

# PRESIDENT'S REPORT



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**AMERICAN COLLEGE OF TRIAL LAWYERS**  
**2013-2014**



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## 2013-14 President's Report

What a trip it has been – forty-four individual journeys throughout North America this past year. Jane and I have made hundreds of new friends. We have made countless old friendships stronger. We have seen the US and Canada from top to bottom, side to side. And we never had a bad seat – there has always been an interesting Fellow – or an even more interesting spouse – to enjoy.



The primary goal, Jane told me from day one, was that we not get a big head. And that nearly worked, at least until we got to South Dakota. But in the end, Jane managed to keep it all in perspective.

One particular exchange captures our entire year. We were in Richmond for the Virginia Fellows Dinner. Jimmy Morris came up, and in his most



solicitous voice (and Jimmy, you all know, wields solicitous like Heifetz used a bow), said “How are you bearing up under all the travel? Is it getting to you?” “Jimmy,” I responded, “every Past President wails about how hard their year was with all the travel, but I have to tell you: We’re having fun. This is fun!” Jimmy looked around the room to make sure no one was eavesdropping, lowered his voice to a conspiratorial whisper, and confessed “I know. I’d kill to do it again.”

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That grand old Cub Ernie Banks was famous for “Let’s play two!” It wasn’t a job to him, it was fun. This past year has not been a job, it’s been pure fun. We would kill to do it again. But the College doesn’t do double headers, so we must be content with our one year. And we are. That’s our report. It was fun. You can, if you like, stop reading. But tradition requires that I keep writing a bit.

### *The College Is In Strong Financial Shape*

The College is robustly healthy, both financially and in terms of our Fellowship.

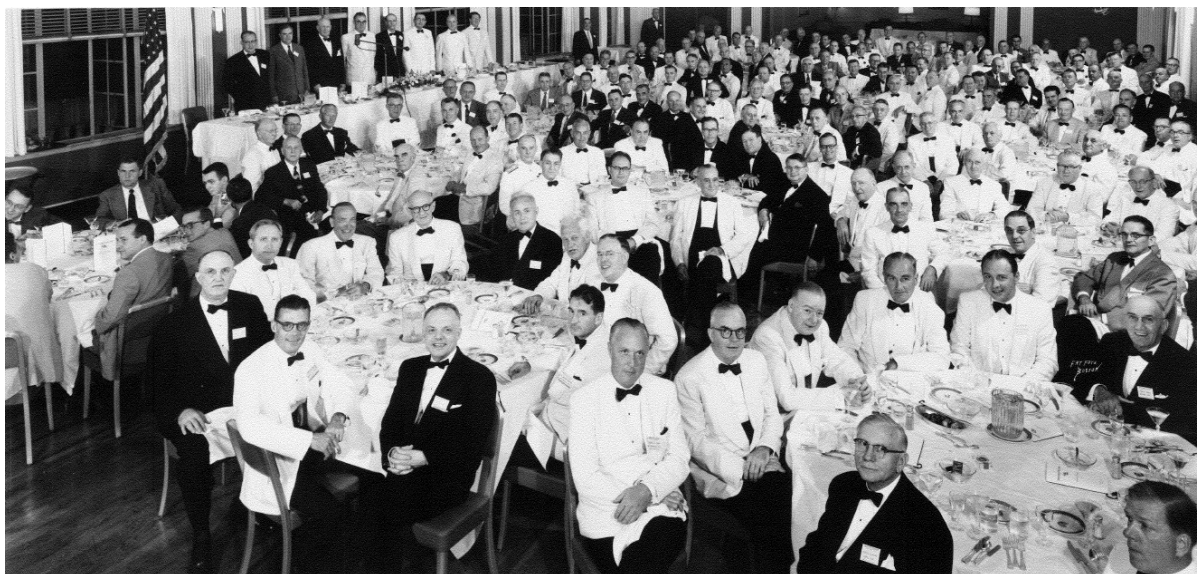
We had an operating surplus for the fiscal year ended 6/30/14 of over \$430K - \$130K better than the budgeted amount. We had investment income of more than \$458K; so we enjoyed a 2014 net surplus of more than \$873,600.

