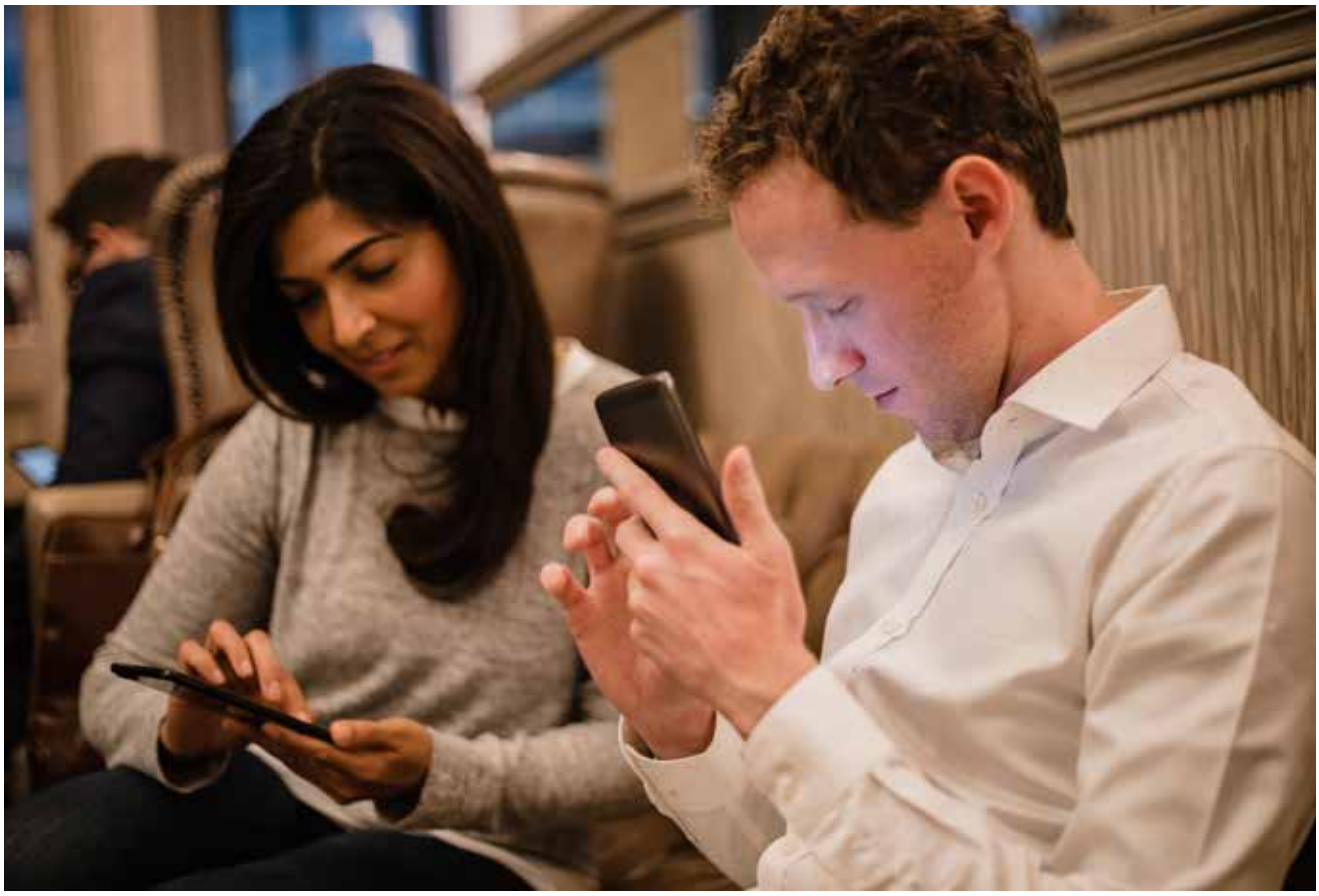

DISABILITY AND ACCESS

Perspectives from Judiciary Personnel on Issues of Accessibility

By Mamadi Corra

In 2004, the U.S. Supreme Court affirmed the constitutionality of Title II of the Americans with Disabilities Act "as it applies to the class of cases implicating the fundamental right of access to the courts."[1] In his majority opinion in *Tennessee v. Lane*, Justice John Paul Stevens wrote that Title II "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." The opinion noted that these other guarantees included the right of access to courts protected by the Due Process clause of the Fourteenth Amendment.

