

PRESIDENT'S REPORT



DOUGLAS R. YOUNG
2019-2020

AMERICAN COLLEGE OF TRIAL LAWYERS

President's Year End Report American College of Trial Lawyers 2019-2020

Dear Friends:

The theme of this Report, which marks the end of the 2020 presidential term for the College and anticipates the College's 70th Anniversary, is "*Gratitude*" as we contemplate all that has happened in our societies and the world since the year began at the Vancouver meeting in September 2019. The pandemic, economic uncertainties, the incomprehensible killings of George Floyd and others, and the social unrest that these events inspired, have challenged faith in institutions and affected the ways in which people interact. But they have not changed our Mission or our resolve. In understanding and responding to the events of this year our commitment was only strengthened as we learned to be vulnerable, empathetic, and resilient at the same time.

Terry and I are grateful to have made this journey -- truly a tale of two different years -- with all of you. You helped immensely as we began the usual College year in which Presidents and spouses travel widely, meet talented and engaging people, and carry the College banner and influence. Between September and March we enjoyed approximately 20 trips throughout the continent (including two to Canada), and we were anticipating many more of course. But then the year transitioned to one in which travel was increasingly difficult or even impossible, meetings were shuttered, and we learned to operate on virtual platforms in an era of masks and social distancing. In the space of about one week, we literally went *from this*:





To this:



Terry and I wish that events had evolved differently, but we dearly appreciate the support shown by so many of you as the College successfully turned moments of disappointment into opportunities to complete its Mission in unique and different ways. As the legendary UCLA basketball coach John Wooden is reported to have said, “Things work out best for those who make the best of how things work out.”

First and foremost is my gratitude to Terry. In the shorter version of this Report, published in the *Journal*, I describe how much I have been “honored and moved by her support and myriad contributions, all of which she offered unselfishly, with enthusiasm, and with the purpose of making the College experience better for those participating in it.” Most of you have seen first-hand her devotion to the College fellowship these last many years in College leadership roles; and you have observed, beginning long before last year’s meeting in Vancouver, how enthusiastically and effectively she embarked upon the responsibilities of this year. She has been disappointed that the rewards that go with being the “First Spouse” during the President’s term could not be fully realized. But she has never faltered in her support and efforts to see opportunity wherever she could. I am deeply in her debt. And I love her more than ever (if that is even possible).

The Executive Committee has functioned collegially, and always by consensus. How lucky the College is to have Rodney Acker and Judy as the President and First Lady for the coming year and to have the continued dedication and service of Mike O’Donnell and Brett, Susan Harriman, and Bill Murphy and Pat. Our good friends Jeff Leon and Carol will be missed on the Executive Committee this coming year, but we are grateful that their friendship to us and loyalty to the College will continue. The Regents have also been active and supportive. We will miss outgoing Regents Paul Hickey (Region 4), Dan Reidy (Region 8), and Bob Welsh (Region 13) even as we welcome their successors, Dan Folluo, Jeff Stone, and Katie Recker respectively. And many of our Past Presidents have put “shoulders to the wheel” to offer creative ideas, support for initiatives, and help in developing national and local programs. We lost two giants this year – Michael Mone of Massachusetts (President 1999-2000, memorialized in the Summer 2020 issue of the *Journal*) and Gene Lafitte, Sr. of Louisiana (President 1994-1995 and memorialized in this issue). Both contributed actively even long after their presidential years. Their commitment and example are reminders of the trust our colleagues permit us to fulfill.

The College has been very active this year (substantively, at least as much as in prior years) notwithstanding the confluence of events that held the potential to adversely affect its work and influence. Supporting all of us throughout the year

has been the National Office Staff, which, beginning with the unexpected labor unrest in Vancouver, has pivoted with every surprising development to make things work. Dennis Maggi (Executive Director), Amy Mrugalski (Board/Executive Administrator), Suzanne Alsnauer (Senior Meetings and Conference Manager), Geri Frankenstein (Sr. Manager, Membership) , Eliza Gano (Communications Manager, recently departed for a new career), Katrina Goddard (Meetings and Conference Coordinator), and Cheryl Castillo (Office Administrator) represent the ideal administrative team: well-led, loyal, and dedicated to ensuring every day that the College’s substantive missions continue unabated.

