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Contemporary Issues in Administrative Law

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SYMPOSIUM PANEL DISCUSSION

CONTEMPORARY ISSUES IN ADMINISTRATIVE LAW

JANUARY 15, 2021

Panelists

JUDGE STEVE DARNELL,* KRISTIN HUSAT,**
& SUE SHELDON***

Moderator

AMY MOORE‡

Madison Wait:‡‡ Welcome back everyone. I hope you all had a good break. Right now we're going to move into our discussion panel. I'm going to go ahead and introduce our very esteemed panelists.

First, we have Judge Steve Darnell. Judge Darnell has served as an administrative law judge on Tennessee central panel since 2003. From 1991 to 2003 he was engaged in the practice of law specializing in civil and criminal litigation. From 1996 to 2006 he was certified as a civil trial specialist by the National Board of Trial Advocacy and the Tennessee Supreme Court's Commission on Continuing Education and Specialization. He's a graduate of the National Judicial College which awarded him certificates in Judicial Development in both Dispute Resolution Skills and Administrative Law Adjudication Skills. He is also a certified as a Rule 31 General Civil Mediator by the Tennessee Supreme Court. He received his B.B.A. from the Austin Peay State University in 1988, his J.D. from the

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University of Memphis in 1990, and his Ph.D. in Judicial Studies from the University of Nevada, Reno in 2018.

Our next panelist is Ms. Kristin Husat. Ms. Husat has been an attorney with the Tennessee Department of Revenue for nearly 16 years, serving as General Counsel since 2012 and as an Assistant Commissioner since 2015. Prior to joining the Department, she practiced federal tax law and business law. She received her J.D. from Vanderbilt University Law School and holds a Ph.D. in Italian Language and Literature from Yale University. Ms. Husat is responsible for the operations of the Department's Legal Office and Administrative Hearing Office. She also initiated and supervised a 3-year restructuring and modernization of the Department's collection division. She has extensive experience in state tax administration, including rulemaking legislation, tax litigation and offers in compromise, administrative hearings, tax payer audit appeals, and internal policy making processes. In addition to tax matters, her practice also regularly involves advising on state motor vehicle title and registration law, tax payer confidentiality laws, employment law and civil service disciplinary proceedings, and state contract law.

Our final panelist is Ms. Sue Sheldon. Ms. Sheldon has been with the Tennessee Attorney General's Office since 1992. She came to Tennessee from Illinois and California where she practiced in a variety of settings, including a small, rural general practice and as a counsel for students of the University of Illinois. In recent years at the Attorney General's Office, Sue has focused on representation of the Tennessee Department of Health and its attached agencies and boards. Her litigation practice is mostly appellate in nature as she defends administrative agency decisions issued by the Department of Health.

Today's panel will be moderated by Professor Amy Moore. Professor Moore received her Bachelor of Arts degree from Harding University and received her Juris Doctor degree from the University of Chicago Law School. She is part of the faculty here at Belmont University College of Law, where she has taught a variety of courses including civil procedure and administrative law. Her current scholarly research focuses primarily on how due process affects rights in the administrative law context and a study of judicial deference. With that, I will turn it over to Professor Moore.

Amy Moore: Good morning. Madison already introduce all of you, but administrative law is such a huge, broad field. I was wondering if each of you could give a little bit more information about how your work and your employer fits into this broader context of administrative law.

Judge Darnell: I'll go first here. I am Steve Darnell. I've worked the last 18 years for the Administrative Procedures Division, that division was created by statute when the Uniform Administrative Procedures Act

was initially adopted in Tennessee. I think there are 14 or 15 Administrative Law Judges at APD. We're appointed by the Secretary of State and serve at his pleasure. I have been fortunate to have been at APD through two secretaries, and I continue there now.

The system was set up as a central panel to keep the ALJs from being captive of the agencies. The legislature also gave the Administrative Procedures Division some additional duties such as promulgating the model rules for hearing contested cases that we have, we're in the process of amending those now, as well as to review conflicts between state and federal Administrative Law and those sorts of things. That's where the APD fits in.

We hear cases, the administrative law judges there, by assignment for, I'm just going to guess, over a hundred different state and local agencies. Some of those we're designated to sit for the agency by the commissioner, some of those we preside over the hearing before a board or commission and hear the case. We conduct board or commission hearings much like a jury trial and the board actually deliberates and makes its decision after hearing the contested case proof.

Kristin Husat: I'd be happy to go next. Thank you so much for having us here. I'm really excited to be able to see the practical application side of administrative law in addition to all of our academic colleagues. The Department of Revenue, as everyone probably can guess, is a state executive agency. My work deals everyday with administrative law in a number of different ways. I'm over at our Administrative Hearing Office, which I think we're going to talk a little bit more about later, but is taxed focused.

