Promoting Diversity in the Court System: Dave Whalen, July 1, 2020

John Caher: Welcome to Amici, news and insights from the New York courts. I'm John Caher.

In commemoration of the 30th anniversary of the Americans with Disabilities Act, a momentous change in US law, today's diversity dialogue segment focuses on Dave Whalen, assistant deputy counsel with the Office of Justice Court Support.

In 1981, Dave was a typical 19-year-old, when a skiing accident left him quadriplegic. He maneuvered his electronic wheelchair through college and law school. He's practiced law. And for nearly 30 years, he's worked for the New York State Unified Court System. He's also worked as a judicial law clerk at the Appellate Division, Third Department, the second highest court in the state.

Dave said he's always had the support of the court system, from the very top, with Chief Judges Kaye and Lippman, and with Deputy Chief Administrative Judges Traficanti and Coccoma, with Presiding Justice Cardona of the Third Department, and Justice Spain, and so many others at every level who helped him along the way.

In his free time, Dave is a competitive sailor who uses a sip and puff technology to steer a sailboat hands-free, and to set the sails. He sits in an automobile drag racing seat that has straps and extra metal for reinforcement, so when the boat heels on windy days, he can stay upright.

A music lover for 30 years, Dave wanted to play guitar or some type of music, but he couldn't. So, he helped invent a hands-free instrument, which children and adults with disabilities across the United States use in school music programs, and in regular and jazz bands.

Dave, welcome to the program.

Okay, so you're 19 years old. You've just learned that you're paralyzed from the neck down and you're never going to walk again. Where do you find the strength to not only make the best of the situation, but in the first days, to even wake up the next day?

Dave Whalen: Well, I think that the strength is derived from family and friends. I think initially certainly from family and friends, that really pulls you through. With a spinal cord injury, you don't really know exactly the level of

progress that you will potentially make physically, and sometimes years after an injury, you can regain some function. So, at that time, I really didn't understand the full enormity of what would lie ahead. Thirty, forty years later now, I'm certainly amazed at a lot of the progress and things that have happened.

The thing about a spinal cord injury is that you see an individual, and you think that the not being able to walk part is like the most significant part, but really with a spinal cord injury, it affects your central nervous system in many different ways, from sensory issues, temperature issues, blood pressure issues, pulmonary issues, breathing, and just all kinds of different ways. So not being able to walk is one issue, but it really is more of an inconvenience. With the quadriplegia, you're not able to use your hands, so that can affect many tasks of daily living. So, it is a challenge.

John Caher: It must've been enormously difficult and depressing though, as time went on and you were not improving.

Dave Whalen: Yeah. I had the pleasure of being involved with a state trooper, a friend of mine, Paul Richter, who started a spinal cord injury research board with New York State, that Christopher Reeve was on. And I was able to be on that for eight years. And so, although I wasn't personally making leaps and bounds with the physical recovery, technology was changing and opportunities for education in New York (and other different things) were available constantly.

I wouldn't recommend anyone have a spinal injury, but looking back and going forward as well, it's incredible the amount of resources and things that are available. To be able to go to law school and to be able to be employed with the court system for almost 30 years has been an incredible blessing and really an interesting and a really neat experience. I was looking at the statistics and since 2010, I've worked on about over 40,000 calls and cases.

John Caher: Good Lord!

Dave Whalen: Every day in New York State there are so many cases going on and so many things happening. And so being able to have a career and be able to be employed and work on different things has been tremendous, spinal injury or no spinal injury.

John Caher: Let's back up a second, if we could. First of all, law school. Was that something you were planning to do before the injury? Did you just continue on with your plan or is that something that came up later?

Dave Whalen: Well, I had been really fascinated by different individuals with law backgrounds. One of them was Mario Cuomo, because he was the governor at the time. And I was listening to a lot of public radio and would listen to a lot of his discussions, attorneys who were bringing up all kinds of legal issues that were really, seemed to me to be really pretty fascinating. So, I didn't really early on expect to be going to law school, but there are a lot of resources and great things available in the state. And so I was able to go to a State University of New York and Buffalo Law School. That was a good bargain.

John Caher: So, Mario Cuomo was an inspiration in a way?

Dave Whalen: He's interesting because he would break down so many aspects, and field so many questions, a lot of times, whether it was with energy or issues of equality and racism and just a bunch of issues he was always tackling. And I always found him to be incredibly interesting.

John Caher: He was a real legal scholar. And I had heard him say more than once, that the best job he ever had was a clerk at the Court of Appeals. And of course, people speculated forever that he was a governor who would really have rather been Chief Judge. Now, when you started law school, did you have an idea of what kind of law you were going to practice?

Dave Whalen: Criminal cases are really what I work on mostly now. And they're stories. There's a real context to everything. Criminal law has always been something I've really enjoyed.