The various implications of this ruling are too numerous to note here. Instead, this article reports results from a recent study[2] undertaken by the author as part of an American Association for the Advancement of Science (AAAS) fellowship with the Federal Judicial Center in Washington, D.C.[3] Results reported here come from interviews with various judiciary personnel, as well as individuals in the judicial and disability legal and research communities, to survey perspectives on issues of accessibility that are of concern to judicial personnel with disabilities. Judges (federal and state), scholars in the disability research community, U.S. attorneys, and disability rights and other attorneys shared what "access to courts" and/or accessibility means to them. What, for example, does access entail inside the courtroom (where the rubber actually

meets the road)? In reporting the results here, the hope is to increase awareness of some of the issues on accessibility that are of concern to members of the court family with disabilities.

Judiciary personnel with disability interviewed represent three main categories: physical impediment, visual impairment, and hard of hearing and/or deafness. Additional interviewees included personnel that work/have worked with these, as well as members of the legal profession in the area of disability rights/advocacy/research. Initial contact (by email/phone) with organizations like the American Bar Association's Commission on Disability Rights, the Federal Bar Association, the National Association of the Deaf Law and Advocacy Center, the National Federation of the Blind, and Disability Rights Advocates helped generate lists of possible interviewees. The interviews were conducted in person, by phone, and/or by email.

At the outset, a consensus from interviews of judicial employees with disabilities is that they enjoy an overall welcoming and accommodating working environment, with co-workers who are very helpful. A previous staff attorney with one of the U.S. circuit courts, for example, had "no issue whatsoever" with co-workers. This interviewee reported that, in fact, everyone that he had worked with in the federal judiciary was very accommodating and ready to offer assistance when asked. A state judge interviewee similarly noted that he experiences little or no "physical barriers." This judge further mentioned that court access was previously improved for an earlier judge and that automatic doors were retrofitted to accommodate his needs. Another state judge indicated that his "experience has been that most judges are very understanding of the need for accessibility accommodations and will do whatever they can to make sure they are provided in the courtroom—given enough notice beforehand." He added, however, that "there are always a few judges out there who are resistant." This judge found providing accommodations to persons with disabilities "a problem more in the state courts than the federal courts," but he has "heard of a couple of federal judges who are not on board."

On the other hand, a few less positive issues also came up in the interviews, including (1) concerns about the underrepresentation of persons with disabilities, especially judges, in the judiciary; (2) communication barriers for hard-of-hearing and/or deaf individuals; (3) difficulties in accessing documents by persons with vision impairments; (4) limited knowledge and familiarity with the types of assistive technology available and how they can be used; and (5) attitudinal impediments.

The Underrepresentation of Persons with Disabilities, Especially Judges, in the Judiciary

This is one of the most recurring issues that came up in discussions with judicial personnel. Virtually everyone expressed concern with the underrepresentation of persons with disabilities in the judiciary. A quick (nonscientific) search of the number of blind/visually impaired judges in the United States, for example, revealed only two currently serving at the federal level, and an additional two serving at the state level. The Honorable Judge David Tatel is currently a federal judge with the U.S. Court of Appeal for the D.C. Circuit, and the Honorable Judge Eric N. Vitaliano is a senior judge with the U.S. District Court for the Eastern District of New York. A third federal judge, the Honorable Judge Richard Conway Casey, U.S. District Court for the Southern District of New York, died in 2007. The two blind/visually impaired judges currently serving at the state level are Judge Peter J. O'Donoghue in New York State and Justice Richard Bernstein with the Michigan Supreme Court.