Among the milestones of the year was the creation of the Thurgood Marshall Equality and Justice Award (the award name pending formal approval from the Marshall family), and the decision to award it posthumously to Congressman John Lewis. Regents Joe Caldwell and Rick Deane led an outstanding Task Force that worked collegially and with dispatch to create the criteria for the award and to identify its first recipient. As Joe and Rick explained to members of the Task Force:

“Recurring issues of race and inequality are again at the forefront of our public discourse. Both the U.S. and Canada have long grappled with these issues through much our history. Now, the tragic deaths of George Floyd and too many others have again put a spotlight on injustices that continue to plague our pursuit of equality and justice for all. . . . As a preliminary step, the College wishes to recognize champions who have fought for equality and justice and against racism in keeping with standards for such an award to be established by the College.”

The members of the Task Force included Fellows Nanci Clarence, Isabelle Kirshner, Kenneth Murphy, Louis Charette, La’Verne Edney, Lamont Jefferson, Pleasant Brodnax, Virgil Adams, the Honorable Maria Aguilera, Gregory Wells, Michael Herring, Frederic Gilbert, and Ashok Ramani. (The Task Force members have accepted appointments to the new Standing Committee for the Award, which will be chaired by Gregory Wells. La’Verne Edney will serve as Vice-Chair and Rick Deane will serve as the Regent Liaison for the committee’s initial year.) The award, to be given “from time to time to an individual who has, with vision, courage, and fortitude, stood steadfast in the passionate and effective pursuit of equal justice under the law,” will be a meaningful response to the events of the

current year and also a regular reminder of the College's commitment to equality and justice in every facet of our societies.

Another significant development this year was the creation, literally within hours after the pandemic was officially acknowledged, of the Task Force on Advocacy in the 21st Century. The Task Force has been ably chaired by Regent John Day and, in a matter of several weeks (and following multiple almost-weekly meetings), resulted in eight comprehensive "Interim Guidelines" on issues pertaining to the conduct of judicial proceedings (including trials and appellate arguments) and regarding important constitutional and other protections to be considered when considering the reopening of criminal courts during the pandemic. These papers, prepared by distinguished Fellows and Judicial Fellows from both the U.S. and Canada, are posted on the College website and have been widely distributed to the Fellows and courts throughout both countries. The work of this Task Force is immensely important to the administration of justice, one of the primary prongs of the College Mission, and represents an example of how the College can mobilize quickly and responsibly in response to unexpected needs. As the Chief Justice of the Michigan Supreme Court has noted:

"Why is our system of justice held together with the threads of 20th century technology and 19th century processes?"

Through the Task Force, the College is among the groups at the head of the curve in evaluating these issues and will be continuing its important work into 2021 and likely beyond, as what are now "interim" guidelines are refined in the light of experience over time. I am recommending, therefore, that the Executive Committee and the Board of Regents consider conferring General Committee status to the Task Force.

One of the featured issues of the Leadership Workshop that followed the Annual Meeting in Vancouver was Judicial Independence. The Honorable Jeremy Fogel, a retired state and federal judge, former head of the Federal Judicial Center, and current Executive Director of the Berkeley Judicial Institute was the keynote speaker for the Workshop, which offered the traditional opportunities for College leaders to interact and prepare for their responsibilities in the coming year. Judicial Independence was selected as a focus of the Workshop in anticipation of the pressures expected in the upcoming election year and in light of the 2019 White Paper entitled *The Need to Promote and Defend Fair and Impartial Courts*. Within the first few months of the New Year, the College found it necessary to issue two public official statements in support of Judicial Independence: The first, in February 2020, addressed the President's public statements criticizing Federal Judge Amy Berman Jackson and one of the jurors in the case against Roger Stone. It read, in part:

“The American College of Trial Lawyers believes that the President has the right to disagree with a judicial opinion and to seek legal means to overturn it on appeal; but *ad hominem* and disparaging personal attacks on an individual judge are an affront to the fundamental principle of judicial independence that cannot be ignored. The College also believes that no President should interfere in a pending judicial proceeding, take actions or make statements that could reasonably be viewed as intimidating a judge or belittle any judge for his/her decision on sentencing. It is vital that all branches of our government respect the integrity of the judicial process.”