It's not with the Secretary of State's office because tax tends to be a fairly complex area, but we handle taxpayer disputes and Administrative Procedure Act contested case hearings through the office. We, in my office, also deal with rulemaking and application of the laws in both the tax and the motor vehicle context. For us, it really is a daily, hourly deal with Administrative Law.

Sue Sheldon: Hi, I'm Sue Sheldon, and it's a great pleasure to be here today. The Attorney General serves as the Chief Legal Officer of the state and my office represents all state agencies in that regard. I happen to be in the healthcare division, and our primary clients are the Department of Health, TennCare Bureau, and the health services and development agency, which is the agency that issues certificates of need for the establishment of healthcare institutions in the state.

Under Title 8 of the Tennessee Code, the Attorney General's Office has a number of duties pertaining to administrative procedures.¹ The

1. TENN. CODE ANN. § 8-6-109.

primary among those is all the litigation before the administrative agencies and the appellate litigation that ensues from administrative agency decisions. In addition, under Title 4, all regulations before being filed with the Secretary of State must be filed with the Attorney General and approved for legality and constitutionality.² I am involved in those tasks that I have just described. Again, my primary client is the Tennessee Department of Health.

Amy Moore: Because you guys all have such different perspectives here, I want to talk a little bit about emerging issues in administrative law. What do you see from your perspectives as the really big issues right now that people should be thinking about and also the emerging issues that are coming up?

Sue Sheldon: I think from my perspective, the scope of judicial review of administrative agency decisions and regulations is probably the primary issue that I'm concerned with at this point. The legislature has certainly been taking steps to open up judicial review, to make it more accessible. We've seen some recent legislative amendments such as opening up venue for judicial review of administrative agency decisions.

As of 2018, people who seek judicial review may now file that judicial review in the county in which they reside, or in the county in which the cause of action arose.³ Before 2018, virtually all judicial review was limited to the Davidson County Chancery Court, with some exceptions, and some exceptions still do exist to the opening up a venue. For example, the TennCare Bureau judicial review of its decisions is still limited to Davidson County Chancery Court. That is an example. I think we'll be talking more about deference to administrative agency decisions, I understand, and that, I think, is going to continue to be an important issue.

Kristin Husat: I think for the Department of Revenue and other executive agencies one thing that it's not new, but it is an ongoing issue that I think is very important is how to balance applying the law, giving guidance, in our case, to taxpayers, but to our customers, which are the public, and also making sure that the guidance that's provided can be basically relied on. One thing that the Department of Revenue always finds as a challenge is we, for example, have over 300 auditors and we do tens of thousands of audits a year from the very small to the very large, and auditors have to make decisions on how tax law should apply.

For anyone who's taken tax law, it's not easy and there are decisions that have to be made. We are always trying to strike a balance between having an auditor make it, for example-- not just auditors, but many of our

2. TENN. CODE ANN. § 4-5-211.

3. TENN. CODE ANN. § 4-5-322(b)(1)(A) (as amended in 2018 by Pub. Ch. 1021).

personnel make a decision, communicate something to a taxpayer, but then also making sure we've got guidance out there. We do find that taxpayers, for example, might've had an audit 10 years ago where they were told for sales tax, how to collect are audited again and the department has now given them a different answer, and that's understandably extremely frustrating.

We have rules and regulations, but there are literally thousands of tax interpretations that are either impossible to anticipate, or are things that really need to be discussed and focused on. I think striking that balance between being transparent, which we absolutely want to do, providing guidance, which we absolutely want to do, but then having also an across the board position that is thoroughly vetted and can be considered our policy, and getting to that point which takes quite a bit of time and work.

Judge Darnell: I would reiterate what Ms. Sheldon says. The legislature made a major change when it permitted UAPA appeals to be brought in the county of residence.⁴ Previously all appeals were heard in Davidson County. That gave us some continuity in our administrative jurisprudence. We had a couple of chancellors in Davidson County that heard nearly all of the significant appeals, and they well understood administrative law. I don't know that we're going to get that same level of review in some of the particular more rural chancellors if they even want to hear these appeals.

I think that's an issue for us. We'll also deal with a lack of guidance from the chancery and appellate courts. A lot of these cases we decide them, they get appealed, they get to Chancery Court and they're settled there between the parties. We don't get a ruling from the court because of that. At the appellate level, we don't have Justice Koch on the Supreme Court anymore, he's gone now. He's Dean Koch now at the Nashville School of Law. When he was on the Supreme Court, he worked in government himself at the cabinet-level and understood administrative law better than I think anybody we've had on the court in my time. Some of his opinions, really, laid the groundwork for what we do now. We don't have that now.

Also, going forward, I think the administration change from Trump to Biden is going to be significant. You've kept up with the news. The CMS has approved a block grant for TennCare and the Tennessee legislature is apparently going to adopt that.⁵ I don't know where that leaves the Biden administration and changing it, but that will certainly change TennCare, to some extent. Of course, we've spent a lot of time recently, and I know the

4. *Id.*

5. *CMS Approves Innovative Tennessee Aggregate Cap Demonstration to Prioritize Accountability for Value and Outcomes*, CMS, (Jan. 8, 2021), <https://www.cms.gov/newsroom/press-releases/cms-approves-innovative-tennessee-aggregate-cap-demonstration-prioritize-accountability-value-and>.

