

PRESIDENT'S REPORT



MICHAEL W. SMITH

2015-2016

AMERICAN COLLEGE OF TRIAL LAWYERS

President's Report 2015-2016

As I reflect back on all that has been accomplished through the tireless efforts of all levels of Fellows during the 2015-2016 fiscal year, I am pleased to report that the College remains in excellent shape. While we have not been timid, and lived true to our newly expanded Mission, our enduring legacies, high standards and longstanding traditions have been preserved, always placed front and center and consistently reaffirmed. At the same time, we have not turned a blind eye to the significant issues facing the College in the coming years, and, thus, have implemented a number of new initiatives and laid the groundwork for others that will help maintain our status as the premier trial lawyer organization well into the future. Before commenting in more detail on some of these matters, please indulge me a minute for personal reflection and to express my and Ellen Bain's profound appreciation for being afforded this wonderful year.

From the moment I was installed as the 66th president of the College at our Annual Meeting in Chicago, we have had the time of our lives. The greatest experience for any President of the College is traveling and making the rounds from the Atlantic coast to the Pacific coast and all states in between, as well as Canada and as far north as Alaska, west to Hawaii, and even south to Mexico. Seeing old friends, making new friends, going to new places and being exposed to the constant grand level of collegiality and excitement make this job truly unique, and it is simply impossible to adequately express our gratitude.

Over the course of the year, the travel was occasioned not only by the state, province and regional meetings, but other important College events as well, including the trial and moot court competitions, the Emil Gumpert award presentation, the Eastern and Western Chairs workshops, and a dinner at the U.S. Supreme Court, just to name a few. Also, there was the business of the College including, for instance, picking and vetting of new committees and getting them started in their new endeavors. In all, I will have traveled 140 days since mid-October 2015, on College matters, but I am not complaining. Of those trips, many were spent with some of the most interesting and fun people I've ever known. For the fellowship and friendships, we thank everyone.

I especially thank all members of the Executive Committee and Board of Regents, and the Chairs of our 61 State and Province and our 33 General Committees who, not only were an enormous help to me, but served the College with their time, talents, and dedication. We tackled many important issues this year, and no President could even think about doing it alone. For instance, it took the time of very busy lawyers on short notice to participate in four specially called telephonic Board meetings necessary to accomplish timely our tasks. During each, the Past Presidents and Regents gave of their time, good advice and good humor without complaint or reservation. And, with all of these balls in the air this year, we still managed to maintain our high standards. Let me elaborate a bit on some of the year's activities.

We are now operating under our revised and expanded Mission Statement.

As the result of much hard work and thought by members of this and previous Boards, we now have a broader Mission Statement for the College that better describes who we are, what we do, and what we stand for. The new mission statement, under which we are now operating, is:

The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

We have reaffirmed our commitment to our high standards of admission to the College.

The College maintains an unequivocal commitment to its admission standards. The Board has adopted a statement of principles for uniform application of the qualifications requirement. The statement reads:

**PRINCIPLES FOR UNIFORM APPLICATION OF THE
QUALIFICATION REQUIREMENTS**

A prospective nominee must demonstrate excellence in trial. The prospective nominee must be considered to be among the very best trial lawyers in his or her State or Province.

There is no minimum number of trials required for admission: a prospective nominee must have completed a reasonable number of trials. All areas of practice are eligible for consideration.

Admission depends upon the breadth, weight, and complexity of the individual prospective nominee's total body of work.

Jury and bench trials are the primary adversarial proceedings considered for membership. For prospective nominees who have demonstrated excellence in trial, other adversarial proceedings are considered if they are trial-like; i.e., they include such elements as opening statements, examination of witnesses, and closing arguments. Appeals are not qualifying adversarial proceedings for purposes of admission to the College, although they may be

favorably considered if a prospective nominee otherwise meets the criteria for membership.

Once a prospective nominee has otherwise satisfied the criteria, the absence of qualifying trials and other adversary proceedings in recent years will not foreclose admission so long as the prospective nominee is actively engaged in trial practice as the principal activity, and currently demonstrates the excellence in trial skills required for admission. Active engagement includes actual participation in the preparation and trial of cases, and may include active supervision of trial lawyers engaged in trial practice so long as the prospective nominee's primary activity is focused on trial practice as opposed to other management responsibilities (i.e., the prospective nominee is doing hands-on trial work as opposed to merely supervising others).

We adopted a new Diversity Statement and implemented new initiatives to support it.