As a second example, the statistics on the number of deaf and/or hard-of-hearing judges is particularly low. An interviewee with the National Association of the Deaf (NAD), for example, observed that his organization was "not aware of any persons who were deaf from birth or childhood becoming a judge in the United States at any time in history." Rather, "the judges we know of that are deaf or hard of hearing either acquired their deafness later in life or were hard of hearing throughout their life rather than deaf," and "[t]o the best of our knowledge, there are two well-known late-deafened or hard-of-hearing judges that recently retired." They are retired Honorable Judge Richard S. Brown, Wisconsin Court of Appeals, and retired Honorable Judge Charles W. Ray Jr., superior court judge for the Fourth Judicial District of Alaska.

The interviewee with the NAD added that they "have asked Judge Brown (who is now the president of the Association of Late Deafened Adults [ALDA]) about other deaf/hard-of-hearing judges, and his answer was that there were a few (probably not much more than a handful), but all the ones he knew have all retired or left the bench. He is not aware of any deaf or hard-of-hearing persons currently serving as a judge." The NAD official added that they "believe all of these judges served at the state or local level, and that there has never been a self-identified deaf or hard-of-hearing judge at the federal level."

Another state judge interviewee observed that there are upward of 500 judgeships in Arizona, and yet there are only three judges with a physical disability. This interviewee also brought up the issue of the pipeline of individuals going to school to become lawyers and ultimately judges. He observed that few in this

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pipeline are persons with disabilities and that effort should be made to increase the number of persons with disabilities in this pipeline.

Some interviewees emphasized attitudinal barriers as related issues with the underrepresentation of persons with disabilities in the judiciary. Several interviewees noted such barriers to be main impediments. Here, "attitudinal" means public attitudes toward persons with disabilities in the judiciary.

One state judge with a speech impairment, for example, observed that, in public opinion surveys, some have expressed that he is difficult to understand. He attributes this sentiment to the limited interactions that people have with persons who are judges with disabilities.

Communication Barriers for Hard-of-Hearing and/or Deaf Individuals

Another recurring issue that came up in interviews with judicial personnel has to do with "the ability to understand communication." A judge interviewee observed that he saw this as "the major impediment." This judge added that this "is especially important for judges because they must understand everything that is said in court."

Here, captioning of material was an issue that came up repeatedly. A hearing-impaired judge mentioned that "captioning or ASL [American Sign Language] is a must for a deaf judge." He then quickly added that he knows that "the concern will be that the judge is only looking at the screen or the interpreter and will miss out on everything else that is occurring in the courtroom, things that help a judge determine demeanor, for example." In this judge's opinion, however, "deaf and hard-of-hearing people have learned to be multitaskers in these situations. No doubt, the judge should be adept at looking at the courtroom and the captioning or ASL at the same time. This is quickly learned in my opinion. I used captioning and was still able to keep my eye on everything that was going on." A disability rights attorney and advocate similarly mentioned that oral arguments of federal appeals courts that are posted online are not captioned. These arguments are only in audio form, which makes it impossible for the deaf and/or hard of hearing to review.

A hearing-impaired judge interviewee more generally offered a number of areas that he saw as impediments to communication for deaf and/or hard-of-hearing individuals. These include the sound and lighting of courtrooms, distance between participants in judicial proceedings, and physical barriers between participants in judicial proceedings. With respect to sound, for example, this judge observed that "[m]arble or slate floors and high ceilings provide poor sound. Sounds echo with tall ceilings. The courtrooms should be carpeted, the ceilings low, soundproof the walls to keep out echoes." Moreover, "[i]t's hard to speech-read (lip read) with poor lighting. The lighting should be easy on the eyes." In other words, "[i]t is easier to hear and speech-read close up than far away. Counsel tables should be closer to the bench and the witness box should be in a place where it is easy to see the witness."