Attorney General has as well, on rules to implement new Title IX regulations that came out of DeVos's Department of Education.

Now she is gone, and we understand that President-elect Biden wants to set those new rules aside. The state has spent a lot of time preparing for those changes. We don't know where they're going to end up. I see those types of changes coming. Of course, there's a ripple effect throughout Tennessee's state agencies who are bound to implement and promulgate rules that are consistent with the federal rules and programs. We're going to see some changes at that level.

Amy Moore: Ms. Sheldon, I'm so glad that you brought up deference because it's something that I really like to teach and talk about. It's a really big part of a federal administrative law course to talk about judicial deference. I'd like to ask you guys about the difference between deference at the federal level and the state level. How is it similar or how is it different?

Kristin Husat: I probably have the most non-answer answer to that, but I can start. Interestingly, some agencies, for example, my agency, Department of Revenue, we don't really deal with deference on a direct level. That's largely because under state law, the position of the department on tax is presumed to be correct. For example when we have tax litigation, the Department of Revenue is always the defendant.⁶ Really our assessment is presumed correct and then it shifts the burden of proof to the taxpayer and that I think really changes-- or it's really different for us from several other agencies. I'll have to defer on the deference issue directly.

Sue Sheldon: I will speak to our state accorded deference. I am not as familiar with the federal Administrative Procedure Act as many other practitioners in your audience are. The deference in ode to administrative agency decisions and to rules in this state is largely statutorily driven and with respect to administrative agencies decisions, it rests primarily in TCA § 4-5-322(h). It sets out the well-known substantial and material evidence standard for reviewing the factual findings that are made by agencies in their decisions.⁷

It also does allow for overt reversal of an agency decision if it is arbitrary or capricious, but it also requires that a court refrained from reversing an agency decision unless there was error, harmful error.⁸ If error was harmless, a court is prohibited from overturning the decision on that basis. There is substantial deference that is paid to administrative agency decisions in Tennessee.

6. TENN. CODE ANN. § 67-1-1801(a)(1)(B).

7. TENN. CODE ANN. § 4-5-322(h)(5)(A).

8. TENN. CODE ANN. § 4-5-322(h)(4); TENN. CODE ANN. § 4-5-322(h)(i).

Furthermore, certain aspects of those decisions are even entitled to additional deference. For example, an agency's decision as to the penalty to be applied, for example, the decision whether to say revoke a healthcare provider's license as opposed to suspending it, or merely censuring misconduct, that is entitled to even more deference than is set out in § 4-5-322(h).⁹ That decision to accord additional deference was premised on federal decisional law, I understand. I'm not sure whether or not that federal decisional law is still effective or not. Those are some aspects of deference that certainly are very, very important in Tennessee. In addition, the deference that is owed to an agency's interpretation and construction of its own rules in Tennessee is basically the agency's decision is given controlling weight, unless its interpretation is completely inconsistent with the controlling statute.

I believe that is a more deferential standard, perhaps, than has been recently announced by the US Supreme Court with respect to deference to federal agency interpretations of their own regulations. We will see, I guess, if some of those changes will trickle over into Tennessee law as well.

Judge Darnell: I just don't see it come up a great deal. Occasionally we'll have agencies assert it, but we are independent of the agencies and I know they get frustrated with us at times because we don't see things always as they do. We take a neutral look at it. As Ms. Sheldon was saying, when it does come up, it tends to be with the interpretation of their rules, we call it rules in Tennessee, the regulations.

Typically when I see that arise, it's where there's an interpretation by the agency that is almost inconsistent with the rule itself, with the plain language of the rule and of course we have to apply the standard statutory rules of construction to interpret the rules. That's been the few times I've seen it come up. We see it some when professional boards discipline their licensees, but they're still constrained to not mete out discipline that's arbitrary or capricious. We've had cases where the agencies have been reversed because it's inconsistent with what they've done in the past or what they've done to other litigants.

It's one of those things I think administrative law practitioners like to talk about, but at the end of the day, it just doesn't come up a whole lot in what I hear.

Amy Moore: It sounds like the rules and regulations piece is really important. I'm going to take some individual questions walking through this rulemaking process. Let's start with Ms. Husat. How does the rulemaking process work from a departmental vantage point? How is the public engaged in the process, to the extent that they are?

9. TENN. CODE ANN. § 4-5-320(d)(2).

Kristin Husat: Tennessee has an extremely involved process for rulemaking. We prefer to actually do legislation often just because as hard as legislation can be, it's actually a little bit simpler than the rule making process. Really the way it starts is obviously we identify some issue and that needs to be addressed by rule. A lot of agencies have other law driving it, for example, federal law might be driving healthcare and so on. For it for tax, we're a little bit different in that it's usually being driven by the need to put out guidance but in the end, it's the same thing. It's an issue that needs to be addressed.