The second, issued in March 2020, addressed public remarks by Senate Minority Leader Chuck Schumer that publicly called out Supreme Court Justices Neil Gorsuch and Brett Kavanaugh in a manner that appeared to challenge the Justices by name if they did not vote a certain way on a particular matter pending before the Court. The College statement read, in part:

“While the First Amendment protects the free speech of all American citizens, when a prominent and leading member of the legislative branch personally demeans individual members of the judiciary by name and in so doing appears to threaten them if they do not vote a certain way on a particular issue, the criticisms threaten the balance among our branches of government and particularly the independence of the judiciary. . . . [N]o public official should interfere in a pending judicial proceeding, take actions or make statements that could reasonably be viewed as intimidating a judge or belittle any judge for his/her decision.”

State Committees in Alaska and Arizona also issued statements in support of the judiciary. In Alaska, the statement was issued after the Governor vetoed part of the budget enacted by the legislature to fund the Alaska court system in response to a ruling of the State Supreme Court with which he disagreed; in Arizona the statement was issued after the Governor publicly criticized a federal district judge on a personal level in response to an opinion he did not like.

The overall effort in support of Judicial Independence, including those described above, has been led by a new General Committee led by Fellows John (“Buddy”) Wester and Kent Thomson. Recognizing that public statements in support of judicial independence are important but not sufficient, the Committee has also facilitated the College’s joint effort with the National Association of Women Judges (NAWJ) to develop a public education pilot project through which College

Fellows will make public presentations using NAWJ's Informed Voters Project (IVP) appropriately modified to highlight the importance of judicial independence. This project represents an important and very impressive opportunity for the College to engage in public education that will lead to greater confidence in our judiciaries and the Rule of Law generally. A subcommittee, including Fellows Virginia Nelson and Kathleen Trafford, working with IVP leadership, refined the pilot project and developed a 50-slide Power Point deck including animations and a video along with notes for the Fellows who will be making the presentations. These are posted on the College website. In addition (and significantly), the curriculum is appropriate for either in-person or remote and recorded use. Although the pandemic resulted in a pause in the initial schedule, the program is ready to be rolled out in 2021 and initially will target ten states (California, Florida, Iowa, Kansas, New York, North Carolina, Ohio, Pennsylvania, Texas, and Washington), and can be expanded to include more states and Canadian provinces.

Our Diversity and Mentoring efforts – as important or more so today as ever – have continued to evolve. Almost every State and Province Committee has at least one diversity liaison and, under the leadership of Regents Joe Caldwell and Rick Deane, have helped those Committees identify qualified candidates for Fellowship in places where the College might not otherwise have looked. Their efforts have shown promise, as reflected in the gathering of self-identified diverse inductees in the Presidential Suite for a reception in Tucson:



And, under the direction of Regent Caldwell and Fellows Tom Heiden and Joe Crawford, and the Teaching of Advocacy Committee, two unique programs for diverse trial lawyers have been organized in Chicago, Illinois. One is the Diversity

in the Courtroom Program, designed and dedicated to “helping to develop the next generation of diverse and inclusive trial advocates.” As Fellow Heiden has stated:

“Our society is diverse. Our courtrooms are diverse – judges, jurors, court personnel, and witnesses. The trial lawyers should mirror the diversity in our society and in our courtrooms. . . . The emergence of a broader group of talented diverse trial lawyers will benefit clients and our system of justice in general. ACTL’s Diversity in the Courtroom Trial Advocacy Program will work to bring even more talented advocates of excellence into our courtrooms.”

The other is the In-House Corporate Litigation Attorney Program, which will “strive to equip and assist those in-house lawyers in tasks essential to the performance of their job, such as selecting diverse trial counsel, managing trial theme development, and guiding trial and settlement strategies”. These programs will not charge fees to attendees and ACTL Fellows will serve as faculty. In announcing these programs, the College stated:

“Both programs will strive to build faith, trust, and belief in the civil justice system. Preserving and protecting the rule of law and the civil trial system depends in part on the commitment provided today. The ACTL is committed to these goals and to nurturing the next generations of excellent trial advocates.”

The programs had to be postponed in light of the pandemic, but will be rescheduled for 2021, if possible.