Finally, with respect to physical barriers between participants in judicial proceedings, this judge thought that there should be less distance. As he put it, "the wooden barrier forming the [witness] 'box' is too high. Many courtrooms, especially the older ones, have an actual 'box.' They are usually four sided, with an opening for ingress and egress. The box is made of wood, usually, and it is the height of the wood that is of concern. Some of these wooden boxes are so high that the judge's vision of the witness is impaired, depending on the witness." He added that he has "been in courtrooms where the witness box was so high, the judge could hardly see the witness from the bench."

This judge interviewee was certain that all these communication impediments can be easily remedied. He observed that having a court reporter who captions would go a long way toward solving the ability to understand communication. He added: "Having a top-notch ASL interpreter would do the same for those who sign. Infrared and loops in the courtroom for the hard-of-hearing judge would be great and certainly doable. Carpet the floor, bring the tables and bench closer together, remove the physical barriers that hinder eyesight, and get a special soundproof wall—the same kind used by symphony orchestras, and the judge is in business."

Issues Associated with Persons with Visual Impairment

The interviews revealed several issues in dealing with persons with visual impairment. These issues include access to electronic case file (ECF) documents, machine-unreadable handwritten/scanned submissions, and Optical Character Recognition (OCR) of transmittals (e.g., Administrative Office of the Courts (AO) Transmittals on Ethics and Judicial Conduct) to judicial personnel with visual impairments. Interviewees emphasized that some of these can be minor, while others can be major. One interviewee found it to be minor when a single page (or short document) is written by hand and thus machine unreadable. This interviewee observed that co-workers frequently (and happily) read to him short documents that are not readable by a screen reader. But he finds it imposing to ask that of co-workers when it comes to long documents. In general, handwritten documents are problematic for persons with visual impairment. One federal judge interviewee suggested that the Federal Judicial Conference think about how to handle handwritten documents as a uniform rule.

With respect to ECF documents, a former clerk to a federal district judge with visual impairment noted: "When one files any document on ECF, the system 'stamps' the document with a header at the top listing the case number, document number, etc." She added: "This process—whatever it is—used to turn a previously accessible document into an inaccessible one." Importantly, this interviewee provided me with a copy of a complaint in a case her office filed as fully accessible. She also sent me the stamped version that's available on ECF (to both the court and the parties) that removes all of that accessibility—the screen reader can only read the header in the ECF version.

By "used to turn a previously accessible document into an inaccessible one," however, the interviewee informed me that she thought this may have been fixed. She

"looked at more recent examples" and thought "they've actually fixed this issue!" She provided me with the original filed version and the one that's on ECF of a recent case that she was working on. The stamped version of this did not have the screen reader inaccessibility issue. "Short answer: I think they may have actually fixed this problem, which is great!"

Other interviewees continue to have issues with OCR of transmittals (e.g., AO Transmittals on Ethics and Judicial Conduct) and other documents to judicial personnel. AO transmittals on Guide to Judicial Ethics, for example, usually come with an embedded link to a PDF file that is not directly OCR. And depending on what browser one uses to open the file, and what screen reader one is using, the PDF file is inaccessible.

This problem usually arises when a document is first printed, then scanned, and then saved as a PDF file. The original document prepared in Word and saved as a PDF, for example, would be directly readable by a screen reader. The scanned PDF version, however, may not be OCR compatible and/or readable by a screen reader. To make the information in an image only PDF accessible, one can use the PDF recognition features found in certain brands of OCR software. Alternatively, the OCR features of Adobe Acrobat Standard or Professional can be used to convert an image file to readable text. Here, the automatic OCR software in Acrobat is an easy fix when preparing a document for dissemination.[4]

A related issue is documents submitted by individuals (e.g., attorneys) that are sometimes not accessible—because the attorney may have filed an inaccessible document. A possible remedy to this might be courts adopting a uniform rule for how documents should be submitted.