The first step is to actually speak with the governor's office. They have a questionnaire. I think it's in the range of about 28 different questions that we need to answer, everything from necessity to impact on different groups, various things like that. We'll have quite a bit of discussion with them about just is this actually needed? What does it involve? Who are the stakeholders?

As a practice, the Department of Revenue, we like to take advantage of the APA statute that allows us to have informal preliminary discussions. We try to identify the different stakeholders in a tax rule or it might be a motor vehicle rule, we also administer those, so speak with industry groups, the Chamber of Commerce. There's a very good CPA group in Tennessee that's very active and get informal feedback, then we began the drafting process and we'll go through numerous drafts. We'll often share drafts with these different groups to get their input and make sure that we are answering questions that they need answered, phrasing the guidance in ways that both responds to current situation, but then also is flexible enough to address changes in industry that might come down the road, unforeseen circumstances and so on.

That's a several week process, and then we go through really the more formal process at that point. After the governor's office has signed off on that draft, then we will publish a notice of public hearing and we'll hold the hearing and really anyone who wants to can come and comment, we receive written comments as well. After that point, we prepare a package for the Attorney General's office review, which includes responses to all of the concerns or issues or questions raised by the public and contains a final draft, and then I think, like Sue mentioned, the AG's office then reviews that for constitutionality and legality.

I like to say that all of our proposals so far have not been kicked back to us for either of those reasons, so knock on wood there. Then after that, we file it with Secretary of State, publish a notice, and then it has to go through first the government operations committee with the legislature, where they will ask anything and everything about the rule. If they recommend it, then it goes to the full general assembly and every year all of the rules that have been approved by government ops go into what we call a rule omnibus bill.

They're approved, but it's not one at a time. There'll be one bill, usually towards the end of session, which in recent years has been in April, that approves all of the rules across the board that have been proposed that year. Finally, if that's proved, then they become permanent. If a rule is not included in that omnibus bill, it's in effect but then it will expire on, I believe, it's June 30th of that year.

It's a really involved process. You have to be pretty serious about wanting to start it. It's obviously one though that I like our process because I think it's really important to have that transparency, that conversation with affected members of the public, also sometimes other agencies are affected by it, to make sure that we're really getting it right and that we have considered everything. My view of rules, really, in the end are to serve the public. That's really the end goal of this long, involved process.

Amy Moore: That's really interesting, although I've never heard someone say legislation is the easier path. Ms. Sheldon, could you talk about from your perspective, what ways is your office involved with the creation and rules of regulations in Tennessee?

Sue Sheldon: Yes, indeed. My clients, if they anticipate that there could be some difficulties with a particular rule, will go ahead and bring us into the process at the early side at times. We will assist them in working through issues in that regard, but once that's done, if it happens, the formal packet does come to us after the agency has made its decision to go forward and has engaged in the public hearing process. We have an involved review where we look at all of the formatting requirements, et cetera, that are imposed by the Secretary of State's office on rules, as well as at the substance of the proposed rules, and that involves three or four folks at my office.

We still catch problems even as the rules get to the Attorney General for the actual signature. We'll do some back and forth with the client if we find some small errors that need to be corrected. If there are more substantial changes that need to be made, then oftentimes the rule will have to go back to the agency for additional notice and maybe a new vote. I work with a number of multi-member agencies who make rules. There are many, many health-related boards that are attached to the department of health, so each one of those can only make decisions in an open meeting.

For them to vote to make changes to a rule requires, again, a full hearing with public notice and a quorum. Those things happen. On rare occasions, we do find ourselves in the position of needing to decline approval of a rule. It doesn't happen often, at least in my experience, but on occasions it does. In this particular case I'm remembering, there was a problem in that there was insufficient legislative guidance statutorily. Ultimately, the client went ahead and got the necessary statutory authority to proceed with the rule.

In the event that a rule needs to be changed that goes beyond the scope of the initial rulemaking notice, then the entire process has to start all over again. Yes, it can be very, very lengthy. There is also a way for agencies to enact emergency rules under very limited circumstances. When that happens, the public notice and hearing are dispensed with under the very limited circumstances that are necessary to do that, but emergency rules can only remain in effect for 180 days. If the agency desires continuance, they're going to have to go through a public hearing and notice process.

Amy Moore: Once the rules are made and they get challenged, they come to you, Judge Darnell. You said earlier that a lot of the deference issues come up with interpretation of their own statute. Are those the problems you see more broadly across the board challenging rules and regulations? What comes to you?

Judge Darnell: We do get challenges to it, and I've had a few successful ones over the years. Of course, Ms. Sheldon is right, I always hear the argument from the agency that the Attorney General signed off and approved them; we've got a chancellor in Nashville who's quoted to saying that everyone that chancellor has ever struck down was approved by the Attorney General's office. That does happen occasionally.

