



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 50<sup>th</sup> 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 22, 2017

### Dinetia Newman interviewing Tom Crane:

Dinetia: My name is Dinetia Newman, I'm with Bradley Arant in Jackson, Mississippi, and I have the pleasure this morning of interviewing Tom Crane, who's a long-standing and prominent attorney in the healthcare area. He's currently with Mintz Levin in Boston, Massachusetts. Thank you for joining this morning, Tom. I'm looking forward to hearing about your story.

Tom: Dinetia, great to be with you. Thanks.

Dinetia: So let's just start off, as I mentioned, you've had a lengthy and really illustrious career as a health lawyer in government and in private practice. It might be good to start off, just tell us exactly how you decided on health law as your career area, and maybe some of your early experiences in private before we get to your governmental experiences.

Tom: Sure, Dinetia. So I had an interest very early on, and as a matter of fact I went to the University of Michigan School of Public Health well before law school, and worked in the healthcare field before going to law school in 1981. So when I went to law school, I really think the fix was in. I was going to, it was going to be health law. I didn't know it was going to be focused on fraud and abuse, but certainly some kind of health law.

Dinetia: Sure. I anticipated that, but then when you first started the practice, tell about those experiences. Were they with the government, or were you in private practice, and how did that work?

Tom: I'd spent some time on the Hill, and frankly, found it wasn't really to my liking, and through a colleague, knew of an opening at the office of the Inspector General, so I started there in 1985. So my first real full-time career as an attorney was in fact at the Inspector General's office.

Dinetia: And that was at a time that, certainly, health law was not a real practice area, and it was really the beginning of some of the federal statutes, and that was in 1987 [inaudible 00:03:04], but you were there in the OIG's office at a really critical time. Tell us about your experience there. How did that practice shape your career path? I know you were involved in important rule-making and litigation.

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Tom: Yeah, so a couple things came together. First of all, in, I think it was in 1987, the Congress mandated the creation of safe harbors, and very soon I got involved in that project. I didn't do the draft safe harbors that first came out, but once the draft was issued and we had comments, I was assigned the project of writing what became the first set of safe harbors that came out in 1991.

And then sort of along a parallel track, there were a lot of issues about financial relationships physicians had with referral sources, and it led to two things coming together right at the same time in 1989. We were looking for, in the enforcement part of the OIG, a case to test the theory whether a joint venture ownership interest could constitute a kickback. And we also felt we needed to get more guidance out, so in April 1989 we issued, with my drafting, the so-called Joint Venture Fraud Alert. It was later published in 1994 in the Federal Register, but it actually came out in April 1989.

And then soon thereafter, a case assigned to me, we brought formal charges against the Hanlester Network, various joint venture labs, general partners, et cetera. And that became, you know, obviously a very, very well-known case on the theory of when a profit distribution can constitute a kickback, and it was decided by the Ninth Circuit in 1995 in a fairly narrow opinion, but did uphold the illegality, at least some respects of the joint venture labs.

Interestingly, just before we filed the formal charges in Hanlester 1989, the other party that was an actor in that case was the national laboratory SmithKline Beecham, and we reached a settlement of one point five million dollars. And I know today one point five million dollars to a national lab would seem like a parking ticket, but you know at that time it was a record. It was an eye-popping number.

Dinetia: Sure.

Tom: And you know, people thought it really made a statement at the time. So those are three things that all came together for me, that were very, very challenging, very rewarding, gave me, as with the [inaudible 00:06:33] of the office, have a respect for the law, respect for the facts, but being both tough and fair. That certainly held me in good stead when I went into private practice in January of 1992.

Dinetia: Wow. When you were leaving the OIG, how did you make that transition, and did your perspective change from your perspective at the OIG once you got to private practice? How did that work?

Tom: Well you know, it always changes, but your client changed. And my client was the government of the United States, and I represented that client vigorously, and I had private practice clients that I was fully prepared to represent. But you can't kid yourself. The perspective is very, very different. The time demands of clients, and getting bills out. Anyone going back and forth from government, I think, knows this well, and some people do it better than others. But it's definitely a challenge.

Dinetia: Sure, sure. So were you involved with either the Academy or NHLA while you were in government, and if not, how did your involvement begin and progress?

Tom: You know, I was really involved in both the Academy and NHLA, but what I remember, one of my first assignments in, I believe it was 1995, I was asked by the Academy to form a conference

dedicated solely on compliance programs. We held it in New Orleans, but it was the first national conference on compliance programs. And I think it really was a marker in the sand as a new industry got going, promoted in large part by the Inspector General, who really believed in compliance.

But soon after that was a real takeoff, I thought, for what is now the NHLA, but we had the [inaudible 00:09:03], which I believe stands for the Substantive Interest Special Law Committees. And I was asked ...

Dinetia: Right.