The Second Circuit provides an excellent example of a uniform rule on how documents should be submitted via the CM/ECF System.[5] Its "Working with PDFs" outlines Local Rules 25.1(c)(1), (e), and (j)(3); 25.2(b)(2) and (3); and 27.1(a)(2).[6] These series of rules require (1) CM/ECF document submissions to be in PDF; (2) such documents to be text-searchable; (3) fillable PDF files uploaded to NextGen CM/ECF to be "flattened" before uploading;[7] and (4) multiple PDFs to be combined into one PDF and the resulting document appropriately paginated. The site then provides links to information that provides instructions for completing each of the foregoing tasks, i.e., "Creating a PDF from Word or WordPerfect," "Making a PDF Text-Searchable," "Flattening a Fillable PDF," "Combining Multiple PDFS into a Single PDF," "Paginating a PDF," and "Dividing an Oversized PDF."

Limited Knowledge and Familiarity with the Types of Assistive Technology Available and How They Can Be Used

Another key issue that came up in discussions with interviewees is the limited knowledge and familiarity with the types of assistive technology available and how they can be used. With respect to assistive technology in the courtroom, for example, one interviewee noted: "If the participant is deaf, then C.A.R.T. (Computer Assisted Real-time Technology) is essential. If the person has a visual disability, then text-to-speech is important—if there are documents that come into the record. If the participant has an ambulatory disability, then doors which open by pushing a button are important."

One key source is the website of the Web Accessibility Initiative,[8] which posts key developments on digital accessibility and emerging technology. Such "assistive" technology includes:[9]

- Alternative mouse and keyboards,
- Speech recognition and text-to-speech software,
- Speech recognition and speech-to-text software,
- Captioning software, and
- Screen magnifiers and readers.

Key Suggestions

1. A Process That Leads to More Nominations of Qualified People with Disabilities in Judgeships.

This was a key suggestion/recommendation that came up in many of the discussions. A state judge interviewee noted that he thought that "the individual states need to do more to encourage people with disabilities, such as hearing loss or deafness, to apply for judgeships. Too many people assume that a deaf person cannot be a judge because of the impediment. The more the public sees successful deaf and hard-of-hearing judges, the less this will continue to be a problem." Another judge suggested the federal judiciary consider having a process that leads to more nominations of qualified people with disabilities in judgeships. Yet another interviewee suggested the need for programs that help increase the number of people with disabilities in the pipeline of individuals going to school to become lawyers and ultimately judges.

2. Having an Accessibility Coordinator Central in the Judiciary as a Resource for Advice, Guidance, and Recommendations.

This was another key suggestion that came up repeatedly. A judge interviewee, for example, made the following observations: "In state courts, an ADA coordinator on the state level, one well-versed in the accommodations available and the cost involved, should be available to help county ADA coordinators to do each specific job. The judges should be able to get help by only having to make one phone call. So, for example, when the court is informed that an accommodation will be needed on a certain date, the court need only call the county ADA coordinator. The county ADA coordinator should bring in the state coordinator if he or she does not have the resources available to take care of the problem. At the federal level, the ADA does not apply. Still, the clerks should be well-aware of the accommodations available and act just as a state ADA coordinator would."

3. Courts Adopting a Uniform Rule for How Documents Should Be Submitted.

An excellent example of this is the Second Circuit submission procedure detailed above.

4. Continual Judicial Education on Issues of Accessibility.

Interviewees emphasized that this should include programs aimed at increasing

knowledge and familiarity with the types of assistive technology available and how they can be used. The observations of a judge interviewee are typical: "There must be continuing efforts to educate the judges and hold these judges accountable. I would like to see judicial ethics rules amended so that judges face suspension or public reprimand if they don't provide accommodations without good cause. I believe judicial education should have refresher courses every few years as a reminder of the importance of providing accommodations to those with disabilities. They should be plenary sessions, not breakouts. And attendance should be required."