I've had a few that just appear to be inconsistent with the statute with various agencies. It is, I understand, a very onerous process to go through, and we don't deal with it much at the rule making level. APD is dealing with it now because the administrative procedures division is in the process of amending its model rules for hearing contested cases. I know from experience that several agencies that we deal with have issues in their rules that need to be corrected, but they don't want to go through the process of correcting them, so they rely on orders that have been issued and those sorts of things to kind of hobble things together.

For me, the objections I get are mostly from private attorneys that maybe don't understand when a rule exceeds the authority delegated to the agency. We hear that pretty frequently when these issues come up, but they're not good arguments, and they typically tend to be attorneys that don't do a lot of admin law that think that the statute has to specifically authorize everything that the agency has promulgated by rule.

The ones that I do get that have been successful are agency policies. The agency will have a policy that should have been promulgated as a rule. These are policies that can change the substantive outcome of the case. I recall a case where the agency referred to it policy as a cheat sheet that agency staff used. When an issue came up, they had a written policy, it was finally produced in discovery, like a flow chart of how agency staff was to deal with various issues. Agency staff would follow the policy and reach outcomes that were inconsistent with agency rules.

One of the issues practitioners overlook is that the Administrative Procedures Act has a provision requiring the APD, Administrative Procedures Division, to promulgate model rules for hearing contested cases,¹⁰ and we've done that. That statute also says that the agencies are to adopt those rules for hearing their contested cases.¹¹ If they don't adopt those rules, there has to be a signing statement with the alternative rules when they're filed with the Secretary of State articulating why the agency cannot follow the model rules when hearing their contested cases.

We see some agencies that deviate from the model rules on minor things, but we've got a few agencies who have promulgated their own hearing rules wholecloth. We've had that issue come up from time to time. I think that some attorneys for the state and on the other side don't understand that the APA mandates that the agency adopt the model rules. I've had attorneys object to the agency not complying with the model rules and, unfortunately, those cases ended up getting settled when those issues came up, so we never reach a resolution of that issue. That makes it a little difficult on us because we don't have a precedent model from the courts. That's generally where these issues come up in our world.

Amy Moore: Can I follow up on that a little bit? We have a lot of young attorneys that are coming before you that are trying, in these administrative proceedings, to get things done. Can you point out some common mistakes that they might make or give them some best practice pointers for how they might proceed?

Judge Darnell: Yes. I was a litigator for many years before I came up to the Administrative Procedures Division. My only experience really with administrative law was social security hearings. I think that a lot of attorneys, that's the extent of their understanding of admin law. Because we've got a niche bar that does administrative law and health, like Sue was talking about, healthcare. We've got a handful of attorneys that do a lot of representation of the doctors and the nurses, physical therapists, those folks.

That's what they do and they understand it and do it well. We get folks that come into administrative hearings at times that are private attorneys and the only experience they've had with the admin law is social security cases or perhaps unemployment hearings. APD's model rules and Tennessee's Administrative Procedures Act, requires us to follow Tennessee's Rules of Evidence and we follow the Tennessee Rules of Civil Procedure with a few exceptions that are found in APA. The predominant exception is the use of affidavits if they're not objected to.¹²

Other than that, we hear a contested case under the UAPA just the same as you would hear it in a Circuit or Chancery Court when the ALJ is

10. See TENN. CODE ANN. § 4-5-32.

11. *Id.*

12. See TENN. CODE ANN. § 4-5-313.

setting alone. If we're sitting with a board or commission, we hear that just like a jury trial. We charge the board members on the law after the proof. The board has to deliberate in public, that's the only real difference. I've had attorneys that have shown up at hearings that they don't even know what the agency's rules are. They haven't looked at them, they don't even understand the exist. They think that they'll just take a stab at it and appeal the case if they lose. Of course they don't understand that the record is created at the administrative level to be reviewed on appeal. And there could be nothing to appeal.

There are also some attorneys that do prepare but fall into a trap. I think one of the caveats that all attorneys must know is that all administrative hearings in Tennessee are not mandated to be contested case hearings under the APA.¹³ The majority are, but you'll find some case law out there that comes from non-APA hearings, and there's case law that predates our APA as well. You'll find case law, which is just bad now, that talks about things like hearsay being admissible and those types of things. That case law is no good in a contested case hearing under the APA. I try to have pre-hearing conferences on cases and make sure we send out pre-hearing orders giving attorneys a little bit of a roadmap to those issues so they can avoid a pitfall.