Paralleling these efforts is the work of the College’s Boot Camp Trial Training Programs Committee, led by Fellow Paul Sandler. The pandemic has had its impact on the work of this Committee, but the Committee has persevered nonetheless. It has presented some programs via virtual formats recently and has approximately six programs scheduled or in the works for the remainder of this year and early 2021. As has been reported earlier, it has established a new project, entitled “Trial Talks”, through which Fellows describe their real-life courtroom experiences. After these programs have been presented, written outlines of the presentations will be posted to a new “Boot Camp Trial Library,” containing books, articles, and Power-Point presentations relating to trial practice generally. The Library also envisions development of a book that includes stories by Fellows about “lessons learned” in the practice of trial advocacy. Past President Bob Byman and former Regent Elizabeth Mulvey have agreed to serve with Paul

Sandler as co-editors of the book. Other College teaching and outreach efforts included: through the efforts of Fellow Sylvia Walbolt and Regent Sandra Forbes, the website postings of videos of effective trial examinations, including by women advocates, which may be especially useful for younger women lawyers who do not have mentors to assist them; the National Moot Court Competition in New York City; and the Gale Cup, which Terry and I were honored to attend in Toronto. (As I reported in an earlier writing, one of my favorite quotes from the year came from Judicial Fellow Sheila Martin who, when addressing the students at the Gale Cup on the fine art of oral advocacy, advised them to consider what judicial officers need to hear in order to be persuaded, and thus to “be a guide dog, not a show dog”.) Unfortunately, both the National Trial Competition and the Sopinka Cup were affected by Covid-19 disruptions.

A related effort has been the very successful Civility Initiative led by members of the Teaching of Trial and Appellate Advocacy Committee and the Legal Ethics and Professionalism Committee and led by Fellows Joe Crawford and Don McKinney. This distinguished group of Fellows developed a seminar using videos filmed in 2019 at the Annual Meeting in Vancouver and at the Leadership Workshop in California. The initial presentation, conducted at the Temple University’s Beasley School of Law in Philadelphia before an audience of approximately 150 lawyers, included the Honorable C. Darnell Jones of the federal district court in Pennsylvania and Fellows Linda Hoffa, Michael Turner, John McShea, and Joe Crawford. A video featuring Fellow Beatrice O’Donnell – described as “powerful and full of humility” -- was also part of the presentation and was spontaneously applauded. The videos that are part of this overall Initiative are posted on the College website, and are both educational and inspirational. The Initiative is proving to be a great success and, like so many efforts in the current era, will continue in a virtual format in the coming months.

The Access to Justice Committee, under the enthusiastic and very effective leadership of Fellows Mark Suprenant, Randy Block, and Ed Harnden has welcomed 16 Distinguished Pro Bono Fellows since its program began. Its mission is “to encourage and facilitate the provision of pro bono legal services by individual College Fellows to persons who are unable to afford counsel” As such, it is a tangible example of how one of the fundamental prongs of our Mission Statement – “access to justice, and fair and just representation of all parties to legal proceedings” – is met every day. As has been noted earlier this year, the Committee is anticipating the presentation of a joint symposium in Canada with The Advocates’ Society in 2021 either in person (when travel between Canada and the United States can be easily accommodated) or on an appropriate “virtual” platform. In addition, upon the recommendation of the Emil Gumpert Committee and consideration and approval by the Board of Regents, the College selected the

Tulane Law School Women's Prison Project as the 2020 recipient of the Emil Gumpert Award. The Award, which will be officially conferred at the Annual Meeting, comes with a Foundation-funded \$100,000 grant, is the highest award conferred by the College, and recognizes programs whose principal purpose is to maintain and improve the administration of justice. The Women's Prison Project is a first-of-its-kind collaboration between Tulane's Domestic Violence and Criminal Justice clinics and focuses on providing legal representation to domestic violence survivors charged or imprisoned after killing an abuser or for having committed crimes under an abuser's coercion or duress.

The *Journal* (under the able, dedicated, and creative guidance of Editor and Past President Bob Byman) and the *eBulletin* (shepherded by Eliza Gano, the Communications Committee and the editorial eye of Fellow Patricia Lowry) have been essential vehicles for communicating the work of the College. In taking over the editorial functions for the *Journal*, Past President Byman has built upon the editorial traditions established by his venerable predecessors, Past Presidents Ozzie Ayscue and Andy Coats and Fellow Stephen Grant. Among other things he has continued the "In Memoriam" section of the *Journal* and has added widely heralded features such as "Heroes Among Us" and "All in the College Family."