John Caher: Did you intend at that point to become a prosecutor or defense attorney or had you broken it down to that extent?

Dave Whalen: Well, initially I worked privately and was working on criminal cases and I was doing criminal defense.

One of the first experiences with a court, was a rural court where I needed to go argue a motion and there were stairs to get in. And so the work-around was the court system asked the town emergency squad to help me with a stretcher to get up like five steps into the courtroom. But as a quadriplegic, you've got a huge electric wheelchair and that's pretty heavy. And that was not really a practical way to kind of get in and out of courts all over the place. So, there was a jury pool waiting on the courthouse steps and then the emergency squad arrived at the court and they wanted to put me on a stretcher.

And then people were looking at me thinking, “Was he having a heart attack? Was he the emergency?” I can even remember an individual that was in the jury pool, I don't know, for some reason walked up and gave me a $5 bill!

John Caher: Really?

Dave Whalen: Yeah, and I was just blown away by the whole experience. And so ultimately I ended up switching and going to work with the court system, where the traveling was not so much an issue. Now, the courts have really improved and there's been constant improvement in access to courts and things, but that's actually how my first, one of my first experiences was.

John Caher: Now, when you were initially injured, that was, I don't know, 10 years before the Americans with Disabilities Act. And I think you were well into, or almost done with law school before it was passed. So, as this month marks the 30th anniversary of the ADA, can you tell me from personal experience what that piece of legislation means to you?

Dave Whalen: It's utterly fantastic. Made my life better in many different ways. Just to go to a movie theater or sporting event or a venue and to be able to be included, have access, and the seating aspects of it is fantastic. The court system and other organizations have made opportunities available for people with high levels of disability. It's a great thing in many respects, and I think that the ADA has been a really super helpful thing for a lot of people and a great advance.

John Caher: I imagine part of it is probably a willingness to accommodate, and part of it is probably a knowing *how* to accommodate.

Dave Whalen: When I started to work with the court system, I worked at the Appellate Division, Third Department, in Albany. They're located at the Justice Building, which is right across from the Capitol. And they hadn't had someone in my situation and they didn't really have as much technology then. And so I would write with a pen in my mouth, and then later, I would use computers and technology and speech recognition.

When I first started at the Appellate Division, in a law clerk role, which is a temporary role, I was able to use Judge Spain's chambers. That was, well, a huge accommodation. It's such a great thing from Judge Spain. It was the corner office of the Justice Building on the third floor, one of the neatest places to have an office anywhere. It was an incredible gesture

on Judge Spain's part and there was other really neat accommodations along the way to make things possible, make things work.

John Caher: Judge Spain, of course, is Justice Edward Spain. And I'm guessing at the time the Presiding Justice was Justice [Anthony] Cardona?

Dave Whalen: Yes. Justice Cardona was also incredibly helpful and actually helped me, enabled me, to get my spot with the Office of Justice Court Support. Another very bright individual and a very kind individual and very helpful to me.

I just wanted to say thank you to a few people. There's a lot of talented people, and hardworking people in the court system, that never get acknowledged. You know, people in my office are really hardworking, bright people that don't get a lot of acknowledgement and saying thank you to them [it is really important to me]. And then at the Appellate Division—they're really amazing—and the Court of Appeals judges, two judges in particular, Judge Bellacosa and Judge Kaye, were awesome.

John Caher: So, it sounds like everyone from the Chief Judge on down is invested in accommodating people like you and giving them an opportunity for success. Is that, do you think that's correct?

Dave Whalen: No doubt about it.

John Caher: That's great to hear. Now the Office of Justice Court Support. What is it that you do there?

Dave Whalen: So I did a little research before the interview. We work with 1,806 judges, 1,196 village courts, 1,785 court clerks. And then we also work with the city courts. We provide a range of different kinds of services that have really evolved, like education and training for judges. I do a lot of research. All of these courts have issues and trials going on, and different kinds of cases and pending motions. And so we get calls and then we work with the judges individually on various types of cases, but mostly criminal. They could be a summary proceedings, they could be ethical issues, they could be administrative issues. And all kinds of logistics, interpreters, and access to documents. Many times there'll be a famous case that might be on CNN or something. And we'll get a call from those courts, working with the press and working with which types of documents can be disseminated, what can go out that's public and what cannot.

John Caher: Just by way of background, the town and justice courts are kind of the entry-level courts, and there are an awful lot of them. A great many of them are part time. A great many of the judges are not lawyers and they handle, I don't know how many cases, but an enormous number. And I think for a whole lot of people, that is their first and only experience with the justice system. Correct?

Dave Whalen: Yeah, it's true. You know, I mean the state, from the Adirondacks and out in Long Island, has so many different areas geographically, but municipalities host and have the justice courts, and our judges are calling us, striving to do everything correctly.