5. A Proactive Approach to Accessibility. For example, in total, to date there have been about 140 ad hoc and special committees of the Judicial Conference of the United States that have been in place at one time or another since its inception in 1922.[10] To the knowledge of interviewees, none has been dedicated to disabilities and access to the courts. Accordingly, it is suggested that the Federal Judicial Conference consider establishing a committee on accessibility or incorporating issues of access as part of the tasks of one of the already-established committees.

Another suggestion is a more proactive approach to building architecture. A visually impaired federal district judge, for example, would like to see more uniformity in flooring/building architecture. He suggests a more utilitarian approach to architecture—one that emphasizes the utility of the feature of a building rather than its aesthetic appeal. This judge, for example, noted that for a long time he had issues with identifying the steps of the courthouse building where he works. Presumably the steps were initially designed for aesthetic appeal. But this made it difficult to differentiate one step from the other. This issue persisted for him until yellow edgings were added to the steps.

Conclusion

This article details results from interviews with some relevant stakeholders aimed at surveying perspectives on accessibility of courts. A general consensus from interviews of judicial employees with disabilities is an overall welcoming and accommodating working environment, with co-workers that are very helpful. Some key issues, however, include (1) concerns about the underrepresentation of persons with disabilities, especially judges, in the judiciary; (2) limited knowledge and familiarity with the types of assistive technology available and how they can be used; (3) communication barriers for hard-of-hearing and/or deaf individuals; (4) difficulties in accessing documents by persons with vision impairments; and (5) attitudinal impediments. A main takeaway from these is that barriers to access are as varied as the types of disabilities individuals have.

Moreover, these interviews reveal several suggested improvements, including (1) the need for a process that leads to more nominations of qualified people with disabilities in judgeships; (2) the need for continual judicial education on issues of accessibility; (3) the need for a uniform rule for how documents should be submitted; (4) a proactive approach to accessibility; and (5) the need for a centralized accessibility coordinator for advice, guidance, and recommendations. Yet, a key limitation is also worth noting. Findings reported in this article are based on interviews of a convenience sample. Moreover, the focus of the study was on the federal judiciary, although interviewees included both state and federal judicial personnel.

Notwithstanding these limitations, however, the results of the study reported here can serve as a foundation for future investigations with larger, more representative samples. Finally, a reviewer of this article thankfully brought to my attention an important limitation that needed acknowledgment. This reviewer rightly pointed out that monetary resources are a huge barrier to the needed accommodations, especially at the state level, and that "[b]uildings have been retrofitted where able, but much of the technology required, especially for visually impaired and deaf judges, is overwhelming and hard to justify given the real hard choices that courts must make." ■

Endnotes

1. Tennessee v. Lane, 541 U.S. 509, 531 (2004).

2. The full report of this study is accessible at the website of the Federal Judicial Center at https://www.fjc.gov/content/343147/disability-and-federal-courts-study-web-accessibility; or directly at https://www.fjc.gov/sites/default/files/materials/24/Disability%20and%20the%20Federal%20Courts.pdf.

3. I am grateful to the American Association for the Advancement of Science (AAAS) for a 2018–19 AAAS Science & Technology Policy Fellowship placement in the Judicial Branch program, and support of the Gordon and Betty Moore Foundation that funds this fellowship. I thank the Federal Judicial Center (FJC) for hosting me during this fellowship year, and Research Division Director Jim Eaglin for his excellent mentorship.

4. *See* https://acrobat.adobe.com/us/en/acrobat/how-to/ocr-software-convert-pdf-to-text.html.

5. The site notes: "The CM/ECF system accommodates Adobe Acrobat Version 5 and higher. If a user's computer does not meet this software requirement, a filer can obtain Adobe Acrobat Reader, Adobe Acrobat Standard, or Adobe Acrobat Professional software from Adobe's website [link https://www.adobe.com/provided]."