Our off-shore meetings have always been great successes and of enormous value to the College's prestige and standing – but they come with a substantial cost over and above what we charge individuals for attendance – so we estimate that the London/Paris meeting will add about \$250K to our usual expenses. Because of that, even with further cost reductions in other areas, our current 2015 budget projects an operating deficit of \$110K. But that is the budget – and, in reality, we may be able to trim costs to come closer to break-even.

Even so, this is a one-year issue. We expect to return to a surplus in 2016; we are confident that the College will remain financially sound for the foreseeable future.

### *The College Remains Robustly Viable*

This picture, taken at the 1953 Annual Meeting in Boston, has special significance to me, because the good looking Fellow wearing black glasses and a white dinner jacket in the bottom left corner is my partner Bert Jenner, who would become the College's 8<sup>th</sup> President. Emil Gumpert is the third guy from the right at the head table.



There are some remarkable things evident from this picture. I count nearly 200 attendees. In 1953, the College consisted of 322 Fellows, 6 of them honorary. So nearly two thirds of the entire Fellowship traveled to be present for the annual meeting. Today, our annual meetings draw about 15% or less of the Fellowship. But attendance aside, look closely at the photo. Not a single dark beverage – the drink of the day was exclusively martinis. Not a single dark face. The racial mix of the day was exclusively white. Not a single pretty face. The gender of day was exclusively male.

The gender thing, sadly, was no accident. In the early days of the College, the thought of a woman qualifying for Fellowship was, well, just not thought of. And Emil Gumpert – and many others, like Cody Fowler (President in 1952-53) and Leon Jaworski (1961-62) – openly resisted the thought of inviting the Fellows' wives. Gumpert, in 1966, told the Board that "Change from a stag affair to one of mixed attendance would, I fear, be extremely harmful to the College." *Sages Of Their Craft*, p. 112. Fowler wrote "Women do not mix as well as men." *Id.* at 113.

Great men, but not very enlightened.

It was not until 1979 that we admitted our first woman Fellow – Amalya Kearse, who was later appointed to and served with distinction on the Second Circuit Court of Appeals. She was followed in 1981 by Sylvia Walbolt, and in 1982 by my partner, Joan Hall. We were still so awkward about having women that when Joan opened the package with her plaque, she noticed that it read

*"The Regents of the American College of Trial Lawyers hereby certify to the admission of Joan M. Hall as a Fellow of the College, these Letters being their testimonial that he possesses the necessary experience, skill and integrity . . . ."*

"he?" The plaque was signed by then-president Alston Jennings, a friend of Joan's. Joan made a copy of the plaque, circled the word "he," wrote in the margin "How long, oh Lord, how long?" and mailed it to Alston. Alston wrote back: "When we in the College make someone a Fellow, we go whole hog." The College sent Joan a new plaque with the word "she" and asked her to return the other. Joan declined; she hung both plaques in her office.

We have come some of the way – though there is a long, long way to go. Today, we have 348 Fellows who are women. We don't keep real statistics on minorities – it is a voluntary report – but 101 Fellows have reported ethnicity other than Caucasian.

But I can tell you that our failure to get those numbers up is not for want of trying. Throughout our travels this year, at every state and province meeting I attended, I saw that our Committees are sincerely looking for qualified women and minority candidates – the tide is turning slowly, but it will turn.

We have heard much of the vanishing trial – and with it the vanishing trial lawyer. This is a legitimate concern for the future of the College. But like global warming, it is a legitimate but *future* problem. Today – and in the near future – our Fellowship numbers remain at historical highs. In 2008, the year David Beck was our President, we had approximately 5800 Fellows, a substantial number of them fully retired; we had 4108 dues-paying Fellows. The 5800 total has remained fairly constant over the past six years – but in 2014 we have 4237 dues-paying Fellows – a 3% increase. And while we have of late experienced a small decline in the size of our induction classes, our attrition rates have also declined. So we currently project that in 2017 we will have 4144 dues paying Fellows, about 1% more than 10 years earlier.

