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Exhausting Administrative Remedies in North Carolina

Exhausting Administrative Remedies in North Carolina*

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M/F: MALE/FEMALE SPEAKER

M: Thank you, everyone, for coming back. We are going to be starting our next panel on exhausting remedies in North Carolina, a hugely important topic for administrative law. And we're going to have moderating the panel Mr. Jack Nichols here from Nichols, Choi & Lee. We're also going to have, standing here to my right, Special Superior Court Judge Croom—

M: Okay.

M: —Professor Hessick, at the end of the table, from UNC Chapel Hill School of Law, and Mr. Abe Jones from Abe Jones Law. And I'm going to let them kind of introduce themselves, and I'm going to give the show over to Mr. Nichols at this time. Thank you.

Nichols: Is there anybody in the room that can't read? [LAUGHTER] Okay, so we're not doing bios. Y'all can read the program. And everybody will introduce, but of course, Abe doesn't need to be introduced. He's been introduced three times today. I want to—before I told the panel I was going to do this. Y'all just heard what you might think is an academic presentation about ex parte from Judge Mann. But I'm going to tell you, you're going to face that because most administrative hearings are not from administrative

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* Panelists made edits to this transcript.

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law judge but from agencies. And I'm going to tell you a story about ex parte.

Eddie Ray Crump was a coach in Catawba County, and he had the unfortunate decision to have an affair with a high school cheerleader, and the school board found out about it, and for some understandable reason they fired him. At the hearing before the school board, his attorney, who's—Jim Fuller, who was a—for a period of time, the associate justice of the North Carolina Supreme Court, but he was—this is before he was on the court. He inquired into the school board, "Do any of you have any prior knowledge that would keep you from issuing a fair and impartial decision in this case?" And all the school board members solemnly shook their head or said, "No," that they didn't have any prior knowledge. And, of course, they proceeded to fire him, and that case went up to the Court of Appeals, and they affirmed his dismissal.

Mr. Fuller later filed a 1983 action alleging violation of Eddie Ray Crump's civil right because he had learned that two of the school board members had been overheard at a gas station on their way to the school board meeting saying, "We're going to get this Eddie Ray boy," and they did. And that case went to a Catawba County jury which awarded $75,000 for a violation to Mr. Crump's due process rights. The case went all the way to the North Carolina Supreme Court, and the opinion was written by Justice Burley Mitchell, and some of us in the room know Justice Mitchell. And before he was a prosecutor, and a cabinet secretary, and on the Supreme Court, he was in the Navy. And there's a lot of bark on Justice Mitchell, so the fact that he wrote the opinion said a lot because he was sort of a hard-nosed guy.

And he said, "The Catawba County School Board has learned the price of honesty, and it's $75,000." And they formulated a rule that North Carolina is in a minority of jurisdictions in the nation. If you're on an administrative body and the question gets raised about whether or not there's ex parte communication or bias, and you don't do anything about it, from one of your other folks, the entire body is disqualified. It's called the "one bad apple rule." That means that if you know about it and you're passively sitting there and somebody else, another school board member, basically engages in ex parte or biased communication, the entire panel is disqualified.

So what you just heard from Judge Mann is not an academic issue. You're going to see it because the issue in administrative law, particularly at the local government level or the state agency level, where the case isn't going to an ALJ—that case is going to ALJs for decades. I ain't worried about them. It's the other agency people, who are laypeople in decision—quasi-judicial—making roles. Those are the ones that these issues apply to.

And I promise you you're going to see them because people are people. Meanwhile back at the ranch, we're going to talk about exhausting administrative remedies. What I told the panel I would do is talk about a couple of North Carolina cases and sort of give you an overview. This is the applicable statute, and one of the other panelists will talk about that.

But you'll learn, if you haven't taken administrative law yet or when you have one of those cases that I predict you will, there are five things you have to show in order to qualify for judicial review. You have to be an aggrieved party, and you heard some discussion about that this morning. There has to be contested case, and there's a statutory definition of that. There has to be a final agency decision. That means the agency has actually reached a decision. All the administrative remedies have to be exhausted. And the fifth thing in North Carolina is there's no other procedure for judicial review—that's what that means—unless adequate procedure for judicial review is provided by another statute.

For example, somebody asked this morning about tax appeals. Well, there's a separate statute for tax appeal as opposed to using the Administrative Procedure Act. And there are a number of reported cases in North Carolina where this exhaustion requirement has been applied. It's subject-matter jurisdiction. It's not just something you have to do; it is a basis for subject-matter jurisdiction motion to dismiss, which means it can be made at any time, and that's happened.

And if you look at some of the national treatises on administrative law, they'll cite that, but North Carolina has actually followed this in a number of cases. The main one being the Shell Island case, for those of you that go down to Wrightsville and like to watch condos go into the ocean, but there was a case about that.

The burden of proof is on the person that says that the administrative remedies haven't been exhausted, and there's one exception. And I'm going to pick on Abe, because I know he's done some of these cases, when it's his turn. But the one exception to the exhaustion is if it's an ineffective remedy to exhaust that, then you can—you have to allege waiver and that that's ineffective, and it's a waiver. Probably the best North Carolina case was—it's called *Shape versus Department of Transportation*[1] and involved the construction of I-40. And for some reason or another, Chapel Hill didn't want I-40 to go from Raleigh to Chapel Hill. Go figure. [LAUGHTER]

And so somebody filed the lawsuit about it, and they alleged in the lawsuit that do—having a hearing before DOT would have been an ineffective remedy, and the Court of Appeals upheld that. I will tell you that having been on both sides of that argument, it's actually a pretty difficult

1. Orange County v. Dep't of Transportation, 46 N.C. App. 350, 265 S.E.2d 350 (1980).

argument to make. You have to plead it, you have to prove it. You've got two former Superior Court judges here that have heard those arguments, and so they can tell you about that, but that's the one exception to the exhaustion requirement, is you have to show that the administrative remedy is ineffective.

There's this weird North Carolina case that came out of the Board of Elections. Anna was talking about—my law partner Anna, was talking about that this morning. This was an election case back in the '70s that said that you had to file all the challenges before you could go through the administrative process, even if it involved several hundred voter challenges. You had to still go through that, so the fact that it was an onerous requirement still makes you go through the exhaustion requirement. So all of these are annotated under the statute, for those of you that actually like to pull down green books, like us older guys, rather than look them up online, which is what you and my associate in my law firm does, you know, actually looks it up on the computer screen. I'm old-school. I still look at the green books.

But that's sort of a summary of the law. And then what I'd like to do is ask each of the panelists to come forward. I was going to do a poll before I did that, but I sort of—when Dean Leonard asked his question this morning, I sort of chimed in because I was going to ask some leading questions about the fact that you're going to have administrative law cases. If you go into private practice, if you start your own law firm, within your first three years, there'll be an administrative law case that comes across your desk. The question is will you recognize it, because it's going to be there. It's—as Anna said, it's that prevalent out there, and you just have to learn to recognize it.

You know, when you take your regular exams—and you don't have to do essays like we did when we took the bar—but, you know, it's issue spotting. That's what I'm talking about. You have to learn enough of the law to know to be able to spot those issues. So Judge Croom, if you look at his résumé, you'll see that he has pretty much been on all sides of this. He's been a district court judge, administrative law judge, now he's a Superior Court judge. He's been in private practice, so. But I suspect, and in fact, I conferred with him before we started, that he's had experience with this exhaustion issue, so I asked him to address it from his experience.

Croo**M:** All right. Since we're a panel, we'll speak from here. Can y'all hear me okay? And, Judge Mann, if you can hear me, raise your hand. All right. [LAUGHTER] I told them I didn't need this mic because I'm from the country, and, you know, we talk loud. We holler. Okay? I'm not from Spivey's Corner, but you should be able to hear me. I was surprised when I was asked to be on this panel because it's been a while since I've done administrative law, but let me say this much in terms of administrative law.