6. http://www.ca2.uscourts.gov/clerk/case_filing/electronic_filing/how_to_use_cmecf/working_with_pdfs.html.

7. Flattening ensures that the document can be viewed on all devices and prevents others from manipulating or editing the information.

8. https://www.w3.org/WAI.

9. Screen readers, for example, are software programs that enable blind or visually impaired users to read text that is displayed on the computer screen. Voice-to-text software, by contrast, allows for the transcription of audio content into text/written words.

10. *See Judicial Conference of the United States: Comittees*, Fed. Judicial Ctr., https://www.fjc.gov/history/administration/judicial-conference-united-states-committees-chronological.

Canary in the Coalmine

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four times the rate of white men, while Native women are admitted at six times the rate of white women. President Barack Obama made it a point to visit reservations and include Tribes in both consultation and passage of laws protecting Native women and children as well as expanding Tribal jurisdictional authority over criminal actions long unprosecuted by the Department of Justice.

The constant ebb and flow of Tribal policy, the canary in the coalmine, currently sees the Native culture and community used as a punchline for political advancement. Terms such as Braves, Redskins, and Squaw are used without thought as to the negative connotation or impact on the people portrayed. Romanticized and misinformed views of Native Americans continue in film, television, and even costumes at Halloween. Certainly, other minority groups experience similar issues, but the outcry for the plight of the Native community is less vocal, noticeable, and often more accepted for America's first peoples.

Still think the canary effect isn't alerting you to anything? Check the arrests in recent years in your own community. Also, check what sorts of arrests are made. Chances are, there will be an increase in things like public drunkenness, illegal citizen arrests, and confrontations based on racial or ethnic classifications.

What we are seeing in recent years should be concerning to all of us: lack of medical and educational funding and resources, dirty water, depression, alcohol dependence, generational suicide trends, and attacks on individuals based solely on religious affiliation or cultural identity. Yet, it has been so easy for us as a nation to look away from all of this. When the society becomes so poisonous that it allows any group or people to be attacked or vilified without consequence or outrage, everyone should be concerned. The Native nations are only indicators.

Within this issue, you will find a number of insightful articles on not only the Native American community and culture, but also solutions and approaches to problems that are currently present throughout the United States and the world. Understanding and expanding your own view of how we should approach solutions to that which confronts us and working outside the conventional and accepted legal and political norms is the goal of this issue.

Restorative justice acknowledges not only the impact that crime has on a community but also what happens when the criminal is released. Giving power to natural resources reflects the relationship that we have with the environment in which we live. Addressing our protection of women and children supports the basis for our continued survival as people and a community.

All of these issues are reflective of a culture that has been removed, attacked, exterminated, terminated, and locked away, but yet it has survived. In spite of the attempts by nations from around the world to ignore, remove, and minimize them, Native American nations have survived and flourished. Finding balance and harmony within their boundaries and holding strong to their original cultural values, Tribes now generate over $50 billion a year in revenue and in some states present the largest employment opportunity for its citizens.

The canary is struggling in its reflection of the United States. It is time that we started looking to those who have survived, despite the efforts to choke off the very air that the canary needs to breathe. The hope is this issue continues (or perhaps continues to begin) that journey. ■

Are You an Author in Waiting?

The Judicial Division has appointed a Book Editorial Board that will soon be seeking submissions.

As for the types of books the book board will consider, here a few ideas that have been tossed around:

- Practicing in Specialty Courts (DWI Courts, Drug Courts, Housing Courts, Family Courts, etc.)
- A View from the Bench on Dispositive Motions in Criminal and Civil Cases
- A View from the Bench on the DOs and DON'Ts of Appellate Advocacy
- Judicial Perspective on Discovery and eDiscovery
- Judges, Lawyers, and Social Media
- How Judges Read Digital Submissions

Stay tuned for future announcements from the Book Editorial Board!