John Caher: Yeah. They do try awfully hard. And I know that your office provides a lot of support. As I mentioned, many of the town and village justices are part time, and many of them are not attorneys. And I know your office provides very, very welcome support and assistance so these people can administer justice.

Dave Whalen: Three people in our office are judges, local judges: Nancy Sunukjian, who runs the office of justice support court support, is a Waterford town judge; and there's Sand Lake Town Judge, David Fryer; Diane Turo was in Milton. And then we also have Jeremy Zeliger and Alex Glick-Kutscha in our office, and all of them have enormous amount of experience. And it's an enormous pleasure to be able to work with them. They function at the highest level, super dedicated and really very bright.

John Caher: Now, obviously you have an experience that most people do not. Do you think your background, your experience, your unique perspective, adds something to the Office of Justice Court Support?

Dave Whalen: You know, I certainly feel that a perspective of being disabled and using an electric wheelchair and having certain kinds of issues, you certainly see the world different from different perspectives sometimes. And you want to be constantly challenging yourself toward any kind of bias and making sure that people just get what they deserve. It's incredibly special to have the public trust and be able to be employed and work on behalf of the public and try to make sure that they are treated fairly and justly.

And we're reminded of that by one of our judges, Judge Coccoma, who is going to be retiring. But as the Chief Administrative Deputy for all judges outside of New York City, he'd just constantly remind us that we don't own the particular jobs that we have. We are serving temporarily, for whatever duration that is, and reaffirm how important it is to just not have any bias and just do your work and do it diligently and appreciate

the fact that you're able to serve the public in a special way, to strive for a more just system.

John Caher: When did you join the court system again?

Dave Whalen: Roughly around 1995-ish.

John Caher: And in those years, how has the court system accommodated your needs?

Dave Whalen: In many, many different ways —allowing for different work schedules and telecommuting when it's needed, and open lines of communication and being proactive many times, in terms of if any technologies are needed or adjusting work schedules. With the court system, I work Monday evenings, recording night court. And then during the week I work nine to five. Then about a weekend a month, we split up a pager where we all assist judges for off-hour issues, which could be something like an arraignment or if a fugitive is apprehended and needs to be arraigned, or there's a night court going on or something of that nature.

John Caher: So, is it fair to say that you're carrying a full load and that the court system does what it can to make it possible for you to carry that full load?

Dave Whalen: I would say that the court system has been always striving to do really well, from my perspective, for people with disabilities.

John Caher: That's good to hear. Now, back to the ADA and since this is the anniversary, if you could tweak it or rewrite it or change it, what would you do? How does it need to be improved? What have we learned in these 30 years?

Dave Whalen: You hope that a public entity doesn't need the threat of litigation to make a more inclusive program or make a facility more inclusive. That being said, it's tough because architecturally for instance, investments are made and it's very difficult to make a change. For example, if you look at any university basketball arena, most of them are stadium seating. And so if you're in a wheelchair, you're either down near the floor, which is going to be very expensive, or up the rails beyond the stadium seating with the rails at the top. And so there's nothing in the middle.

If you look, if you want to see a tremendously inclusive architectural public accommodation, we have the Valley Cats locally in the Albany area [the Joseph L. Bruno Stadium is located in Troy]. They have dozens of

different locations [suitable for a wheelchair] and many movie theaters now have new seating schemes. Stadiums can't really correct if they were built before the ADA.

John Caher: With Valley Cats, you're referring to the minor league baseball team in Troy, right?

Dave Whalen: Yeah, yeah. And wonderful architecture, wonderful inclusion, huge numbers of seats that are available throughout the season.

But going forward, having the ADA in place is going to be really nice for people in many ways. The other thing is, I'd like to remind the listeners that we all grow old. We all have issues with our health. And so, you might not think of it at your early stage in your life that this would be an important issue. But these kinds of things can really turn out to be helpful for everyone.

John Caher: I know you have an interest in criminal law. I also know that you have unfortunate experience as a crime victim. In 2018, you were victimized by your caretakers' cousin, as part of a scheme to exploit disabled and elderly victims. A couple of things jump out at me from that incident, from the media coverage I was able to find.

One, the Schenectady County District Attorney, Bob Carney, said that the thieves were, quote, "no match" for you. Two, you were quoted as saying that you viewed the conviction as more of a tragedy than a victory. So how did all this come to light? What did you do about it? And where's the tragedy?

Dave Whalen: The case ended up getting media coverage from all over the United States. It really put me in touch with the criminal justice system. For everyone who's the victim of a crime, pursuing justice is a huge effort because you need to meet with the police and try to track down evidence and then work with an assistant district attorney. In my case, it was Dan Bulger who was incredible, incredibly dedicated and worked incredibly hard. And so did Bob Carney, the DA, and he worked at it diligently as well. Ultimately there was a conviction.