	Full	Part/Emer	Total
2008	4000	108	4108
2009	3954	120	4074
2010	3983	164	4147
2011	3984	190	4174
2012	4003	194	4197
2013	4,008	202	4,210
2014	4,023	214	4,237
Projected			
2015	3,964	226	4,190
2016	3,929	242	4,171
2017	3,887	257	4,144

As Yogi Berra so eloquently put it, “it’s hard to predict things, especially the future.” If smaller induction classes are indeed the reality, the size of the College will eventually contract. The possible problem is real, so the Board of Regents is putting together a Retreat to give serious thought to these issues, to, as the old prayer goes, find the strength to change what we can change, find the serenity to accept what we cannot change, and find the wisdom to sort out which is which.

In the meantime the College is strong, our coffers are full, our ranks are swelled. And we are doing good work.

### *The College Is Hewing To Its Mission*

Through its Board and Committees, the College advances its three-part mission to maintain and improve (1) the standards of trial practice, (2) the administration of justice, and (3) the ethics of the profession.

Our Committees have done far more work this year than I can do credit to in what is supposed to be a brief report, and I've already roared way past brief. So I will simply set out a few highlights.

### *The Foundation and the Gumpert Committee*

What could be more important to improving the administration of justice than the work of the Foundation of The American College and the Emil Gumpert Committee?

Although individual annual donations to the ACTL Foundation by Fellows decreased in 2013 by 24% – from \$222K to \$168K – the Foundation's corpus has increased to slightly more than \$4M, enabling the Foundation to fund meaningful, game-changing grants to worthy public-interest groups that are essential to the administration of justice.



You should look at the Foundation's separate report about the totality of its work, such as giving significant support to the National College of District Attorneys, the National Criminal Defense College and other worthy groups. But the largest share of the Foundation's giving goes to funding the Gumpert Award.

In the past, the Gumpert Award was \$50K. This year we were able to increase it to \$100K and make awards of \$25K each to the runners up. Joe Caldwell and his Committee did the painstaking work to identify three highly worthy groups – the winner, the Human Trafficking Courts Project of the Urban Justice Center in New York, and the two finalists, the National Access to Veteran Justice Project of the Veterans Legal Support Center & Clinic of the John Marshall Law School of Chicago, and the Medical-Legal Partnership of the Legal Aid Society Employment Law Center of San Francisco.

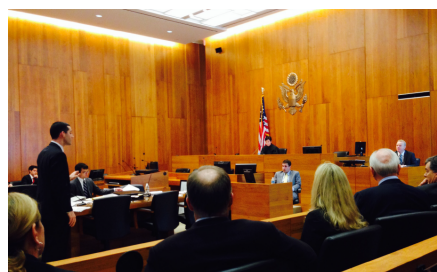
The award to the Human Trafficking Courts Project will make a real difference to get *rehabilitative* services to the victims of the human sex trade, rather than treat them as criminals. The grant to the Veteran Justice Project will help veterans get

the legal services they need to secure the benefits they so obviously deserve. The funds provided to the Medical-Legal Partnership will help thousands of low-income hospital workers get maternity benefits.

We all have multiple demands on our charitable giving. But if you as a Fellow believe in the mission of the College, you should strongly consider the Foundation in your mix. We are doing real, good work here.

### *The College's Trial and Moot Court Competitions*

What could be more important to the improvement of the standards of trial practice than the work of our Competition Committees? The future of the College is in the future trial lawyers who will arise from the law schools of North America. And our competitions have involved, motivated and invigorated hundreds of future stars. One of the real perks of office as President was the chance to judge the finals of these competitions – and I can tell you firsthand how inspiring and comforting it is to see the caliber of future trial lawyers that our competitions produce.



The Canadian Competitions Committee, ably chaired by Greg Richards of Toronto, put on the Sopinka Cup Trial Advocacy and Gale Cup Moot Court Competitions; the National Trial Competition Committee, industriously chaired by Tim Helfrich of Ontario Oregon, put on the US Trial Competition. The National Moot Court Competition Committee, superbly<sup>1</sup> chaired by Bruce Alverson of Las Vegas, ran the National Moot Court Competition.