Tom: To form the committee on fraud and abuse, stark, and anti-kick ... I think it was called Fraud and Abuse, Self-Referrals, False Claims Committee, was what they were called at the time. But it quickly took off like a rocket. I did it for the three years, '96 to '99, and by the time I left I know we had over three thousand members. It was by far the largest [inaudible 00:09:39], and I'd like to take some credit, but I think it really was a testament to the interest in the industry. [crosstalk 00:09:50]

But partly through that, there's a big event in 1998 that most attorneys still remember. July 15th, 1998, two lawyers in Kansas City were indicted as part of what became known as the LaHue-McClatchy case. It really struck the, shook up the industry, and shook up the health lawyer fraud and abuse bar. And so I convened a task force. We called it the Best Practices Task Force, and we put out a manual. It was really a wonderful working group of some of the best colleagues at the time.

Dinetia: And this is through AHLA.

Tom: This is through AHLA at the time. The merger had happened. And it was called Best Practices Handbook in Advising Clients on Fraud and Abuse Issues. And it really covered some of the most important issues, whether it's writing opinions, what are the limits of opinions, what's the duty to inquire of a client, how do you deal with the issue when a client is demonstrating clear criminal intent, et cetera, et cetera. It's really a great treatise, and I think the wisdom in there probably is as valid back then as it is today.

Dinetia: Sure. Who was in charge of that? Do you remember [crosstalk 00:11:26]?

Tom: Sure. Well, I mean it really was the [inaudible 00:11:29] Paul DeMuro, Dan Roche, Dennis Witherell, Tom Mayo, Mike LaFond, Jack Basie I asked to chair the committee.

Dinetia: Oh wow.

Tom: A few others. Charles Silverman from Quest. So it really was great, great group of people, and it was, I think, a real good project. I remember a local attorney up here, don't remember his name right now, but when it came out, he had just randomly picked up the phone and it was really delightful, he said, "You know, Tom, if you do nothing else in your career, I think this document has made your career and we're all going to remember you for it."

Dinetia: Wow. Well I think the AHLA ought to bring that back, and that would be a wonderful public interest project, or a fraud and abuse practice group project, to clean that up and look at it ... [crosstalk 00:12:37]

- Tom: I'd be happy to discuss with you about it. So I was really involved in many of the earlier things, but when I sit back, I think about how many things have changed, how enormously more complicated life is for a fraud and abuse attorney. There's so much more guidance now. There's now parallel Stark and anti-kickback, you have to look at them together, all the guidance that's out there. There are now several enforcement power centers, that often in one case, you have to deal with at the same time. Department of Justice and maybe Main Justice, US Attorneys' offices, AGs are now obviously very, very involved, the OIG, and then you cut it from a different perspective, criminal versus civil, parallel criminal civil.
- And then the last couple years, and maybe it isn't really all that new, but the whole issue of individual accountability versus corporate accountability. When do you need separate counsel?
- Dinetia: Mm-hmm (affirmative).
- Tom: To what extent does a prosecutor just want to make a name for himself, to have a individual named in the settlement? And they're good policy reasons. I understand that trend, but it also just enormously, enormously complicates the work of a fraud and abuse defense attorney.
- Dinetia: Sure. [inaudible 00:14:33] go back to your AHLA involvement, because I've attended almost every Medicare/Medicaid Institute since probably the early '90s, so you're a frequent speaker. How important has that been in your career, both at Medicare/Medicaid Physician Hospitals Annual Meeting, and so forth? But what has that meant to you?
- Tom: You know, Dinetia, it's meant everything. One of the things we all know about AHLA is it runs the premier conferences. Everyone who speaks is at the top of their game. There's a substantive written requirement, so the written materials are excellent. So when I go back every year, it's seeing a bunch of colleagues who are really the top people at their game. And the interaction with those people who are speaking, as well as just seeing clients who are there ...
- But for me, also, it requires me to be at the top of my game, because I know you're as good as your last speech, and there are ratings that are looked at, and I'd like to think I get good ratings, but every speech I'm doing again. And next week preparing my materials once again for March. But it really requires you to sharpen your pencil and really say, "What's new, what do people want to hear?" And also, I'm at a place in my career where I can depart from the materials a bit and really try to give a little bit more wisdom than just reading off slides, but really what's the background going on, and what's my take on some of the new trends. So I enjoy it, but it's always a challenge.
- Dinetia: [inaudible 00:16:52] one reason that I find the AHLA in-person programs so necessary, really, for my practice, and that is the wisdom of the speakers, plus the mix of private practice and governmental. But having as speakers those who have that historical perspective is really quite unique and important, and sets AHLA apart, I think, in large part.
- Tom: And Dinetia, one piece you, maybe you were going to mention it in the end, but it really was a great honor, something I deeply appreciate, that two years ago AHLA recognized me, elected me as a fellow. At the time, I was only the third private practice fraud and abuse attorney elected as a fellow. And it was just a very nice recognition by my colleagues, of what I think the leadership I've given to the organization in the field over the years.