And I told Ms. Griffin this a while back. I'm going to tell the same story I talked to you about, about how this affects so many things. You will see this. Let me give you an example.

You represent a bar owner, and for some reason they are charged with some criminal offense because they sell alcohol to someone under age. But then what's going to happen is the ABC Commission is then going to come after them related to that sale, and then you're going to deal with that. One of the issues I used to deal with a lot as an administrative law judge was the ABC Commission. Say, for example there's a crime committed at a club. Y'all know what clubs are. Y'all go hang out. Y'all go drink at these places. And say, for example, someone is shot or murdered in the parking lot. The police come to that location over and over and over again, and then what happens is the ABC Commission will seek to shut that place down.

And I remember I used to hear TROs all the time, Judge Mann, for clubs where they would be seeking to take the license. Once you take that license, that's it. They can't basically be a bar. And how do you make money in a bar? You sell alcohol. And so I just want to make sure we're clear that you know that this is going to touch so many things that you do.

Say, for example, you have—and I've had this happen to someone I know—you represent a daycare, and one of their workers end up hurting someone. And there may be some issues with child neglect. It may even be a criminal case. And I always say this with criminal lawyers, you know, how this can sort of affect other things. And then all of a sudden, Health and Human Services will come after your client, the daycare only, even though they were not the person who actually committed the offense, and seek to get their license. Again, that regulatory agency. So those are just examples. I just want to make sure I'm clear, and hope everybody is clear by this time, that it affects so much.

In terms of exhaustion of administrative remedies, the biggest example I used to see when I was an administrative law judge, and I spent two years doing it, was these state personnel cases in terms of making sure that person goes through all of those steps. And as I—when I became an ALJ, there was some changes in that law in terms of those—that exhaustions of administrative remedies. And it's so important for you to remember. And this is the guru on administrative law. Okay? I just want to make sure you know that. Okay? Whatever he says, just listen to him. But it is jurisdictional.

Y'all remember your 12(b)s from civil procedure? You remember—oh, somebody is shaking their head, so you know I had to pick on her. In other words, the 12(b)(1), 12(b)(2), 12(b)(3), 12(b)(4), 12(b)(5). Which one is 12(b)(4)? Do you remember? I won't test you on that. But if you don't exhaust these administrative remedies it leads to a 12(b)(1) subject-matter

jurisdiction, all those things, you can't be there. Okay? You could have the best case in the world, but if you have not exhausted those administrative remedies, you can't come before an ALJ. Okay?

So I'm going to stop there. I get a little longwinded. Karen, you supposed to tell me to move on. But I'm going to stop there because I'm going to let me senior judge here who spent 17 years on the superior court bench. He was also an administrative law judge. He has so many more stories to tell because he has so much more experience. Okay? So I'm going to pass it on to Judge Jones.

Jones: Okay. You can tell when you're being setup, right? But anyway, thank you. Thank you, Judge Croom. I wrote down some notes. I may not even use all of them, but I think the primary thing one has to do is when you're starting into cases—you've never had one before—is go read the regulations that apply to that agency. Almost every agency, or company, or whatever has some rules out there, unless you're dealing with a mom-and-pop store or something like that. And so go read the regs, become familiar. And that's whether you've done it—doing it at the state level or the federal level, do that. Then familiarize yourself with the schedule. The time thing is very important, and you can get tripped. You can trip up so quickly by missing a date.

And I'm not going to pick on the state that much, but they always are happy—and the AGs obviously raise that time thing on you, and file that motion to dismiss you, and so you need to be cognizant of that.

Another thing to do that's very practical, just talk to somebody who's done it. Talk to a Jack Nichols, you know, or somebody like that, you know, who's done it, and will help you or, you know, sort of guide you along the way, or give you a little primer on it. Then, I think, another thing to do—and these may just seem very simple, but I think it's important—whatever it is, the agency you're dealing with, go watch one. Watch one of those hearings internally, the internal things, because it—you'll learn a lot from that, just how it's done, where the building is, how to get in the parking lot, how to, you know, be seated in the right place, just those basics, and who the hearing officer is.

And then all of these agencies—you know, Industrial Commission—not all—but the Employment Security Commission, the federal level, then, of course, the Office of Administrative Hearings—these are public places, and you can go and observe, so do that.

Another thing I wanted to say—and I mentioned this this morning—it's very important if you're actually doing the hearing to make your record. And if you—and if it's something you think won't get in, try to get it in anyway, because you're making a record that it was refused, and put on the record

what it would have been, because it's important. This is your first and maybe only chance to make that record, and so that's so very important.

And the last thing I put on that side was you're going to get a final agency decision in some form, and the date you get that, that's your trigger date. And so you've got to remember that as far as appeal purposes and so forth, so be on the watch for it; make sure they have the proper address, that's all coordinated with what you have down. Those little things are very important.

Now, I have about six suggestions I going to make that are just sort of—I put it down here from the petitioner's perspective, because that's all you get to do when—once you start working in private practice, and you're no longer representing your agency; you're doing it from the petitioner's perspective.

And first thing I put down that the rules aren't written for you. They're written to you, meaning you must abide by them. And so get familiar with that so you can abide by the rules and don't get tripped up, because your client is depending on you to know what those rules are. And there's no embarrassment not knowing them because you can't know the rules for every agency. At least I can't. I had to go re-familiarize myself with them when something comes up.

Number two, talk to your client about where're the consequences of using the procedure on whatever it is they're upset about, because it starts internally in the agency. And the very people you are filing this for, against, or with are the people who are going to be your bosses that next day. So think about that. Not saying be intimidated, but just weigh that in your own mind from the human perspective, "Is this the hill you want to fight on? Is this the hill you may want to die on?" Don't—so don't do it lightly, but do it if you have to.

Number three, if—when you're getting into one of these, sort of study and find out about the history of the process. You know, how many people have done these before? If you can find out more about that, you know, how—what happened and—with—to them. Were they successful? Did they have to appeal? That type of thing because that's important to know.

If you can—don't break any rules doing this—try to find out a little something about the hearing officer that's going to be coming over there. You know, used to be in the old, old days before AP—before the Office of Administrative Hearings, the hearing officer came right out of the same agency you worked in, just put on a different hat, and rolled right on in hearing the case. Well, now we don't have that. We have Office of Administrative Hearings out there, which is a great, great thing. But find out a little bit about the internal hearing officer that's coming over, and who he or she is so you know—just know something about them. I would go to

the—if you can get the records of past hearings from the agency, and look over some of them. See what has occurred.

And then, lastly, most importantly, research the law and the rules, have some case law that you might be able to use if you can. I think if you follow these basic rules that you'll be fine. Try to be yourself, don't try to be anybody else. And hopefully, your client will listen to you and take your advice.

I think the primary problem with clients is they need to understand that this is your ball field, this is—you're the coach, and if they're going to be on the field, they need to listen to you. That's why they're paying you the money. And say, "Hey, you wouldn't go into a doctor's office and tell him how to treat you. Right? Or you wouldn't go to the mechanic shop and try to work on your own car. Well, you shouldn't come in here telling me how to do this. I don't go to your shop and tell you how to run your business, and I wouldn't try. You come in here? I want you to listen to me and do as I ask you to do, so you get your money's worth, and so we'll have the best result." You just almost have to put it that directly to the client. That's all I've got to say.

Nichols: Abe, before we turn it over to Professor Hessick, I want you to address a specific area. You guys will learn that employment is one area that has a lot of administrative law, both if you're a state employee, those hearings go to the Office of Administrative Hearings, but you also have a remedy to go to the Equal Employment Opportunity Commission. You have a choice of remedies then.