### *The Legal Ethics And Professionalism and Outreach Committees*

What could be more important to the improvement of the ethics of the profession than the work of our Legal Ethics And Professionalism and Outreach Committees?

When the College issued its latest iteration of the *Code of Pretrial and Trial Conduct* in 2009, Chief Justice John Roberts provided the introduction:

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<sup>1</sup> Please take nothing from the different adjectives or the failure to call out more than the chairs – all three Committees were ably, industriously, and superbly chaired, vice-chaired and staffed.

For more than fifty years, the American College of Trial Lawyers has promoted professionalism in the conduct of trial litigation. Its authoritative Code of Trial Conduct, first published in 1956, has served as an enduring landmark in the development of professional standards for advocates.

The College continues those efforts through the publication of its revised and enlarged Code of Pretrial and Trial Conduct. This comprehensive resource sets out aspirational principles to guide litigators in all aspects of their work as advocates of client interests. The Code looks beyond the minimum ethical requirements that every lawyer must follow and instead identifies those practices that elevate the profession and contribute to fairness in the administration of justice.

As Justice Frankfurter noted, "An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." I encourage lawyers who engage in trial work to observe and advance the principles that the College has set forth in this volume.

I commend the American College of Trial Lawyers for its leadership in defining and refining the standards of professionalism that are vital to our system of justice.



John G. Roberts, Jr.  
Chief Justice of the United States

The Code remains an enduring and respected paradigm for ethical behavior. Two years ago, the Legal Ethics Committee, under the leadership of Harry Cornett of Cleveland, produced a series of professional quality videos with vignettes on ethics issues for use in CLE programs. These tools – the Code and the Video Vignettes – make it easy for State and Province Committees to put on local programs that both advance the ethics of the profession and serve as outreach to make the College's star shine. The Outreach Committee, under Billy Bates of Birmingham, has gotten the word out. In the past two years, CLE Ethics Programs have been presented by State Committees in Alabama, Georgia, Illinois, Kentucky, North Dakota, Michigan, Missouri, New York, Ohio, Pennsylvania, South Dakota, and Vermont. Every State and Province should consider joining this group.

The College has more than 30 General Committees, more than 60 State and Province Committees. Each of these Committees has dedicated leadership and membership. Each of them is doing important work. Each of them deserves a shout-out. But this is supposed to be an overview, not an encyclopedia. So let me just call out a few other high points from the past year.



*Special Problems in the Administration of Justice (US)*

Under Chair John Chandler of Atlanta, the Committee has been working with the Veterans Administration about the possibility of offering the College's assistance on two possible fronts to help our veterans get benefits to which they are entitled.

*First*, the College may be able to significantly assist in reducing the time it takes for a veteran to get benefits. When benefits are denied, the recourse is an appeal to the Board of Veterans' Appeals. A large number of appeals, once reviewed, are simply remanded for additional evidence. For example, a vet may seek medical help for a hearing loss; the claim is denied because he does not provide evidence of the causal link between the hearing defect and military service. The vet, unaware that he has the right to supplement the record, waits for his appeal to be heard. But the backlog of appeals is nearly 50-60,000 – estimated to triple in the next two years – and currently it takes 1000 days from denial to BVA review and remand – rebooting the 1000 day process. Justice delayed is justice denied.

If someone could review these appeals – now, not 3 years later – we could identify the cases that have these evidentiary gaps, get them fixed, and get veterans their benefits *now*. This will require a small army of volunteers from the College. It is not a huge commitment. Volunteers will have to be certified with 3 hours or so of on-line computer training, but the education curve is not large. The time to review a particular file and provide meaningful help is not extensive. But it would make a real difference to our veterans.

*Second*, the BVA has expressed interest in having College Fellows take on "mass cases" that would resolve common legal issues through global findings that provide a uniform answer for all claims that raise common issues. For example: if a veteran of the artillery corps simply provides evidence that he has a hearing loss and that he has spent some minimum number of days firing artillery pieces, should the VA presume hearing loss without further proof? These mass cases will require a more significant time commitment, but they should be a highly rewarding experience.