Appearing before a grand jury, which I did, and getting questions from the grand jurors, questioning me, my veracity, questioning me about how the scheme unfolded…When you're a victim and you're tied to it. There's really a lot of pain in terms of feeling vulnerable, as well as the financial loss. It was recouped in my case, but it wasn't certain that it was going to

be. If you work for years and put away money for your retirement and have it stolen, it's an enormous feeling of loss.

John Caher: It must have felt like a terrible violation. I guess it's one thing to have your house burglarized by a stranger. And this is someone you invited into your home, someone who was a caretaker, someone you thought you could trust. That must've been a terrible violation.

Dave Whalen: Yeah. The individual was convicted and received 12 ½ to 20 years in jail. I took no pleasure in having a fellow human being have to go to jail. But I did want to try to protect other individuals with disabilities from being preyed upon. I hope the individual that was involved in my case will learn from it and they will rehabilitate themselves and flourish in life, eventually.

John Caher: Now, as I mentioned at the outset, you are among other things, a sailor. Tell me about that. Tell me about adaptive sailing. What does that entail?

Dave Whalen: Ironically, you wouldn't think I'd want to be anywhere near water if I'm not able to swim. However, I do have a really highly-rated life preserver, and technology has changed, so I'm able to sail.

We've been able to adapt the sailboat to turn it by blowing into a straw, sipping and puffing, and to put in an automobile drag racing seat, a metal one, to be able to lean in and have the boat heel. We have a bunch of boats, different types, but this one I'm talking about it's called the sonar sailboat. It has a special seating system, special steering system, and a lift to get in and out of the boat. So, I'm able to sail and race sailboats and learn about sailing. Sailing is an incredibly adaptive sport, a very accessible sport.

John Caher: Were you into sailing before you got hurt, or is that something you picked up entirely afterward?

Dave Whalen: Definitely an after the injury endeavor.

John Caher: That's fantastic. And you compete as well, right?

Dave Whalen: Yeah, sailing is very accessible and there's a lot of new programs that are available for people to participate. And one of the really top sailing programs is the Clagett Regatta in Rhode Island. They promote opportunities for people with disabilities to learn about competitive sailing.

And each Saturday I do online lessons on racing sailboats, over the summer for the last eight weeks. Dave Dellenbaugh and Dave Perry are Olympic coaches for the United States sailing team. One of them won the America's Cup, was the helmsmen. And the other one was like a multi-time world champion with match racing, and I think was going to be in the Olympics. They volunteer, they help people with disabilities to learn about sailing.

John Caher: Now in your free time, I believe you also invented a musical instrument?

Dave Whalen: Yeah, that's been my real, one of my passions is music. I try to work on that a little bit as a hobby.

We've worked with a large number of other people, making a hands-free musical instrument. It's called Jamboxx. For 30 years I couldn't play music, and I was not getting any younger. I just really wanted to play electric guitar or piano or something and not just listen, but to actually participate in some way, but that was not happening. So, I reached out to a bunch of people and started working on a project that I just kind of stayed with and working on, building electronics and working on music. We're located at Albany Medical Center, our office, and we do music and then respiratory research. But we've got the units out all over the globe and then many different high schools across the United States, where the kids with disabilities use it. https://www.jamboxx.com/about/respiratory-therapy/attachment/albanymedicalcollege/

John Caher: What is this instrument? I guess it has to be a wind instrument. Right?

Dave Whalen: My thought, actually, was to make something you could breathe into like a harmonica that also controls software. So, you can change the instruments sounds, scales and strategies for playing. You can tap into different notes through software and trigger all kinds of different sounds.

John Caher: Well you must be pretty good at it. A couple of years ago, you played the National Anthem at a sporting event for about 12,000 people and the crowd went wild. What was that like?

Dave Whalen: That was an incredible experience. We were trying to promote adaptive music and the idea was proposed to me. I didn't really think about it too much, and I just said yes. It was quite an experience to be honest with you. I never was really a major musician in any way. It's more of a hobby and something I wanted to do. But the portion of the Anthem was picked up on Facebook and then had a huge, huge number of hits, hundreds to

hundreds of thousands within a day. We got feedback from Portugal and Spain and a lot of countries. So, all over the world.

John Caher: On that note, and since we are celebrating the 4th of July, I think we'll end the program, and thank you Dave, by playing your rendition of the National Anthem.

Dave Whalen: Thank you. Thanks for having me.

John Caher: Thanks for listening to Amici. You'll find all of our recent podcasts on the court system's website at www.nycourts.gov. And you'll also find a transcript of each interview. If you have a suggestion for an Amici podcast, let me know. I'm John Caher and I can be reached at (518) 453-8669 or jcaher@nycourts.gov. In the meantime, stay tuned!