Sometimes you have a right to file a 1983 civil rights action. If you're a local government employee, then there's a different process there. They're not under it. Unless they're one of five agencies, they're not under the Office of Administrative Hearings. So sometimes you want to file a 1983 action rather than filing the administrative hearing because your damages are different. Abe and I have both done a lot of employment work, but I thought Abe would talk about that.

It's one of those situations where you're trying to decide between an administrative hearing, a Title VII case, or 1983. And I'll tell you, there—in my opinion, there's no more area of law more filled with snake pits than 1983 in the procedural defense _____. It's like every couple of years the U.S. Supreme Court comes up with another curveball that hits you while you're standing at the plate. Abe?

Jones: Yeah, Jack's so right about that. You really have to make that decision early on. Back when I first started, a long time ago, but I more favored the 1983 route because the federal government would sort of the place to go for employment right and civil rights. Now, it's almost the opposite. If you can stay in the state, do it. But if—you can rest assured if

you're up against a federal agency, they're going to drag you to federal court, and that's a whole different kettle of fish.

M: Or a state agency will take you to federal.

Jones: Or a state agency will take you there too. And, frankly—I don't know if I should say this, but I'm going to say it—I mean, the federal courts tend to oftentimes boot you out if they can, so you have to really dot all the I's and cross all the T's when you go to federal court. And if you get forced in the federal court, same difference. That's why they are bringing you there, because they know that the survival rate is very low. So I think if you have a solid case—I've settled federal cases before—then you're in pretty good shape.

And be—don't be afraid to ask these agencies like the EEOC, if you're in that pew, what they do. Don't try to reinvent the wheel. They'll help you. They're very helpful. I found them to be. And—or any other agency that deals with this a lot. Sometimes you can go talk to the ACLU lawyers, et cetera, so forth. But you're in the business of litigating in behalf of individuals, usually. If you're in defense work, probably in the business of protecting the agency and protecting the government. But if you're in the business and you're out here in the private practice, your clients primarily are going to be private citizens, for the most part, for the most part.

M: And not _____.

Jones: And not going to be able to—right, exactly. And you're up against people who—obviously, kind of laughingly tell my clients, I say, "You know, you're paying me, and you're also paying the folk up against you when you pay your taxes, but that's the way that the world works. But no matter, go ahead and let's see. We've got something that's straightforward. Let's do it. If there's a way to take care of it without going this route, let's do it." And that gets us into, you know, whether you want to do mediation and that type of thing. I think they're useful.

But one last thing on exhausting. It's so important to know the internal agency procedure. Don't stumble, because if you stumble on that, then when you get into Superior Court and you get outside, you're going to get dismissed because you didn't cover that. I mean, just—it's just like night follows day.

Nichols: I'll give you a good example. If you're a state employee, you've got to go through the internal grievance process before you can go to OAH, and if you try and jump over all of that and file an OAH, your case will be dismissed. And then what's usually happened is, during the period of time you were in OAH, you've missed your deadlines—

Jones: Deadlines.

Nichols: —to file your administrative process, and your sort of in deep kimchi then. [LAUGHTER] If you look at Professor Hessick's resume in

the bio here, for those of you who can read [LAUGHTER], boy, he has covered just about every border front there is in administrative law. And I asked him if he would talk about both from his perspective when he was litigating and also when he was clerking for a federal judge—although a long time ago, in a galaxy far away, Abe clerked for a federal judge.

But what you will learn when you got a case in federal court, call the clerks. I'm just not—I'm not kidding you. And it's not about, you know, how they're—the judge is going to rule or anything, but communication with the clerks will facilitate how your case is going to get addressed. It doesn't guarantee it, but I promise you the clerks have known a lot more about the judge's preferences, you know, do they like a double-sided memorandum or, you know, 12-point type, or whatever it is. Learn to communicate with your clerks. Professor Hessick?

Hessick: Yeah, thank you. That's so true. The judge I clerked for actually preferred 16-point, but—

Nichols: The state rests.

Hessick: Yeah, exactly. [LAUGHTER] And I will say also the very, very first case that I worked on as a law clerk was an exhaustion case. And it's federal, not state, but under FERC regulations, Federal Energy Regulatory Commission—under FERC regulations you have to not only go all the way up through the system, sort of challenging FERC determinations, you have to petition for rehearing before the final board. And if you don't petition for rehearing, that constitutes failure to exhaust.

M: Gosh, that's a procedural trap.

Hessick: Yeah, so that was the very first case I worked on. And I remember I was like, "Well, this is easy." Right? Dismissed. You know? Because they didn't petition for rehearing. But what I want to talk about with respect to North Carolina is two things, two things that have already come up, and I think I'm probably going to be knocking on the Court of Appeals again like I did last night, and I feel a little bad about that, but here we go.

So the first thing is I want to talk about that exception to exhaustion that was brought up earlier, the inadequate remedy or futility. My question is, why do we have it? Right? Why does North Carolina have it? Because if you look at the statute, the statute says any person who is aggrieved and who has exhausted administrative remedies is entitled to judicial review. And it doesn't admit of an exception. It doesn't say, "Except for those where the remedy is futile, or it's inadequate," or something like that. It just requires exhaustion. So I looked back and tried to figure out where it came from, and here's what happened.

If you look back, exhaustion was originally a judge-created rule. Right? It was—and it was a rule of judicial administration. It kind of related to a

rule of equity, but a little different because it also applied in damages matters. Right? But it was judge-created. Right? Judge-created. So the way it looked was you would have statutes that didn't have exhaustion requirements. It would say, "Any person who's aggrieved can seek judicial review." And what the courts did is said, "Oh, we're going to impose an exhaustion requirement, because exhaustion makes sense, because they agency knows what it's doing and the agent—you know, the agency is the one that's charged with doing that. So you've got to exhaust."

But then the court started creating these exceptions because they created the rule, and the exceptions were, like, "Well, if exhaustion would be inadequate or if exhaustion would be futile, there's no reason to go through it. That's inequitable. That doesn't make sense," et cetera, et cetera, et cetera. So the statutes didn't require exhaustion. The judges did decide to create exhaustion requirement, but they created their own exceptions when the exhaustion requirement didn't apply.

Those cases are the basis for the North Carolina exceptions. If you sort of track it back, you know, it goes back to a case in 1982, in the Court of Appeals in North Carolina, and then from there it sort of sprays out into these federal cases, Ninth Circuit case, Third Circuit case, et cetera, et cetera, but they're all citing this judicial discretion stuff. But here—you know, it doesn't—it seems to me that that's not right. Right? Because the statute isn't that judicial discretion. Right? We have the opposite situation here. We have a statute that requires exhaustion. Right?

We don't have a common-law rule of judicial convenience. Right? We have a statute that displaces the exhaustion require—the judicial rule. And the statute says, "You have to exhaust." Right? It doesn't have any exceptions. Now, I guess the only way you could get around it is you could say, "Hey, look. If it's inadequate or futile or something like that, we could say maybe that constitutes exhaustion." Right? But that's—but that doesn't seem right. Right? That seems much more like situations where exhaustion wouldn't apply. No one really—it doesn't logically sound like, if there's an exhaustion recruitment that it's silly to exhaust, and if it's silly to exhaust, it constitutes exhaustion. Right? It's—that would be more an exception than actual satisfaction of exhaustion.

Now, I bring—and, you know, why bring this up? I mean, the law is the law. The thing is—you know, the Court of Appeals has recognized these exceptions. From what I can tell, in North Carolina the Supreme Court hasn't, and just a few weeks ago it issued a decision that talked about these exceptions, and it said—it didn't own the exception. It said, "Our courts, right—our courts have recognized these exceptions," and then they cited those, and then they were like crickets, and just kind of, like, went on from there. And they definitely didn't own it. Right? They—the way it was

written teed it up very much that the Supreme Court looked like it might be skeptical of those exceptions.