The biggest issue, even with experienced practitioners, I think is to - and we as administrative law judges is we have to look and say, "What's my role here?" In some cases, the commissioner has designated me to hear the case and issue an initial order for the agency to review. In some cases, I'm designated to sit with the board. The APA sets out a different role for the ALJ when sitting with a board or commission. In some cases, like the special education cases, department of safety of seizure cases now, the legislature has specifically designated us to hear and issue the final order for the agency.¹⁴ You have to start and we still have a few cases where we sit with the commissioner's designee, where I conduct the hearing and the designee, which is typically a deputy commissioner or someone at that level, issues the final order for the agency. In those cases, the commissioner's designee basically acts as a jury of one.

I think that's an issue even experienced practitioners can overlook.

Amy Moore: Yes, it's really different there. It's really hard to play the game if you don't know the rules of that particular game that you're trying to play. I almost hate to ask this. Obviously, we're all on Zoom right now for this symposium where normally we would be in person. How have you seen COVID specifically impact your work? What changes have you had to make to your work in this field because of the virus?

13. See TENN. CODE ANN. § 4-5-103(a)(1).

14. See TENN. CODE ANN. § 4-5-315.

Kristin Husat: I'd be happy to answer that. I guess really we've seen some huge changes. My agency was about 40% on its way to having some employees work from home some part of the week. We were actually relatively well-positioned last March when Governor Lee decided to have as many employees work from home as possible.¹⁵ We literally overnight sent home 900 people. There were the technical changes and setting everybody up with that and all. One thing that we found we had to do on the administrative side with our hearing office is, under our statute that creates a hearing office, it specifically says that taxpayers have the option to have their conference either by telephone or "in-person".¹⁶

At that time we were hoping it was just going to be a few months, but we didn't want to delay having conferences, these were on tax assessments, delay and then it became more and more apparent that this could be a long haul thing. We decided to start doing conferences via WebEx, which was brand new and it took some trial and error, but it actually has turned out to be a real silver lining of COVID. We've had just great response just across the board from tax reps and our pro se taxpayers, who—they don't have to travel to Nashville if they want the in-person conference, we can share documents.

I think it's really in the end has made it more accessible. Anyone can do a phone conference, but there's just something additional to being able to sit across from someone, see them and then also being able to share documents online has been really, really good. One other thing we have also been dealing with on an ongoing basis, as I think everyone knows Governor Lee has periodically issued orders suspending certain laws and regulations.¹⁷ Most of them relate to healthcare and allowing different practitioners to be able to provide healthcare in different circumstances, but there are other areas that are affected.¹⁸

We have dealt with a couple involving motor vehicle title registration to make it still work and all, but one silver lining for everybody, but I think a good example of an unforeseen administrative snafu was, what I so far has perceived as the universally welcome order suspending the law that requires, or that prohibits delivery sales of alcohol and pickup of alcohol from restaurants,¹⁹ that no, I have not heard one complaint that somebody can now get the delivery of alcohol to their home. The unforeseen consequence of that was, we have a liquor by the drink tax,

15. COVID-19 TIMELINE, <https://www.tn.gov/governor/covid-19/covid19/timeline.html> (Last visited Mar. 10, 2021).

16. See TENN. CODE ANN. § 67-1-1438(e)(2).

17. See, e.g., Butler Snow LLP, *Tennessee Governor Issues Executive Order No. 68 Increasing Health Care Resources and Capacity*, JDSUPRA (Dec. 9, 2020), <https://www.jdsupra.com/legalnews/tennessee-governor-issues-executive-97999/>.

18. *Id.*

19. Tenn. Exec. Order No. 77 (Feb. 20, 2020).

which is about 15% of the price of a drink that you would get in a restaurant.²⁰

Well, it specifically is for on premises consumption. I guess a silver lining for the public, but an unforeseen financial hit to the state, was when you go and pick your margarita up, or you have it delivered to your house, it's 15% off in terms of tax. It's one of those things where I think it's a good example, it's funny, but it's also a good example of how it can be really hard to balance needing to respond to COVID and emergency, do it in a practical way, but then there are these just things that no one thought of while those emergency orders were being put out. By the way, you still can purchase your liquor by the drink tax-free through February.

Amy Moore: Does anybody else want to weigh in? Does anyone else have any COVID-related updates?

Sue Sheldon: I just think it was so difficult to anticipate where we found ourselves. It's astounding. In March, when this was all starting to come down, I know my office was huddling together and we anticipated that we would be traveling throughout the state going into court and trying to get quarantine orders. I haven't been to court in person, but once since COVID; we shut down essentially which is astounding, but the ability to do TRO hearings, mediations, motion, practice, all online has just been amazing. I'm so grateful for that and grateful that our office had put into place a VPN, very shortly before this all occurred. Thank goodness. If we hadn't been able to access our documents at home, things would have been much, much different.

Judge Darnell: We at APD have been really fortunate. We were transitioning to a new case management system, electronic filing and so forth. We didn't expect to roll that out until the end of last year, but when this all came in March, we rolled it out immediately. We had a little bit of a learning curve to do it, but we were able to do it and we were hearing cases by WebEx and it's worked really well, particularly with attorneys. One of the concerns we had was that some self-represented litigants wouldn't have the technology to participate in a virtual hearing-- But that's actually been very few. I was surprised by this, but we have very few that don't have the technology to participate in a video conference hearing.