Near to my heart personally has been the work of the Special Problems in the Administration of Justice (U.S.) Committee in support of disabled veterans. In 2017, attorneys including Fellows John Chandler, Stephen Raber, and Elizabeth Tanis filed consolidated briefs in the U.S. Court of Appeals for the Federal Circuit addressing deprivation of due process claims for veterans where the failure to adjudicate appeals of disability claims in a timely way has led to a deprivation of due process. On August 4, oral argument in the last of the cases pending was heard in the Federal Circuit on behalf of the widow of deceased Air Force veteran Wayne Mote, who served in classified special operations in Vietnam where he was exposed to Agent Orange. After developing coronary artery disease and lung cancer, Mr. Mote filed a claim based upon his Agent Orange exposure in 2010, which was denied in 2012. After his death, his widow took over the case, but made no meaningful progress on appeal until she joined the ACTL group of veterans. Mrs. Mote and other veterans represented by the ACTL team prevailed in the Federal Circuit, convincing the court to adopt a new standard (proposed by the ACTL team) that takes into consideration the interests of the affected veterans, but on remand to the Veterans Court her petition was denied again. The current appeal argues that the Veterans Court failed to apply the new standard and erred by failing to find that unreasonable delays in the appeal process violated Mrs. Mote's right to due process.

Outlining all that has been accomplished this year is a daunting task, and I risk omitting accomplishments that should be acknowledged. In addition to the achievements described above, consider:

- a. The Access to Justice Committee and Legal Services Committee presented, on very short notice, a comment objecting to a proposed amendment by DHS and DOJ to immigration regulations governing credible fear asylum determinations, which could permit judges to deny without hearing applications of disadvantaged persons.
- b. In coordination with other national organizations and the Federal Public and Community Defenders, the College has been helping to identify attorneys and other professionals to assist with preparation of compassionate release motions for prisoners most at risk for Covid-19. This effort is pursuant to the First Step Act, signed into law in December 2108.
- c. The Federal Civil Procedure Committee, under the direction of chair Fred Buck, prepared a letter to congressional leaders encouraging enactment of legislation tolling applicable statutes of limitations in federal question cases.
- d. The Federal Criminal Procedure Committee, through the leadership of Chair Bill Keane and Vice-Chair Sharon McCarthy, is in the process of publishing a White Paper entitled “Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations.” The paper was developed by a subcommittee that included Fellows Henry Asbill, Robert M. Cary, Richard S. Glaser, Neil A. Kaplan, William P. Keane, John J. Kenney, Sharon L. McCarthy, and Edward Swanson and is a 2020 update to the original version issued by the same Committee in 2008. When the paper was originally published, the practice of conducting internal corporate investigations was still emerging, an outgrowth in the mid-2000s of the option-backdating crisis that hit the technology industry especially hard. Internal corporate investigations are now a well-recognized and busy practice specialty, conducted by counsel for public and non-public companies, big and small, covering any number of issues that impact business integrity. The 2020 version, with the benefit of 12 years of experience and hindsight, provides updates and further recommended best practices and includes new sections on cross-border investigations and joint or common interest agreements.
- e. As detailed in Summer edition of the *Journal* the College is in the midst of an important “Fellow Engagement” process under the

direction of the Executive Committee in an effort to evaluate what motivates Fellows to participate in College activities and projects. The results of this process, which is being led by an outside consulting firm, will be a topic at the Leadership Workshop this Fall, and will be an ongoing project for 2021.

- f. The U.S. Foundation, now led by Past President Joan Lukey following the very generous and successful leadership of Former Regent Chuck Dick, employs the new tagline “Because Justice Can’t Wait”, which recognizes the unique and evolving demands of this moment in which disadvantaged are bearing the heaviest burdens. The work of the Foundation, which distributed grants in excess of \$500,000 in fiscal year 2020, is detailed in this edition of the *Journal*. The Canadian Foundation continues to expand its monetary corpus and hopes to be able to begin distributing grants soon.

The bottom line in all of this is that the College is in good shape in every way. Its values are embodied and rooted in strong traditions that have allowed it to endure and even thrive in these unprecedented times. Its Fellows have shown courage, commitment, and resilience and have proven that the systems of justice they support and defend are – in real life – as much a matter of narrative and example as they are precept and principle. I have been deeply honored to serve as President of the College this year, and hope that history will record that, in the end, the year was one for which we can be proud as well as grateful.

Many of you know how much I like music, and if you were in Vancouver, you will remember that some of the Canadian songwriters and poets are among my favorites. This includes Ian Tyson, whose song “Friends of Mine” captures how I feel about our fellowship as this amazing year comes to a close:

“These friends of mine, we shared some good times
together,
Days of sunshine, days of rain.

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And by all those roads my friend, we’ve traveled down
I’m a better man for just the knowin’ of you.”

It is true. Thank you for your support, patience, commitment, and example.

--- Doug