So the second thing I want to talk about is the fact that we call it "subject-matter jurisdiction." And we do. It's a 12(b)(1). Right? Just like the judge said. It's a 12(b)(1) if you fail to exhaust. And that's the law, and that's what we should be doing. But, again, I think this is a little weird because the statute is definitely not written in terms of subject-matter jurisdiction. Right? Because jurisdiction is judicial power. Right? It's the assignment of power. And this isn't talking about power. This is written in terms of who can file suit. And those people who can file suit—statutes that say who can file suit are much more in the spirit of who has a cause of action. Right? Who has a cause of action? And this would be like, "Oh, if you're aggrieved, you have a cause of action," and, like, "If you haven't exhausted, maybe that's an affirmative defense," something like that. It reads more like a cause of action as opposed to a jurisdictional provision.

And actually, there are a bunch of federal provisions that—federal provisions come in two forms for exhaustion. Some of them are like this, and they get treated as more like affirmative defenses, and they're waivable. But there are other provisions that are written a different way. So for like the EEOC, for example, it's not written in terms of who can petition. It's instead written in terms of no argument shall be made that wasn't made before the commission. Right? It's much more deemed in terms of what the court's allowed to hear as opposed to who can make the argument. There's actually a case before the U.S. Supreme Court this term on precisely this issue.

So does it matter? Does it matter if we treat it as subject-matter jurisdiction versus, you know, something more on the merits of defense, or a failure to state a claim, or something like that? I mean, not that much for the most part because, you know, you could say, "Oh, you know, subject-matter jurisdiction is raiseable at any time, and, you know, not waivable," but, I mean, you could kind of create those same rules for this special kind of affirmative defensey thing if you wanted to. But the one place where it's going to matter, where it's really going to matter, and if anyone makes—and no one's made the argument yet, but it's got to be right—is that if you go to federal court and you have this provision come up in front of you, it is highly unclear that the federal courts are going to be bound by it if it's jurisdictional, because state law rules do not dictate the jurisdiction of the federal courts.

This comes up every once in a while in the context of standings. There'll be a state standing rule, and it'll be raised in a diversity action in federal courts, and the federal courts are like, "Huh. That's weird because we have our own case in controversy, injury, and fact stuff, and the state has a different rule. Are we bound by that?" And they usually just sort of, like,

wave their hands and get rid of the case some other way. But there is a federal case that's sort—that says, you know, "Hey, this is subject-matter jurisdiction. We're going to dismiss." Not obviously correct, because state law rules just do not dictate the power of the federal courts.

M: Particularly in employment.

Hessick: Yeah.

M: Particularly employment.

Hessick: Yeah.

Nichols: Because there is a case in the Eastern District that said that if you didn't exhaust your administrative remedies, then as a state employee pursuant then you can't come into the Eastern District to file a Title VII. Now, I think that's an erroneous decision, but it's still an important case in the Eastern District. What Professor Hessick was talking about with respect to exhaustion, we could have—a similar panel discussion about person aggrieved because it's—in my experience the appellate courts have been both broad and narrow in approaching person aggrieved.

I had a case involving a surveyor who filed a complaint that somebody had falsely placed a monument to setup a boundary line, and he filed the complaint with the engineering board, and it was both his property and he was the surveyor. And the Court of Appeals said that he was not a person aggrieved and dismissed the case. I mean, I got a little hot. I was a Young Turk then. I'm an old Turk now. And I said, "Well, I guess they could have taken it out of the ground and hit him, and then he would have been aggrieved," and I got sort of an angry look from the bench, but you know. I was pretty sure I'd already lost it by then. [LAUGHTER]

But my point being the same kind of discussion they were having about parsing out words, and how the judges will apply them, and in my experience it's more at the appellate level than at the bench level, you can go through with person aggrieved.

So, one of the unfortunate aspects of administrative law is there are a lot of procedural traps in there, and you just—I told you you're going to see them, and you will. But just to give you a heads up, there's a stupid statute right now that say that if you file a petition for judicial review, you have to file it in the petition—I mean, in the county of residence of the petitioner. It used to be Wake County or that one, and Judge Morrison sent me a case a couple of years ago where a Superior Court judge dismissed the petition and said that that requirement was jurisdictional, and they filed in the wrong county, dismissed the case.

So I hate that part because, you know, the federal rules and everything else is supposed to make things less about procedure and more about substance, but administrative law is an area where you can step in a snake pit real fast. And you guys want to add anything to that?

Jones: Yeah, I want to add one thing onto this on this exhaustion thing in terms of timing, because I ran into a case. It was in the federal jurisdiction, and an agency had so much time to give me the final agency decision. Right? Right there in the statue. However, the time started to run, and I found out the hard way that some of the judges would interpret that meaning if I didn't—even if they didn't do what they were supposed to do, I should have come any way to—on appeal, and say, "I didn't get my FA—my federal—final agency decision." If I wait around, it's my case, and they rule the other way, I'm the one—my client is going to suffer.

Nichols: You waived it.

Jones: Right, I waive it. So that's tricky, but they can sit on their behinds and do nothing, and then dismiss you because they didn't do anything. And some judges will let them get away with it, so just push the envelope. I think it's a safe rule to say if you go to the next high agency, it's better to go and get kicked out and told, "This is where you need to do next," than to wait around and let the time run, because if you let the time run, it's on you. And so that's one thing.

On the person aggrieved business, I think that's another thing. I—one little ace I always try to have in my pocket is most courts will give you some relief if you say, "If you take the position being argued by my opponent, I'm left with no remedy." They don't want to let it be in a position where there's no remedy. "If I didn't go—if I can't come here, if he's not aggrieved, then where does he go?" So—and they will listen to you if you get your facts straight and argue that many times. If—many times they will listen to you. I mean, more often than not is what I'm saying. So just keep that in mind, that they—the courts don't like to leave you with no remedy. You know, or sometimes they say, "Well, this is not the right direction. You should go on to this direction." But don't get left out there.

F: I have a question. For those of you that have been ALJs, did you ever have to issue a decision, an unfavorable decision, and you felt like it wasn't maybe the right thing to do, but you had to do it because of the regulation?

Croo**M:** Our job is to follow the law. And I've been doing this in some role since 1999. And a lot of times, it's not just as an administrative law judge, it's as a judge, period, that you have to follow the law. And I just remind people of that. And it's tough. You know, but it's just that simple though. In other words, you can't bring emotion into it. You can't bring all these other things into it. It's just simply the sky has to be blue, so therefore, you know. It's tough, though. It really is.

F: I ask that question because from doing Social Security disability—

Croo**M:** Oh.

F: —the regulations are so specific and so hard to fit somebody into that box that they've created. And I didn't know if it was like that with other agencies' regulations and if it was ever difficult for you guys as judges?

Nichols: Could I interject? And, of course, I can't talk about Social Security disability because I haven't done those, but since OAH has really ramped up its mediation, my experience is that there'll be a push in the mediation area, even if they know that there are procedural vulnerabilities. As Judge Mann said earlier today, if you've ever been in a mediation with Judge Morrison—

M: Yeah.

Nichols: —you know what it's like to be between a hammer and an anvil. [LAUGHTER] True or false, Abe?