While the standards for admission will not change, the Board has reaffirmed our dedication to identifying every exceptional, ethical and collegial trial lawyer to be measured against our standards, and that includes including women and minority lawyers. For at least as long as I have been involved, the College has been proactive in its approach to identifying for consideration every exceptional trial lawyer from whatever walk of life. While the College has increased the number of qualified female and minority Fellows, we can do better. Therefore, the Board adopted a Diversity Statement:

Consistent with its Mission Statement, the College seeks to promote the treatment of every person with dignity and respect, and to foster an inclusive, collegial environment that values the unique background, experiences, perspectives, and contributions of all. Under a singular standard of excellence that values and appreciates differences in its membership, the College endeavors to identify talented and accomplished trial lawyers as possible Fellows, including women and persons of color, varying ethnicities, disabilities, and sexual orientation.

To make sure that the Diversity Statement had teeth, the Diversity Subcommittee, a part of the General Committee on the Admission to Fellowship, was appointed with the charge of maximizing our efforts through recommendations aimed at identifying minority candidates and developing a process through which we are accountable for our efforts. The Subcommittee was appointed early in the year and responded quickly by filing its recommendations to the Executive Committee within the year. The Subcommittee suggested guidelines to assist State and Province Committees focus on all appropriate practice areas and organizations. Additionally, it suggested potential contacts best suited to identifying diverse, qualified candidates. Along with the creation of locally-tailored plans to help enhance the State and Province efforts, built into the process is an appropriate level of accountability. Based on the Diversity Subcommittee's

recommendations, the Executive Committee recommended to the Board a plan of implementation. The Board has approved the implementation plan, and the implementation will commence in earnest at the Fall 2016 Chairs Workshop.

We adopted new Guidelines for Public Statements by the College and its Fellows, which included the Guidelines for Amicus Briefs.

Consistent with our new mission, the Board approved the concept that the College will take a more public or visible position on those issues fitting squarely within the mission of the College. Accordingly, the Board amended the Guidelines for Public Statements which will now read as follows:

1. **Official Statements of the College.** The College may, from time to time, wish to publish a statement that reflects the official position of the College. Official positions of the College shall be limited to matters that impact the Mission of the College.
2. **Amicus Briefs.** It is the Policy of the College to file amicus briefs only where its position or argument can add something of significance. The decision to seek leave to file an amicus brief shall be approved by the Board. If approved, the Board shall designate one or more Fellows to liaise with amicus counsel.

While there were no requests this year for amicus briefs, there now exists a process to help institutionalize how decisions to become involved are made. Past Presidents Chilton Davis Varner and Greg Joseph, and Regent Bill Murphy, were appointed to the Task Force on Amicus Briefs, a committee to review each amicus request and make a recommendation to the Executive Committee which, in turn, will make its recommendation for final action to the Board.

We implemented a new Communications Plan to enhance and improve our internal and external communications.

It became clear in Board discussions that we had let slip adequately communicating internally with our Fellows about many of the good things happening in and with the College. We have attempted to remedy this situation. Increasing communications across the board to remind the legal community of the College's Mission and inspiring Fellows to take advantage of what the College has to offer is important. We have always adhered, of course, to the command that any communication be provided with the required understated elegance.

The Board made it clear that the primary focus of any communications effort should be aimed at our Fellowship first. Following that directive, in January I invited several College leaders and National Office staff members to a one-day communications planning meeting with être Communications at my office in Richmond. At the conclusion of the meeting, être was asked to propose a communications plan in two phases: Phase I would focus on the College's internal audience, with the goals of 1) enhancing the immense feeling of pride in being part of the Fellowship and 2) engaging more Fellows in the activities and projects of the College, particularly on the local level. Phase II would focus on external communications. We have improved our internal communications in several ways, and we have found time to increase our external communications on significant matters that support our Mission.

Our meetings aside, there are three basic ways for the College to communicate with our Fellows. Our *Journal* is an award-winning publication, but it is published only three times a year. So, with the concurrence of the Board, and a specially appointed Committee comprised of Fellows, members of our staff and être Communications, the new *eBulletin* has come to fruition. As presently constituted, it is an every-other-month electronic publication, brisk and to the point, identifying a smorgasbord of events and activities going on in and around the College. It will certainly augment the *Journal* but not in a competitive way, instead using a different format to distribute information in a different way. Lastly, our technology system essentially consisting of a database and website, unlike the first two assets mentioned above, has not proven satisfactorily workable yet from a user-friendly standpoint. We have addressed the problems during the year, however, and while the work has not yet been completed, we are close to the end and expect it to be so in the fall of 2016. Not only will the staff's job be made more efficient, our Fellows' relationship with the College will be greatly enhanced and far more connected.

Having all three components in play will change the College in some ways, but not its standards and traditions. It will simply enhance the College's relevancy, responsiveness and help keep it where it is and should be – at the pinnacle.

