannot remember how that came about. But it was at a time that clinical integration had just really come into vogue. There was a great deal of uncertainty regarding what constituted sufficient clinical integration from an antitrust standpoint, and Mid-South was a relatively small IPA out in Colorado. I can't remember how I got hooked up with them, but we decided that going the staff opinion route was the wise thing to do, and we submitted a request. I think we met with the FTC either once or twice to discuss the facts of the matter, and the opinion came out.

And then the second one that I was primarily responsible for was one, I think, around 1997 involving the Greater Rochester Independent Practice Association, known as GRIPA. That was a much more sophisticated clinical integration program than Mid-South's, and also, the letter that we received was a much more sophisticated analysis, I thought, of clinical integration. And then, I wasn't in charge of the ... down at that came later. One of my partners was, but I did some work on that with her, trying to frame the request letter as best we could. That also includes, I think, a very good, very full discussion of clinical integration from the antitrust standpoint.

Bob: I'd like to thank you for your efforts on that. I know you were focusing on the work for your clients, but it actually did a lot of good for getting the word out to the rest of the bar and to the health care community about how the agencies, at least the FTC, went about looking at clinical integration efforts.

Let's pick a little bit, too, particularly during the 1990s and up until around 2011 or so, that was a major area of focus at the FTC, both from an opinion standpoint and also from an enforcement action standpoint. That sort of petered out over the last six years or so.

Bob: Right. I think, maybe, people ... everyone's sort of learned from the past, and it sounds like people are moving on to other issues that are not so much whether a clinical integration program is, per se, illegal, but more market power questions and other things ...

Jeff: I think that's right, and also, I think that the 2011 enforcement statements regarding ACOs were a big help, even with regard to non-MSSP provider networks. The contracts say only the commercial plans.

Bob: Right. Well, let's focus a little bit on your involvement in the American Health Lawyers or its predecessor organizations. Do you recall how you first got involved?

Jeff: Yeah. Shortly after I went to the antitrust division, for some reason I can't remember, I was asked to give a speech at an AHLA seminar on the antitrust division's work in health care. I think that was my first contact with the Association, and then when I left the antitrust division, it was pretty obvious to me that being a member of AHLA would be extremely beneficial for someone who was going to do health care antitrust work, so I joined up. I think that was around 1983 or 1984. That's how I first got involved with the Association.

I think it was NHLA back then.

Bob: I think that's right. The organizations merged in the mid-to-late 1990s, 1996 or 1997 or so.

Jeff: Right.

Bob: When were you ... You were on the Board of Directors, were you, during some period of time?

Jeff: Yeah. I was on the Board, I think, in the 1997 ... maybe ... somewhere between 1997 and 2001. I can't remember exactly. I was chair of the Antitrust Practice Group for a time, and I've done a pretty large number of speeches at different AHLA programs, which I've enjoyed very much.

Bob: You've been practicing now for about 40 years or so. Is that right?

Jeff: Yes.

Bob: Any thoughts-

Jeff: 44.

Bob: 44? Okay. Don't want to short-change you here. Any thoughts, first of all, on how the practice has changed, particularly with respect to health lawyers?

Jeff: I guess I would say two things. Number one, the number of attorneys that handle these types of matters has increased substantially. When I first got into this, there was almost no one who I think could say that they specialized, or a majority of their practice constituted, health care antitrust law. And I guess the second thing that's been interesting to me is just to see the evolution of the different types of antitrust issues that have arisen through the years. When I first went out in private practice, I would say the majority of cases involved staff privilege antitrust matters. Then there was sort of a shift to issues involving provider control contracting networks, such as IPAs.

Now, we're more into mergers, both hospital mergers, physician practice mergers, health insurer mergers. And also, I think, within the last 10 years or so, there's probably been more enforcement effort on exclusionary-type practices in health care: bundled discounts, exclusive dealing arrangements, and those sorts of things.

Bob: So it's still a changing field, I guess. One thing that's gone through all that, I think, has been mergers all along, and maybe ebbs and flows of how the agencies have fared in that, but it's still a very active area.

Jeff: Oh, yes. The merger enforcement effort in health care began around 1980 and, as you well know, the government tended to be pretty successful through around mid-1995. And then, I think, at the federal and state level, they lost eight straight litigated cases. And with the Evanston decision in 2007, everything changed completely in that regard. And that's the situation since then.

Bob: Right. I guess we'll see ... It seems like there's almost always a case or two each year the last few years, so we'll see if that record continues.

Jeff: Right. I think a lot of people in this area are anxiously awaiting the Stanford Health case out in North Dakota, which is a hospital acquisition, a physician practice case. There ought to be, from what I hear, a decision in that pretty soon.

Bob: Great. Okay. Just to wrap up, any thoughts and advice, given your long career, advice you would give to junior lawyers who are interested in doing health law or maybe particularly antitrust law in the health care sector?

Jeff: I guess the most general advice I would give them is to join AHLA if they're not members. My relationship with the AHLA has been a long one and, I think from my standpoint, it's been an extremely beneficial one as far as both education and also the ability to network and market services. I certainly would not have been anywhere near as successful as I've been without AHLA and not only being a member, but also a close relationship: trying to speak when I could, write when I could, those sorts of things. I think that's very, very important, especially for younger attorneys starting out without a client base but who, down the road in their firm, are going to be expected to have one.

- Bob: Thanks. I think that advice I've heard from others as well, and I think it's something that I would give, as well, to junior lawyers. Well, thanks for participating in this call today. I gather you are still actively involved at Baker Donelson?
- Jeff: I guess the best way to put it is I'm semi-actively involved. I'm partially retired. I teach an antitrust law course at a law school that takes much time, but I very much want to sort of keep my finger in the pie.
- Bob: I hope you continue to do that because we look forward to your advice and your perspective. On that note, thanks a lot again, and best wishes.
- Jeff: Well, thanks. Same to you, and thanks very much.