Jones: That'd be true. [LAUGHTER]

M: [INDISCERNIBLE]

Jones: But one thing. I mentioned this, this morning. And not to overemphasize it, but all of you are either lawyers or going to be lawyers. And the law is not frozen. It can be changed, and can be changed with facts. And have a little politician in you, and go over there, and work on it incrementally. I mean, because politicians get moved by examples. You get a real bad result because a judge was trapped by the law, then publicize it. That's why we have the great—the press. And it may eventually change because the politicians—if it gets publicized and the regular people start to say, "Is that what happened? My goodness. That doesn't make sense."

M: Mm-hmm.

Jones: A lot of times it doesn't make sense, so don't be afraid to use that. Just don't talk badly about the judge. Stay away from that. Deal with the impact of the law, you know.

M: [INDISCERNIBLE]

Jones: And then they collectively can change it. They need to hear from you, and they will react to it, and eventually you can get it changed.

Croo**M:** That's a great point.

Hessick: It's such a good point. I mean, on a side note, we—I was in a case we lost on summary judgment because the—well, I guess we got—maybe lost on motion to dismiss, and they were like, "There's no cause of action here. It's just not going to happen." So we had no recourse, and so I was at a sort of a lobbying firm in D.C., so what we decided to do was lobby Congress. And we got Congress eventually to pass a law that created a new cause of action, that made it so we could sue retroactively, and the law said res judicata doesn't apply. And so, I mean, that's like the extreme example.

Croo**M:** Wow. [LAUGHTER] What firm is this? [LAUGHTER] Geez.

Nichols: I did that for NCAE, too. It's a good feeling.

CrooM: Oh, man. That's awesome.

M: Yeah.

Nichols: It makes you believe in the resurrection.

M: Yeah.

CrooM: Lazarus, okay. [LAUGHTER]

Nichols: Where are we on time?

CrooM: Oh, I got to go pay my parking meter.

F: [INDISCERNIBLE]. It's two—

M: 2:20.

F: Judge Croom, I can go put money in your meter.

CrooM: You might have to, save me that $20.

Nichols: My goodness. I think we've got another hour here. Unless we want to start telling war stories. Uh-oh, Judge Mann has a war story.

F: I have a quick question. Is it okay if I stand?

Nichols: Sure.

F: Okay. So this is for Judge Morrison.

CrooM: Judge Morrison?

F: Okay. So, Judge Morrison, earlier you mentioned six suggestions for the petitioner's perspective.

M: He did.

F: And I was able to write down most of them, but I kind of missed a few.

M: Oh.

F: So I was wondering if you could repeat them so I could have record of it.

Jones: And I don't want to insult Fred, so I'm not Judge Morrison.

F: Oh, sorry about that.

Jones: —so I just want to make sure. The six rules, oh, these were just my little rules I wrote up thinking about when I was going to talk about this. I mentioned that the rules aren't written for you, they're written to you, meaning you have to find what they are so you can follow them. And a judge I used to work for used to say, "Abe, don't find out where the line is so you can skate along the line. Find out where the line is so you can get away from the line, as far as you can be on the right side of not breaking the rule," so that's why you have to find out what the rules are.

I—my second point was, weigh the consequences of what you're about to embark on because, you know, clients come to your office, they don't

understand the law many times. They just want a result. They just want, "I was done wrong. I want it righted." And you can point out to them, "Okay, you may want this righted, but if you were in"—I was thinking more about internal grievance procedures within an agency. "Okay, you may not like that this happened. You got a written warning, which is un-appealable, blah, blah, blah. May be better to suck up on this one, build a little record, keep some notes at home, keep a journal, and see what happens next, than trying to fight this and casting down the gauntlet right now." That's what I was talking about on that one. So weigh the consequences.

When I said study the history of what's gone on before, you know, in this particular agency, whether your DOT or wherever, see where these things—what's happened to people who have done it before. Has it turned out okay, or did they end up transferring, you know? So, you know, you just have to think that through, the real-life consequences.

I put down learn something about the hearing officers, particularly you can find out who the one that's coming over to hear your case internally, because some of them—they're like everyone else. I mean, some are really good, and some aren't so good, and so forth, but learn that if you can.

Then I said if you go over to your administrative agency where the record is being created, kind of check and see what kinds of things were included, and that type of thing gives you some ideas about what you may want to include. And then my last point was—you could easily make this the first point—make sure you research the law and the rules that apply to this particular agency that you're dealing with right here. Those are just important practical tips that I've just learned over the years to do. I hope I didn't do that too fast.

Croo**M:** Let me ask something. Judge Mann, correct me if I'm wrong. At the Office for Administrative Hearings you can now go online and look at the opinions—

M: Yes.

Croo**M:** —and, I believe, also you can look at the—is the record up there as—in terms of—what else is up there? Because I know I do a lot as a judge. For example, I'm working on a speedy trial order right now. And what I'm doing is just say, "Well, let me go find a good template for one." And so I'm going to find some cases on appeal, where there's a record on appeal, and find that order. You see how you can sort of do this in reverse? So I believe there are some things you can find online that will help you, and that way you will also avoid those pitfalls, those snake pits, because there's someone else that has litigated your case before, and they've been successful.

Hessick: That's right. I mean, I'll add. It's—I mean, this is all from the petitioner side pretty much, but, like, on the respondent side, you also definitely want to sort of figure out exactly what's going on, because, like,

exhaustion is a good weapon sometimes—right—to make your side win. You know? Just or not, it's the rule. Right? And so you, you know, it's—I think a lot of time people just sort of forget to look to see whether everything has been exhausted, what precise procedures have to be done, and they lose some opportunities that way.

Mann: Judge Croom, you always ask good questions, and we're in progress on this. There's a number of our decisions on our website that you can get to, but we're trying to make access into our e-filing system public, where you can actually go into each file and see the entire pleadings and whatever is—

M: Yeah.

Mann: —in that file electronically, you'll be able to see. We're moving to that kind of transparency.

M: Good.

Mann: We're not there fully yet, but we're going to get there. Because we feel like it's like a court file. Anybody should be able to see whatever is in anybody's court file. The one comment that I would like to make is that—is kind of in the same vein as Professor Hessick's petition for rehearing. We were beginning to see—if you look in Article 4 150B-43, some of these motions were being made under the—before you could get judicial review, and it said, "Absent a specific statutory requirement, nothing in this Chapter shall require a party or a person aggrieved to petition an—agency for rule-making or to seek or obtain a declaratory ruling before obtaining judicial review," because that was being petitioned by the agency as something that had to be exhausted first.

And just after years of experience, I can't tell you how important it is to honor the exhaustion requirement. It is going to push you out of an independent constitutional, judicial-branch court, and put you into an executive-branch court where sometimes your panoply of protections are not there.

But if you don't do it, you are just out of luck. And usually you've got a statute of limitations problem later, or you don't want to be told in the Court of Appeals or by a Superior Court judge or Supreme Court that you failed to exhaust, because that can be the absolute end of your case, or can delay it by another 10 years. So I—just remember, in an administrative hearing you don't have a constitutionally separate branch of government, a separate judge under the constitution. You don't have a right to a jury. You have no right to a jury trial. You're going to be limited in what you can offer your client.

Nichols: Can I just add to that? The area, I think, that's probably the most prevalent is employment areas. If you file an employment claim in OAH, and you have to exhaust your administrative remedies as a state employee, you're going to be limited to back pay less whatever you've

earned while you've been—during the interim period and attorney's fees. No compensatory damages. Unless there's a statute, you can't get punitives against a state agency, and you can't get interest.

On the other hand, if you file a Title VII action or you file a 1983 action, you can get additional damages. So part of that ends up being that choice that you have to make on whether or not you're exhausting. And if you're at the local level—and whether or not—like a municipality, they're going to be—I mean, that's sort of a wide, open area because they're not subject to the jurisdiction of OAH, and so you have to usually go through—there's usually some citizen group that the city council has set up, and that's your civil service commission or something like that.