When the time comes for us to look for volunteers, we hope you will step up to help the men and women who stepped up to serve in uniform.

*Working Smarter, Not Harder*

A joint project of the College, spearheaded by Dick Holme of Denver, and the Institute for the Advancement of the American Legal System (IAALS) of the

University of Denver, interviewed a group of judges carefully chosen as ones recognized as great trial judges. We synthesized their views on best practices to manage and try cases and summarized those practices in a pamphlet entitled *Working Smarter, Not Harder*. Every State Committee was encouraged to contact their State and Federal chief judges to make the pamphlet available – and the initial responses have been highly gratifying. For example, Connecticut State Chair Frank Silvestri met with Chief Justice Chase T. Rogers of the Connecticut Supreme Court and Judge Patrick Carroll, Chief Judge of the Superior Court. Frank reported “The recommendations contained in the report are exactly the kind of thing [the Chief Judge] is looking for, and she is extremely interested in what the report had to say -- practically grabbed it out of my hands as I was handing it to her and started to devour it. . . . The fact that the recommendations come from judges recognized as excellent case managers by the trial bar will also be helpful to her in turning around the mind-set of those members of the Connecticut judiciary who are used to doing things a certain way and may be resistant to change. Bottom line is that the Chief and Judge Carroll are enthusiastic about having "Working Smarter" as a resource as they implement this major change in the way the Connecticut judiciary manages cases.”

The Canadian Special Problems in the Administration of Justice Committee, under Bruce Carr-Harris of Ottawa, has launched efforts to do its own version of *Working Smarter* by sending out a survey to Canadian Fellows to identify best practices.

*Working Smarter, Not Harder* is both a valuable resource and a valuable way to expand the College’s image to the bench. It is not our purpose to seek accolades or recognition. But as we perform our mission, a little recognition is nice. Here’s an example, from Delaware Chief Justice Leo Strine. Justice Strine announced the creation of an Access to Justice Commission by advising all of the State’s lawyers: “We have asked the finest lawyers in our state to help us take a hard look at ourselves and give us feedback about what we are doing well, and what we can do better. To that end, the Delaware Chapter of the American College of Trial Lawyers has agreed to work in concert with the leadership of the Delaware State Bar Association to conduct a survey giving practitioners the chance to provide confidential input about how we are doing as a court system in all the key practice areas. Admission to the ACTL is a professional honor of the highest kind, and available only to those who demonstrate excellence as a trial lawyer. The local ACTL membership has strong lawyers in almost all practice areas.”

*Teaching of Trial and Appellate Advocacy*

The Teaching of Trial and Appellate Advocacy Committee has prepared a series of video vignettes depicting the various issues that arise in deposition practice ranging from how to set up a deposition, to ethical issues that can arise dealing with non-party witnesses, to questioning techniques, and dealing with objections and obstreperous opponents. While the videos were primarily designed for use in training young public interest lawyers, they will be informative for training – and retraining – any lawyer. The entire program is over 5 hours long; but it is made up of fifteen 20-minute segments so that Fellows can use as much or as little as they choose to supplement live presentations in particular CLE programs.

*And So Much More*

I have left out a great deal. I haven't mentioned the Federal Criminal Procedure Committee, under Nanci Clarence of San Francisco, that plans a White Paper on substantive waivers in Federal plea arrangements, that is reviewing the impact of the Federal Sequester on the Federal Defender System, and is reviewing proposed changes in Federal Criminal Procedure Rules. I haven't mentioned the Complex Litigation Committee, under Hank Gutman of New York, that is publishing a Manual on the Effective Use of Demonstrative Evidence in Complex Cases. I haven't mentioned all of the dozens of State and Province Committees that are putting on public interest CLE programs and doing other great work. I haven't mentioned all of the other General Committees. There just isn't time in this brief overview. The Reports of these Committees to the Board of Regents fill – consume – more than 300 pages. So here's the bottom line: The College – through its many Committees, is *doing* things, important things.

The College is strong and robust. We are relevant; we make a genuine contribution to our profession and our society. I am proud to be a Fellow. It has been my singular honor to have served this past year as your President.