They can participate by phone as well, but I think they're at a disadvantage if all the other litigants can be seen on video. This is particularly true when a case is being heard by a board or commission. But I have also had litigants and witnesses that don't want to be there by video. They just don't want to be seen that day. We rolled video conferencing

20. See generally LIQUOR-BY-THE-DRINK TAX, <https://www.tn.gov/revenue/taxes/liquor-by-the-drink-tax.html> (last visited Mar. 10, 2020).

hearings out using WebEx, and it's worked very well. It has kept us from having a backlog of cases when this is over, which is a big concern for everyone. I think, though, we still do have some; I just continued a forfeiture case that over \$100,000 money and these attorneys have a lot of witnesses and they want a live hearing and I can appreciate that.

There's a lot at stake in that case. We have some of those bigger cases that we've continued out because of those things. I think also, because of COVID, the agencies may not be working at typical levels writing citations, interacting with the public, and generating cases. I think we're probably going to have somewhat of a backlog at APD because of what we've deferred for live hearings, but I think we're also going to have a lot of agency action when this is over and their investigators and staff get back to their normal routine.

Amy Moore: Yes. It seems like there was a big delay for almost everyone when we thought it was short-term and then we realized it was long-term. We had to reassess that short-term fixes didn't always work for the long-term. Ms. Husat talked earlier about hearing officers. Can you tell us more about what the role of a hearing officer is and how they interact with the taxpayers and with the department?

Kristin Husat: Yes, I'd be glad to. The Department of Revenue has the option of using Steve's office, but I think back around 2000, it was decided that we would serve taxpayers better by having our own specialized hearing officers. We, by statute, have an administrative hearing office.²¹ It doesn't have to be staffed by attorneys, but it is a decision that's been made. We've got three full-time hearing officers who are very experienced tax attorneys and then we have an executive administrator who is a partial administrator, which is also designated as a hearing officer for certain areas. She's a long-term employee. She came from audit and she has extensive experience in certain tax areas. They're focused solely on two things. 90% of their time is on reviewing taxpayer challenges to audit assessments or refund claim denials and then the other 10 or so percent is how, like Steve does, presiding over administrative procedures act contest to the case hearings. It's a bit of a mix, but we view it as a really vital service to the public. Conferences are free. The hearing officer is, I guess, more officially in the position of a judge. It's informal, we don't follow rules of evidence or anything like that, we really try to make it as flexible as possible, but they are the decision-maker in the end.

They are also often an investigator, so they are looking at both the issues that a taxpayer might raise to challenge an assessment, but then also our reviewing whether or not they agree with a particular assessment or refund claim denial. They do issue a decision which a taxpayer can

21. See TENN. CODE ANN. § 67-1-1438 (Supp. 2020).

challenge in court. We find that it's a really great alternative without our hearing, taxpayers would have to go straight to court to challenge a tax assessment, which gets costly really quickly. Every year we have about, on average, 300 or 350 conferences a year, but the office does also resolve hundreds of challenges without even having to have a conference.

A lot of times it's just a matter of explaining to a taxpayer why they got an assessment and once they understand they can review it. Any given year, you've got several hundred taxpayers who have been able to get resolution to an issue fairly quickly for no cost whatsoever and that second independent look by a subject matter expert.

Amy Moore: Very important in a tax area, specifically a subject matter expert. You and Ms. Sheldon both talked earlier about your relationship with rule-making. Can you also talk about your relationship with regards to litigation or representation?

Kristin Husat: I'd be happy to. Since I've got my mic on, I'll start on that. I actually was working just until after nine o'clock last night in a mediation on our second largest dollar amount litigation case ever. I think it was over \$150 million in tax at issue. So, yes, we are extremely involved in litigation. We have a really great working relationship with the AGs office. The tax division there are wonderful to work with, subject matter experts in tax and litigation. My legal office, we are really, in addition to being subject matter experts on the taxed, we also, for a lack of a better way of describing it, also are experts in translating litigator speak into auditor speak and vice versa because you've got two extremely different ways of viewing things.

We also, I think very importantly in the regulatory area, is we are in a very good position to identify issues that need to be addressed through guidance, whether it's rulemaking or otherwise. One of my former attorneys, who was also over our hearing office, is now over our centralized policy office that was created to really be a central repository for different issues. When we have matters in litigation that we feel really could be headed off in the future and addressed through guidance and whether again that's formal or not, we'll refer it to the policy office. Then they will do anything from putting out notices, they're right now in the process of drafting our corporate income tax guides, updating them, putting them out there. We also consult with them on other types of guidance.

Amy Moore: Ms. Sheldon, do you want to chime in from your perspective? I know you're not in the tax area, specifically.