So, in my experience, employment is one of these areas where you're going to see that. And I've warned my law partners about it. In light of the Me Too movement, you're going to see a marked increase in Title VII sexual harassment claims, hostile environment claims. I just think you're going to see more of those whether you're plaintiff or defendant. There just will be more of them out there. And all of that, all of that fits in this same sort of murky area that we're talking about.

F: Judge Croom, do you need me to put—feed your meter?

Croo**M:** No, we good. Long as I'm out by about 3:00. I'm out by 3:00, I'm good.

F: Okay. I just wanted to apologize earlier for messing up your name, Mr. Jones. Sorry _____.

Jones: Oh, no, no.

F: My—

Nichols: He's been called a lot worse—[OVERLAPPING]

M: Yes. [LAUGHTER]

Croo**M:** He has thick skin. [LAUGHTER]

F: Okay. So—

Nichols: He and I were county commissioners together. We got called things that were biologically impossible. [LAUGHTER]

F: So—

M: I forgot about that.

M: Yeah.

F: But my question is that with most of these cases that we've been talking about with judicial review, I've noticed that most of them, is someone filing a petition against an agency or a municipality of some sort, but is it ever the case where it's the vice versa—

M: Yes.

F: —where it's an—like, the—

Nichols: Yes, those are fun cases.

F: —organization filing against someone else?

Nichols: Those are fun cases. Or the agency appeals.

M: Yes.

F: Do y'all want to give, like, a—do y'all want to give, like, an example of it, or?

M: Let me think.

F: Like, those cases where someone—well, or an organization—

Nichols: Well.

F: —or a municipality would file against, like, an individual.

Nichols: Well, I'm probably going to be too blunt here, and Gene will probably throw something at me. When the Office of Administrative of Hearings was first set up, there were a lot of people in the AG's office that fought against its existence and routinely appealed every decision that came out of it. So it was a little bit antagonistic. And so there was a period of time where the agencies were upset that, for the first time, adverse decisions were being made against them. Mostly in employ—personnel cases but certainly in civil penalties and other things like that. And so the attorneys and the attorney general's office—and not on their own, under instructions of their client—were appealing a lot of those decisions for judicial review. And those were interesting times.

M: Mm-hmm.

Nichols: And there were some Superior Court judges back then who were pretty courageous in standing up to those agencies and saying, "This was properly decided, and I'm not changing it."

Jones: Yeah. I remember those days.

Nichols: And see, Abe and I are pretty old rats in the barn. [LAUGHTER]

M: Yeah.

Hessick: In the fed—I don't know if they have this at the state system, but in the federal system at least, for like the NLRB, it will enter orders—the NLRB will enter orders, but it can't enforce those orders. So whenever the NLRB prevails, before the NLRB, the NLRB must petition the D.C. Circuit, or, you know, the regional circuit. I think it can go to either for enforcement of its orders. So it ends up all the time having to, like, be in the position of an appellant like that, and it can run into all the same pitfalls as any other sort of standard issue petitioner because of it. And it's interesting because they win, but then they mess something up, and then—they had everything going for them, and then they'll lose.

Jones: One thing you have to keep in mind is sort of the practical side of things, and agencies oftentimes, I've found—not often, but many times—will appeal something because it's a policy, that they aren't that concerned

about the facts sometimes. It's just that someone higher up—and the men and women in the AG's office, they really don't influence that decision. They're just sort of following orders many times, and they do the best they can with what's delved out. And your job is to show the judge that the facts don't line up here with what's right and what's best despite this overarching policy they may have.

I think that it's easy to—don't make it personal. Don't fall in that trap. Just make it about the facts, and this is why relief is needed, and this is why this has gotten off track, and is not getting the result that they—that they couldn't have meant this to happen this way. It's a powerful thing. The facts are so important almost at every level of litigation. And so just keep that in mind, and make sure you line up your documents and your witnesses so that that can be brought out, and focus on the facts, and don't try to fight the whole system. Just deal with your case.

Nichols: Remember what John Adams said when he was defending the redcoats in the Boston shooting. He said, "Facts are stubborn things." So he's right. Focus on the facts.

F: And I guess that's the quote to take away from this symposium today. [LAUGHTER]

Nichols: No. [LAUGHTER] You're—the quote to take away from the symposium is, "Read the statute, read the cases, because—look out for snake pits."

CrooM: I have a question. How many of you guys actually have an interest in doing administrative law?

The reason why I ask that question is it's a great area to practice in. I came about administrative law as a fluke, Judge Mann, but I enjoyed my two years doing it. Because sometimes when we think about justice, we always think about the criminal context, Ms. Griffin, you know. You know, getting that person freed who's been sitting in prison for a long period of time. But think about that person that you represent, and you end up getting their job back. You know, you're making sure they stay employed. Think about that for a second, being an advocate. Think about all the ways that you can help people using—because a lot of stuff is affected, a lot—I mean, it's affected by agencies.

Again, I was thinking about the ABC Commission. If you own—I can remember a case I heard when I was an administrative law judge involving a little place in Greenville that sold to someone under age and the remedy they were seeking against this particular mom-and-pop store. You know, so think about how you can truly help people. There are many ways. The law is a way to really help people, but there are many ways to do that. And, see—and I really truly believe that administrative law is one of those areas that folks don't think about, but there's so much that can be done in this area.

I mean, I look at—Jack, you've been doing personnel cases—I don't want to talk about how long. Maybe back when I was still in high school, but the whole point of it is—

Nichols: Ugh. [LAUGHTER]

Croo**M:** Yeah, I know. But the whole point, think about the number of folks that he helped over the years to keep their job, that had the opportunity to go retire from state government. You know? So I want you to think about that, because, again, we always think about the—you know, it's very important of the criminal context, but there are some things you can do civilly, working with legal aid. There's some stuff you can be doing with administrative law to truly help people. And I don't mean to influence you all, but I went into the law not to make money, but to help people. And we remembered our—why we do this.

M: Mm-hmm.

Croo**M:** You know, there are so many vehicles for us to do that, so that's my editorial comment. I'm going to leave on that. And—well, I'm not going to leave yet, because I still have about 10 minutes left on my parking meter. [LAUGHTER]

Nichols: I just want to echo what Judge Croom just said, because I—this August I will have been practicing 42 years. Administrative law is very satisfying in terms of helping people out, but also, it's intellectually very challenging.

M: Yes.

Nichols: You're doing policy work. As Abe says, sometimes you're doing a little bit of politicking. Sometimes you're doing constitutional work. Because underlying all of administrative law is procedural due process, notice of opportunity to be heard. And you can't argue constitutional issues at the administrative hearing, but you can sure lay the foundation to when you get in front of Superior Court that you're going to be talking about it then. So it's intellectually pretty challenging, too. And let's face it. It's a lot of fun to be arguing a constitutional issue at the Court of Appeals or the Supreme Court. The first time I did it I was pretty nervous, but that was 100 cases ago.

M: So we've been talking a lot about these remedies that have to be exhausted before you can seek judicial review, and I was wondering if maybe we could talk about some examples of what these remedies look like, that, you know, you'd have to tell your client, "Okay, well, we got to do this before we can actually take this in front of the NC OAH."

Nichols: Well, the easiest one is the employment. You've got to tell somebody—I mean, think about it. Somebody comes to your office and then he says, "Well, I'm being sexually harassed," or, "My boss has denied me this promotion," or, "I've been written up." Boy, you get that a lot. And you

tell them, "Well, you have to file a grievance." And they said, "Well, what's the step one?" "You've got to go back in front of your supervisor." Well, that' goes down hard. You tell your client that they got to go back before the person that just wrote them up, but that's the process.

M: Yes.