We acted aggressively with our initiative to assist our veterans in navigating the process of appealing denials of benefits before the Board of Veterans Appeals.

Two of our committees have been very involved with the unconscionable problems our veterans experience with the denial of their benefits and the VA appellate process. It takes, on average, four years for an appeal to make its way through the process. Meanwhile, some veterans die before their appeals are heard, much less decided. John Chandler, as Chair of our Special Problems in the Administration of Justice (U.S.) Committee, has been deeply involved with others working for the past few years to resolve the problem amicably. The College's offers to assist the bureaucracy have fallen on deaf ears or were disregarded.

At our Spring Meeting in Maui, John, Fellows Beth Tanis, Steve Raber and I, discussed the lay of the land and concluded that litigation was the only realistic solution. Faced with no other alternative, it was decided to take the steel hand out of the velvet glove. On July 21, 2016, John and Beth, and their firm King & Spalding, and Steve, and his firm Williams & Connolly, took the lead in filing a Petition for Writ of Mandamus and Other Relief with the United States Court of Appeals for Veterans' Claims. The suit was filed on behalf of 17 veteran plaintiffs or their survivors, asserting that the long delays are violative of plaintiffs' due process rights and, hence, unconstitutional. The suit seeks an order requiring the VA to eliminate the delays in the appeals system. We are grateful to the Fellows and their firms who have undertaken this outstanding effort on a pro bono basis.

We are addressing the issue of a proper process to handle sexual harassment allegations at colleges and universities.

A Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence was appointed and is working on recommendations concerning procedures used by many colleges and universities to resolve sexual harassment allegations. These procedures in

many cases are demonstratively unfair to the accused, with no right to representation or cross-examination in many of them. The procedures, for the most part, were developed by the Department of Education. Threatening the colleges and universities with the powers of the purse, the DOE imposed its process on their proceedings. Generally, the Task Force is preparing a white paper on the topic of an acceptable process, after which it will consider avenues to the Department of Education through which our white paper may become an approved template for future use by the colleges and universities in their discretion.

We published, *Working Smarter But Not Harder in Canada: The Development of a Unified Approach to Case Management in Civil Litigation.*

In Canada, lawyers and judges generally agree that the effective use of case management assists in reducing the cost and delay associated with our civil justice system. There is a wide disparity of views, however, as to the circumstances in which case management should be used and concerning the various approaches and techniques that can or should be implemented to improve the results case management is intended to achieve. In its recent decision in *Hryniak v. Mauldin*, the Supreme Court of Canada noted that the Canadian civil justice system must be reformed in order to ensure timely and affordable access to justice.

The Canadian case management project was undertaken with the aim of identifying techniques and approaches that have been implemented by judges in Canada who are recognized as being particularly adept at the use of case management to assist in the resolution of civil disputes.

The hope is that through the identification of proven case management techniques, this project will assist in the development of a unified approach to the use of case management in the civil justice system in Canada.

Led by Ex Officio of the Judiciary Committee Kent E. Thomson of Davies, Ward, Phillips & Vineberg, and Secretary Jeff Leon of Bennett Jones, implementation of a major communications strategy is being considered across Canada with the goal of instituting real change in the Canadian justice system.

The Canadian project follows in the footsteps of the “Innovating for Efficiency” project that was undertaken recently in the United States by the College, working together with the Institute for the Advancement of the American Legal System. The central purpose of that project was to identify best practices in case management used in civil proceedings in the U.S. The results of the project were set out in a report published in 2014, entitled “Working Smarter, Not Harder: How Excellent Judges Manage Cases,” a project praised and generally credited with providing impetus to the adoption of the recent discovery changes in the Federal Rules of Civil Procedure related to “proportionality.”

We continued to support a number of other access to justice initiatives.

Access to justice has become for the College, as with most other legal institutions, a rallying cry for service to our underserved communities. Our Access to Justice and Legal Services

Committee is always on the lookout for projects to help the underserved. The issue, however, extends across a broad spectrum of College activities, not just the Access to Justice Committee. For instance and to mention just a couple of projects among the many which are in addition to the Veteran's Initiative:

- The Teaching of Trial and Appellate Advocacy Committee has been involved with, and continues to support, our State and Province Committees in providing free trial tactics CLE seminars and instruction to our Legal Aid communities.
- The College Foundation continues to provide significant grants to worthy organizations many, of which are set up to help underserved communities.

The College's ongoing attention to Access to Justice initiatives will continue to grow.

We took important stands recently to protect the independence of the judiciary in instances of unwarranted attacks.