Sue Sheldon: No, but yes, I do have an extensive litigation practice, working practice, which involves primarily the Department of Health. We are engaged in defending the administrative agency contested case decisions that come down when they are challenged in court. We're

getting more involved now in also filing our own actions in chancery court against unlicensed healthcare facilities that continue to operate. This is a building area of our practice. Unfortunately, that is getting to be more and more of a problem all the time. There are some declaratory judgement actions, of course, that do arise as well. Often they are challenges to rules and regulations, or to actions taken by the agencies.

Amy Moore: Can you talk a little bit about the pro se challenges or challenges with pro se cases, both from your perspective shuffling pro se people through, or seeing pro se people in the administrative proceedings for Judge Darnell?

Judge Darnell: We hear TennCare medical necessity appeals now that came out of some litigation years ago that TennCare was involved in. APD was asked to hear those cases then and TennCare has stayed with APD. Most of those litigants, the vast majority, are pro se. They're mostly telephone hearings, of course they are all telephone hearings today because of Covid. But occasionally, they are in person, but they've mastered that process at TennCare. They're almost always pro se and they're just a different type of hearing. I've joked with my colleagues that they're not as much adversarial hearing as they investigatorial hearings. The issue is always do you qualify for this medical service or benefit or not? I think that's TennCare's attorneys' positions on it with their enrollees also.

If the enrollee qualifies, then TennCare is more than happy to give them the service or the benefit. Outside of TennCare, we don't get a lot of pro se or self-represented litigants. Of course, there are certain things that you can do to help self-represented litigants along and move the case along, but at the end of the day, the state or the other party, we hear some cases where it's two private parties against each other and the state truly is the moderator between them, or the adjudicator. At the end of the day, the state or the other party is entitled to a fair hearing, so there's only so much you can do. I've tried to give them as much leeway as possible, without infringing on the other party's rights, but sometimes that works, sometimes it doesn't.

Kristin Husat: I can add that we have, in addition, to what you would think of as your standard pro se litigant in APAs, we also deal with sovereign citizens and groups that don't recognize the state's right to either tax them or, what we see more often, is require them to have a license plate on their vehicle or insurance for their vehicle. We also periodically get bizarre filings from people who've done "inter-webs" research. Those are really challenging to deal with it. We have a fraud investigation division that is law - they're actually licensed, law enforcement. We sometimes have to refer some of our litigants there, not necessarily because they've made

overt threats, but because they're obviously involved in groups that have been flagged as potentially dangerous.

Amy Moore: It looks like we're running short on our panel time; we've got about five minutes left. I was wondering if each of you could offer an insight or a takeaway to leave the audience with about administrative law.

Kristin Husat: I'm happy to go first. I have to say that, especially for any law students and younger attorneys who are watching, I find administrative practice just incredibly rewarding. It's extremely challenging work, it's very sophisticated, you see everything, big to small. It's also incredibly rewarding because, no matter which agency you might end up working with, you're affecting people's lives directly and you're making a difference. I feel like our contribution to society in general is just, it's one of the things that makes it extremely rewarding for me. I would encourage anyone who's looking at government or at non-profit work to really consider state agency work because it's truly an interesting, challenging and rewarding area.

Judge Darnell: I was a litigator and had a very good practice. I got tired of the business end of it. I actually took this position with the intention of doing it for a couple of years while I wrapped up my practice and then going to work for a firm near Nashville. That was 18 years ago. I'm still here, so I've enjoyed it immensely. It's been much more challenging than it expected -- It's just fun. You get these cases that are intellectually challenging, and you get good lawyers. We get cases-- I've heard a TennCare case over a \$6 bottle of cough syrup and I've heard a hospital certificate of need case over \$150,000,000.

You get some of the best attorneys that come in. We get some of the worst that come in. Then we get the sovereign citizens. We always enjoy what they bring to the table. For younger lawyers, I tell my former partners and colleagues, attorneys avoid admin law practice because they are not familiar with it. It's no different than practice in circuit court and the attorneys that practice in this realm make good money. Particularly with agencies like the health related boards, when you start talking about a doctor or physical therapist, these are folks that can pay the attorney's fee and they'll pay to keep their license.

It's a good living for the lawyers that do it. There's really just a handful that do, but it's a good practice area financially for them.

Sue Sheldon: I echo those sentiments. I've been doing the same job since 1992. Do not want to leave it. I think part of the attraction is the fact that administrative agencies compose the three functions of the executive

function, the judicial and the legislative. It makes the work very varied and most interesting and rewarding.

Amy Moore: Thank you so much for being part of this panel. This was a really good insight into a lot of different areas in state administrative law, which you have to be exposed to really learn about. There's not as much academic literature as there should be about how state administrative agencies work. This has been a great panel.

Madison Wait: A huge thank you to Amy Moore for moderating our panel today and of course a huge thank you to our panelists for dedicating their time and lending us your expertise today. We really appreciated the very insightful and engaging conversation you guided us through.