Nichols: You've got to do that. And then after that, you've got to go to your boss's boss, and usually somebody else, and now the legislature required a couple of years ago that you have to go to the Office of State Human Resources. Pretty much in my experience—and I worked at the state government for about seven years and then in private practice since, and I've never really seen the Office of State Human Resources be very pro-employee. They'd probably [LAUGHTER] quibble with you about that. But that's pretty much been my experience over the last 40-something years.

And so you have to tell your client, "You're going to have to go through this." And it's usually a 90-day process before you even get in front of an administrative law judge for a petition. And the first thing that happens, as Abe says, is there's a motion to dismiss.

M: Right.

Nichols: So as soon as you've filed your petition and say, "Man, I'm finally at first base," you get a motion to dismiss and you've got to defend it. So it's not for the faint of heart.

M: No.

Jones: One thing too that happens—and it's why I encourage you young lawyers to go over to the legislature, but most of these agencies don't allow lawyers, at least openly, to come to their procedures. Right? Now, they have lawyers, not at the procedure, but I'm sure they're consulting the HR—their headquarters. And HR is there, supposedly, for both the employees and the employer, but really, they tend to sway toward the employer. Okay? I'm just telling the facts the way they are. My experience tells me that.

Okay. And what I tell my people is I say—and hopefully, they come to you early. And that's the other thing I encourage people—come early. Don't come to me after you've been through two rounds of this stuff, and now you're showing up trying to get the lawyer. The moment you start feeling that pressure and those things are happening at work, and the harassment or whatever it is going on, you need to start thinking about the lawyer, and even though the system says you can't have the lawyer at the hearing, you need to go find a lawyer early on and sort of ghost—let him ghost-watch it with you, and walk you through. So you can keep your journal at home, so you can—you don't have write in it every day, but keep something, because you're going to tend to forget things.

Nichols: At home, not work.

Jones: At home, not at work. [INDISCERNIBLE]. Thanks, Jack. Yeah, and not on your computer. For God's sake, forget you have a computer. You know, get—keep it at home. You know, you can put on a computer if you want to, but I'm old school. I like to write stuff down. Stick in the drawer, you know, in your house. Okay?

And keep that, and keep tracking it, and try to—when you go to work try to do something to kind of loosen yourself up before you go in there, because you're going into a hostile environment, it's tough. You know? So, you know, talk to your wife, or husband, or your girlfriend, your boyfriend, whatever, your aunt, and whatever, say, you know—and just sort of keep it loose. And then your day will come, you know. And I encourage them. I say, "We—one day we're going to be able to get to OAH, but we're not there yet. Okay? So let's go ahead and keep working here, and stay patient, and stay calm."

Hessick: So that actually raises a question for me about having the attorney, because I don't know the answer to this because I don't know enough North Carolina law. For exhaustion purposes, is it the claim that has to be exhausted? Sort of the, like, "You illegally fired me," or whatever like that? Or is it the argument that underlies the claim?

M: The exhaustion.

Nichols: You have to exhaust the procedure.

Jones: Procedure.

Hessick: The procedure, but do you have to—if you don't make the precise argument in the context of making the claim, do you lose that argument?

Nichols: Everything except constitutional claims.

M: Yeah.

Hessick: Yeah.

Nichols: You don't have to make the constitutional claim, you don't have to reserve it. Because the first time you can raise it is in your judicial review petition. I'd like to go back to something Abe just said, and then I know Judge Mann wants to say something. On my card it says "attorney and counselor at law." And, as you've figured out, I do a lot of employment work, and I'm amphibious; I represent both employees and employers. But the same advice I give—

M: [INDISCERNIBLE]

Nichols: —to both of them is—

M: That's right.

Nichols: —"This is an employment-at-will state."

M: Excuse me.

Nichols: "Why do you want to stay in setting? Why do you want to stay in this job? Why do you want to keep this employee? Why do you want to fire this employee?" Before you get into the legal stuff, look at the counselor at law part, and talk to somebody about maybe the best thing for them to do is find another job.

M: Mm-hmm.

Croo**M:** That's fundamental.

Nichols: Judge Mann?

Mann: You go first.

Nichols: Oh, I'm sorry. I didn't see you.

F: Hey. Yeah, I have more of a comment than a question. It really spoke to what you just said just now. Do you want me to—[OVERLAPPING]

Nichols: We can hear you, but I'm not sure they can hear you.

F: [INDISCERNIBLE] Can everyone hear me better now?

M: Mm-hmm.

F: Okay.

Nichols: Just like the TV commercial. We can hear you now. [LAUGHTER]

F: It spoke to—what I had was more of a comment than a question, so I don't have a question. And it spoke more to what you were just saying. You know, and I'll just be transparent. So I consider myself to be what they call—I kind of jokingly say—"super-minority" because I fall into multiple different minority groups. And I've come to the conclusion that, at some point, I—it's inevitable I was going to experience at some time the discrimination somewhere, especially in employment settings. That's one of the reasons why I enjoy working for myself so much now, because I don't have to deal with that, and I have a wonderful, diverse clientele, and they think I'm great.

But, you know, I worked for Veterans Affairs, which was a really unfortunate experience, to say the very least. And, you know, it gave me a lot of insight with working with other people too, in different settings, of how brutal these hostile work environments can truly become, and how strategic these managers are. Because a lot of times they're repeat offenders, and they know how to work the system they're in meticulously better than the lawyers in a lot of cases, better than any of the employees that are complaining. And even if you have clear and convincing evidence where managers are actually saying, "Yes, we know this is to be true."

I mean, if you look at the EEOC, they're underfunded, and they're overloaded with cases. And you can spend years waiting for your case to be heard, if it gets heard. And a lot of lawyers don't want to take these cases.

A lot of employees don't have the funds to pay for lawyers, hundreds of dollars an hour for years to go on and fight these cases.

And, like you said just then, a lot of times you are better off finding a better situation for yourself, whether it be a different job or opening up your own company, because a lot of people do have skills that are transferrable where they can employ themselves and hire other people, you know, and create a better situation.

And I think sad—I mean, I don't feel like that's focused on enough when they talk about employment law, because the—just because a law is on the books doesn't mean it's being enforced or honored in any way, shape, or form. And a lot of times it seems like, especially in employment law, there are so many ways to skirt it, you know, and ways to really terrorize people in the workplace to the point where people will end up having profound psychological, long-term problems from this. And I feel like that's something that's not focused on enough, you know, and very few people have really excellent outcomes. And the ones that do, a lot of times, are badly traumatized throughout the process. You know what I mean?

And so I just thought that's really important to bring up, because I don't think that, you know, it's focused on enough.

Nichols: Everything you said is really true. I mean, I've taken three sexual harassment cases to a jury, and it was brutal on my clients who won, and—but it's a brutal process. And the other thing is if you look at EEOC's webpage, only 10 to 20% of the claims that are filed with that agency have a successful outcome. That means 80 to 90% of them are dismissed somehow, and that's EEOC. National statistics probably—I'm just guessing—a couple hundred thousand claim—charges filed a year. So it just shows you how tough it is to pursue those.

Jones: One thing I like to say to people about the big four—I call them "race, age, gender, handicap"—discrimination is that those laws were written back in a day when the discrimination had a more raw form. The discrimination now, like a virus, has mutated. It's still there. You still got racism, sexism, anti-handicap folk running around, anti-age, you know, that—but it's mutated, and the law hasn't kept up with the mutations.

And so that's what you're caught in, an environment where people say, "Who, me? Us discriminate? Really?" "Yeah, you." But it's harder to prove.

Nichols: Come on, Abe. It ain't just the law, it's the people sitting on the jury.

Jones: That's right. That too.

M: Notable too.