- Dinetia: Well I'm glad you mentioned it. I may or may not have gotten to it, but I totally agree with you, it is an honor. Any recognition by peers is, I think, of the highest honor and I'm so pleased that you've been afforded that and accorded that.
- Tell me a little bit about, you've gone into this about how difficult or maybe complicated, is I think the word you used, practice is now, particularly for a fraud and abuse lawyer. What do you see for the future for your practice, and I'm going to ask you in a little bit about the future for AHLA, but now just the future of the practice as a fraud and abuse lawyer?
- Tom: You know, it seems to evolve gradually. And the kinds of clients, for example, taking a lot more medical device clients. I enjoy the industry and the segment. But the fervor for enforcement of fraud and abuse laws isn't going anywhere, and so I don't see my practice slowing down at all. The inventory of cases keeps coming in. There tend to be much, much more challenging cases, with a lot of different theories, and as you well know, so many of these cases are now brought by whistleblowers, where you have an oddball theory. There's one case I had to take a couple years ago all the way to the Seventh Circuit before I got the final victory for the client. I've had a Fifth Circuit criminal conviction reversal. And you really have to be pressed to litigate. The government knows weakness. And unless you convey that fire in your belly that you're going to take a principled stand and work hard on behalf of your client, they don't respect you.
- Dinetia: Sure. And sometimes it's hard for clients to really want to go that far. There's such a ...
- Tom: Absolutely is.
- Dinetia: Compulsion to settle.
- Tom: Compulsion to settle, but also all of our clients, Dinetia, I'm sure you don't have a one, I certainly don't have a one that wakes up each morning saying, "I want to make an enemy of the Department of Justice." That's just not the world our clients live in. They want peace, they don't think they've done anything wrong, but on the other hand they want to be treated fairly.
- Dinetia: Absolutely. Thinking more to the future now for AHLA, if there was one thing you could say, "I really wish AHLA would have this go for the future." I might not have even talked about this when we had our prep call, but what would you say to this current board, "Here's the direction that I really think you need to take, or here's one, maybe a new group that we, or new area that we need to focus." What would you say?
- Tom: Well, you know. I'm not fully prepared for the question, but I really do think bringing in more life sciences, of pharma people and device people. The manufacturing world is different than the provider world. They have a unique perspective, a unique interest. And the other area that, gosh, I'd love more of, because so much of my practice involves them, is the GPO world. And where they have their hand out when money, when supplies get purchased, they get a cut, and are they adding value to the industry? I think there's still a real debate about that. But in any case, the non-provider world of manufacturing, both pharma and device, and also how GPOs continue to shape the market.
- Dinetia: Sure. I know, because during my tenures on the boards, the life sciences area was certainly a focal point for development. It's been difficult for reasons that escape me, except that there are FDA programs, and those have certain focuses. But what I would think you're more interested in

is, what can be offered to manufacturers in terms of advice on fraud and abuse, and other federal statutes impacting their precious FDA. Am I correct in that?

- Tom: Yeah, that was my focus. I'll leave it to another day for you all to decide how much to expand the FDA. But yes, I was definitely thinking about that. But also, transactions as well as ... Very, very sophisticated purchasing transactions going on, where providers are buying in bulk and want value, want discounts, and some of that's fraud and abuse, but it gets beyond that. [inaudible 00:24:06]
- Dinetia: That sounds like a program proposal to me. I think that you need to speak on that topic. Any advice [inaudible 00:24:17] ... Advice for young health lawyers, and how AHLA might benefit their practices?
- Tom: I guess a few things. One is, find a passion. It's such an incredible broad health system. I'm in this niche of fraud and abuse, but there are transactions, there's so many areas ... But A, find a passion, something you're going to be good at. Be prepared to work hard. Always, always find excellence. Be scrupulous with facts. Read that court decision a third time. It's just always amazing me when I read these court decisions that I read few years ago, and something new pops out. It's like, "Well how did I really miss that?"
- Dinetia: Right.
- Tom: And there's just no replacement for slow, deliberative learning.
- Dinetia: That's really good advice. I've heard that before, recently, as I've interviewed. And which is why I think the fellows are so important to act as mentors, if you will, of some of the younger, newer members of AHLA, to share that information.
- Tom: Yeah. Yeah.
- Dinetia: We're about at the end of our time. Is there anything else that you would like to add. It's such a wonderful career that you've had, and you've actually made a lot of history, so I want to make sure you have ample time.
- Tom: Well, Dinetia, that's very gracious. I do feel I've been lucky in being at the right place at the right time, or maybe if I could be immodest, you know what they said about Wayne Gretzky, of being able to be where the puck's going to be, anticipating new trends. It's something I try to work hard on. But AHLA has been such a key part of my career, and my career development, and being able to work on some of these projects, whether it was Best Practices Handbook, or to roll out new ideas in March, I'm not going to tell you what it is, but in my speech, I'm going to roll out a new legislative idea.
- Dinetia: Oh good!
- Tom: And it's just a good, it's such a good synergy with my career, career development, and it's because of who AHLA is, their demands for excellence. There are a lot of conferences out there, and almost all of them are overwhelmingly cruddy. People come to AHLA with an expectation of excellence, and by and large, all the programs meet those needs. These recurring programs, Medicare, Medicaid, and Fraud and Abuse Conference, Academic Medical Centers, they're all repeats because they continue, year in and year out, to bring value to the members.