The "independence of the judiciary" has always been a priority and will remain one for the College. In 2006, the College made the point for posterity through a unanimous Board-approved white paper on the subject.

Encroachment into the independence of the judiciary has taken many forms. One of the major abusers is the silly season (politics), which generally results in overstated exuberance by some politicians, unbridled by the fact that these days there seems to be very little political capital to be lost by criticizing judges (and lawyers). Sometimes the overreaching is spite-driven.

That the College remains vigilant is exemplified by three situations occurring this year: in Kansas, Fellows successfully challenged special legislation aimed at limiting the role of court which was ultimately declared unconstitutional. The genesis of the legislation was a governor bent on payback for a decision with which he was displeased. A unanimous Kansas Fellowship backed the Court's position. Also, when a political candidate went after a sitting trial judge and his rulings in a case involving the political candidate, the College immediately responded with a press release clearly reaffirming its position against unwarranted attacks against the judiciary. Later, in August, the *Richmond Times-Dispatch* published an Op-Ed addressing intemperate personal remarks made by the Executive Branch in response to an adverse Supreme Court decision.

Over the years, there have been issues other than attacks which infringed judicial independence and about which the College was quick to respond. For instance, some years ago the College endorsed an amicus brief filed in support of the judiciary in a case involving judicial salaries, a successful endorsement I might add.

The College will continue to monitor situations of interference and speak when appropriate to do so in accordance with College standards.

In addition to projects such as *Working Smarter, not Harder*, we continue to participate in service to the courts, state and federal, through independent research, the production of written comments and attendance at Advisory Committee meetings.

The College has always welcomed service to our courts and their related organizations as a duty imposed by its Mission. The service traditionally has flowed from a wide range of activities, far too many and over too long a time to be catalogued here, but following are a couple of examples.

- The College continues to support fully the efforts of the United States Supreme Court Historical Society;
- The College continues to participate in the preparation and presentation of white papers, publications, committee work, and joint efforts with other organizations related to the betterment of the Administration of Justice;
- The College has and will continue to participate with the Federal Judicial Center and National Center for State Courts in developing programs supporting their Administration of Justice initiatives.

We took actions to move forward our goal of maintaining the jury trial as a fundamental part of our democratic system of government.

The vanishing jury trial and trials in general have been a major concern for the College for some time now. And, the College was among the earliest of those institutions who took the problem seriously.

Eight and a half years ago, January 2008, the College sponsored a symposium in Dallas, Texas, addressing not only the causes of the problem, but possible cures. The symposium was a multi-day affair and was attended by academics; federal and state judges; prosecutors and criminal defense lawyers; civil plaintiff and defense lawyers; and users of the system, including General Counsel; insurance companies and other corporate representatives. The subject continues to be a source of widespread interest today, and the College is no exception. The College staunchly remains of the view that trial is the best arbiter of disputes ever devised and, considering that the United States is the only country in the world that provides for it in a Constitution, the College is committed to preserving it.

The College has also been involved in the jury trial issue through other avenues. For instance, a few years ago the College's Foundation made a \$35,000 grant to *iCivics*, a program whose most visible sponsor was and is Justice Sandra Day O'Connor. The program is aimed at the education of our kids on the importance of trial and juries (and serving on them). Also, the College has helped to organize a faculty of Fellows to serve as teachers and instructors in the program.

The College remains focused on the subject and is quick in its support of programs aimed at maintaining this important Constitutional right.

We successfully operated our annual awards and law school competitions programs again this year.

2016 Emil Gumpert Award – This year the Loyola Immigrant Justice Clinic at Loyola Law School, Los Angeles (LIJC) was the recipient of our 2016 Emil Gumpert Award. The

organization received a \$100,000 grant, which was funded by the Foundation. I had the distinct pleasure of attending the awards presentation event and hearing about the amazing work being done, accompanied by Charles Dick, Treasurer of the Foundation, and Robert Warford, Regent for Southern California.

2016 Samuel E. Gates Litigation Award – Justice Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System (IAALS) and former Justice of the Colorado Supreme Court, was the recipient of the Samuel E. Gates Litigation Award. Under Justice Kourlis’ leadership, IAALS has expanded its agenda into four categories, all of which attempt to significantly improve the litigation process in different ways. Those four categories are: Quality of Judges Initiative, Rule One Initiative, Educating Tomorrow’s Lawyers Initiative and Honoring Families Initiative. Justice Kourlis, through her work and that of IAALS, is changing the legal system of this country. Justice Kourlis is a change agent. She is bringing to the forefront the idea that in order to improve the legal system it requires a change in the culture of the courts and the profession itself, and we will recognize her contributions in Philadelphia.