Jones: And so, it's not easy. It's not easy work. That employment law stuff is tough work, but you—someone's got to do it and take it on, and

maybe you can shake out a settlement. I tell my clients too, "Look, do you really want to be there? Even if we win, what do you have left?" So I always say, "If you can leave with a positive reference intact, then get the heck out. Just get your letter, and say, 'Bye.'" If you can get—use this process here, and a lot of times they'll give you that because they just want you to—they just want you gone, and you want to be gone too.

But the thing we're protecting is what you work for, is you work for it to keep a good employment record. You don't want a termination on there, you don't want this stuff on there. Get the good result and get gone. Anyway, good.

Nichols: Frequently my best outcome for an employment client is a settlement amount, an agreed-upon letter of reference, and a resignation instead of a termination.

M: Amen. They don't—

Nichols: That's frequently the best result you're going to get in an employment case.

M: Yeah. That's—ditto.

Mann: Let me shift just—

Nichols: Judge Mann.

Mann: —slightly here and—all good advice—and go back to what Judge Croom says. And I know Judge Jones knows about these, too. Another cause of action in OAH is special education cases under the Individuals with Disability in Education Act. It's a federal law. It's tried—the administrative hearings are on the local level where students are challenging individual education plans. You've got great courses here in Campbell on—in education law, and there are provisions in IDEA for recovery of attorney's fees. But before you get to the OAH due process hearing, as it's called, there's a number of steps that you have to go through before.

And that is—a lot has to happen in the school system, and you have to be sure you exhaust a lot of those preconditions before you get a hearing. But if you want to help people, if you want to look at the practice of law in terms of, "Let me do something to help," this is an area that you can get into. It's fairly complex, and most people that get into it learn on the job. So remember that, that you've got classes here that you can take that can prepare you for that.

Croo**M:** I'm curious. Do y'all have a class on certificates of need? Okay, I just wanted to ask that question, because that might be another area that if they want to—well, I wouldn't even bring it up, but that's a whole other issue.

M: Amen.

M: Yeah, that's a good area.

Nichols: Oh, we got lots of questions. _____.

M: I don't know if she's grabbing the mike, I think I might can make my parking meter _____.

F: I have a question. Katelyn and I both recently took Professor Essary's employment—oh, can you not hear me? Sorry—employment law class, discrimination specifically. And we talked a lot in that class about the prima facie case being more and more difficult for plaintiff's attorney in various discrimination cases. And I just want to know, with your, like, longevity in practice, if you would agree with that statement?

Nichols: That was polite. [LAUGHTER]

F: Expertise—whether you would agree with that, that over the years maybe the prima facie has become more, burdensome even though case law says that it's not necessarily supposed to be a high burden to establish step one, the prima facie case, or whether—you know, just your opinions on that specifically?

Nichols: I do think it's gotten harder. The huge advantage of the Office of Administrative Hearings is that you have judges that hear a lot of state personnel cases. And I'm just guessing, what, Judge Mann, 20%?

M: Yeah.

Nichols: And that used to not be the case, not because of them but because who was hearing the cases, and there was a time that they were actually heard by the state personnel commission, which is a bunch of laypeople. Sometimes my choice between going the Title VII EEOC route with a state employee versus going to the Office of Administrative Hearings, even though there's sort of a limitation on damages, is to go that route because I know I'm going to get experienced judges. Yeah, that's the law, and, yeah, it's shifting, but these judges hear that a lot. And you really get the benefit of their expertise.

And from somebody who's represented hundreds of state employees over the years, that's sort of a battle tactics thing. In federal court, the only cases that I've ever won in the Eastern District, I was representing defendants.

F: Thank you.

Jones: And he said a mouthful. I tell people, "If there's a way"— and this has totally flipped in my lifetime, totally flipped. There was a time where you'd try to get to federal court. Now, you try to stay out of federal court. It's not a friendly forum for individuals. Companies maybe. And there's plenty of state law on our books to use without messing with Title VII. I think the EEOC, depending on what region of the country you are in, varies. Okay?

Nichols: Here in North Carolina, they are ramping up. EEOC is ramping up mediation. They used to not do that.

M: Yeah.

Nichols: But they will take employers to task.

M: Yeah.

Nichols: And it ain't just pro forma.

Jones: Right. So—but I—just I say sort of pick your forum as well as your fight. And I think if you can get to keep it in the state lines, fine—

M: [INDISCERNIBLE]

M: Yeah.

Jones: —if you can.

Hessick: That's really good advice. And, like, avoid, you know, pleading a federal claim so you get removed then.

M: Right.

Nichols: Judge Mann, will you take judicial notice that he needs to go see his car? [LAUGHTER]

CrooM: Oh, no. I'm going to stay as long as I can. I got four more minutes.

Nichols: So you're going to gamble then—transit. I'm impressed.

CrooM: Yeah. Yeah, I love Vegas. [LAUGHTER]

Nichols: Other questions? Employment is fun, but I'll tell you, in my experience, the two areas of law that are most fact-intensive are employment and unfair trade practices. Because a single fact that may—you may not get in the first or second intake may determine the case. Both of those cases—both of those areas of cases are super fact-intensive, and makes you do your homework.

M: [INDISCERNIBLE]

Hessick: Yeah, I'd ad labor to that, but I guess labor is employment—but, like, union fights all the time.

Nichols: We ain't got a lot of that here in our city.

Hessick: Yeah, got it.

CrooM: [INDISCERNIBLE] [LAUGHTER]

Hessick: Are there any agencies that have compulsory mediation, arbitration, anything like that as part of the arbitration—as part of the process?

Nichols: OAH has it.

Hessick: Yeah, the have—it's compulsory?

Nichols: Yeah, and—

Hessick: And that's part of the exhaustion process?

Nichols: No, but try getting past Judge Morrison if you don't. [LAUGHTER] It's tough sledding and not a lot of snow.

Hessick: Yeah. [LAUGHTER]

[OVERLAPPING—INDISCERNIBLE]

Hessick: Yeah, oh, maybe—yeah.

Nichols: And my experience is with the EEOC office here and in Charlotte, if they determine that your case is meritorious, they'll run the employer through the gauntlet. Now, that doesn't mean—and the interesting thing is, they bring in folks from other offices. I've had people from D.C. and Memphis, and not the local folks here, and I had one woman, she put the wood to those people. I mean, I was sort of clapping on the sidelines. It was great. So there's that.

The Department of Labor for wage—state wage-an-hour claims, that's a real interesting process, by the way. If you're looking for employment work, double damages, attorney's fees, interest from the date of the last paycheck. I had a case once that the defendant dragged it out for six years, and when we finally got the jury award the interest award was greater than my attorney's fees. My client was happy.

Hessick: Yeah, you think?

Nichols: But they have a mediation process, but it's not mandatory.

Hessick: Not mandatory.

Nichols: But in my experience they're very thorough in this state. But state employees are exempt, so you have to file a federal wage-and-hour claim for them.

Hessick: I see.

Nichols: So you file in state court, and you get mysteriously moved to federal court. I just don't understand it.

Hessick: Yeah.

Nichols: Gosh, this is a lot of questions for a Friday afternoon. Good thing it's raining outside, otherwise everybody would want to go out and play.

F: It was a good discussion.

[APPLAUSE]

Nichols: I'd like to thank the *Campbell Law Review*. Anna and I had talked to them last year about doing this symposium, and they picked our brain pretty clean on this, but they put together a good program. And part of the reason we wanted it is to expose you folks as students and judge—I mean, well, Judge _____. I actually had a case in front of him where he was the judge. But he—you know, he asked us about the same question he asked this morning, "How does this impact what you, as students, do?" And you've

heard what I think every panelist has said, you're going to see these cases. Take the course.

Thanks to the panelists here—

[END RECORDING]