The College’s Trial and Moot Court Competitions – For years now, the College has vigorously supported four national law school competitions, two each in the United States and Canada. The four competitions remain “Crown Jewels” in the College crown. They are supported financially and with sweat equity by the College and its Foundation. Many Fellows on a local level through the State and Province Committees participate with the law schools in providing adjunct instruction, competitions, conferences, and the like, ranging in subjects from trial practice and acceptable tactics to ethics, both stated as Missions of the College.

Though I am not sure of the exact year, the College’s involvement with the National Moot Court Competition (U.S.) can be traced to the 1950’s or early 1960’s. The finals are always held at the New York City Bar Headquarters. Unfortunately, one unique aspect of the competition no longer exists – in years past, a Justice of the Supreme Court of the United States sat on the panel of judges hearing argument for the finals. Nonetheless, the competition remains today the premier moot competition in the United States.

The National Trial Competition was the brainchild of the Texas Young Lawyers Association. The finals are held annually in Texas. This competition, too, is at the top of the heap of trial competitions in the United States and annually provides as much enjoyment and collegiality to those in the College charged with putting it on as it does to those students participating in it.

In Canada, the Sopinka Cup, named for John Sopinka, a deceased Fellow and former Justice of the Canadian Supreme Court, is the Canadian counterpart to the National Trial Competition in the United States. Started in the 1990’s, it, too, is a trial competition, but bilingual, and has the “best of its kind” reputation in Canada. The finals, which are held in Ottawa, provide an enjoyable week for all involved, including the College President.

Finally, but by no means lacking in similar stature or prestige, is the Gale Cup, the annual Moot competition for Canadians. Its namesake is George Alexander Gale, a deceased former

Chief Justice of Ontario. The competition commenced in the latter 1970's and is held in Toronto each year. With the other competitions, it continues to bring not only credit to the College, but a fun and educational opportunity for the contestants and their respective law schools.

Also, the College strives to stay in touch with and be a part of the law school communities in ways other than just the competitions. For instance, scholarly papers were collaboratively prepared by Supreme Court Justices, judges, academics and Fellows, along with their British counterparts, in the recent United Kingdom – United States Legal Exchange Program. Two of the scholar undertakings have been provided to the Duke University Law School for publication in *Judicature*, a publication now distributed by the law school.

Similarly, several of the State Committees have created awards for outstanding young trial lawyers who have demonstrated proficiency in trying cases and maintaining high ethical standards.

We made time to review the business of the College.

The College continues to monitor its business practices to ensure not only that its standards and traditions are kept firmly in place, but to improve its functionality for the benefit of its Fellows as well.

For instance,

1. The Board of Regents recently approved the adoption of the new Bylaws, Policies, Guidelines and Procedures Manual. Now, for the first time in memory, all of the referred to information can be found in one place, kept up to date and easily accessed by the Fellows. Importantly, it contains an excellent and complete Table of Contents and relevant attachments, where appropriate. The Manual will be accessible after the Annual Meeting on the website (<https://www.actl.com/library/fellow-resources>).
2. Additionally, the Board found time to amend several bylaws to clarify and improve their application. For instance, Section 3.4(b) of the Bylaws (“Adjunct Fellowship Committee”) has been amended and restated so as to best describe the purpose of the Committee and its proper function.
3. The College currently has money in the bank which, with anticipated dues receipts, is sufficient to cover our anticipated operational expenses. Moreover, the College has reserve funds invested in fairly accessible securities, in an amount roughly equal to our budget year expense projections. Nonetheless, with our standards in place and reaffirmed unanimously by the Board at our recent retreat, with fewer cases being tried and with the normal attrition in the College, we must keep an eye on the financial ball. Accordingly, a new ad hoc Committee has been appointed to conduct a long range review for financial planning purposes. We need to be prepared and hopefully, to avoid any unexpected, unpleasant shocks to the system.
4. I am told that at one time the College had an Audit Committee which reviewed the activities of our National Office on a fairly regular basis. We decided to commission an audit this year, under the leadership of Past Presidents Jack Dalton, Tom Tongue and Fran Wikstrom. That audit has been completed, and it will be presented to and discussed at the Philadelphia meeting.

Closing Thoughts

What an organization! Steeped in tradition, made up of the best of its kind, collegial, and a limited but very important and focused Mission. Like you, I am proud of being a Fellow in the American College of Trial Lawyers. I'm delighted to have been afforded an opportunity to sign on as wanting to preserve its high standards and traditions for our 5,900 current Fellows and for all new inductees to come. With our insistence on a standard of excellence, our willingness to take appropriate stands on matters important to our Mission, our commitment to diversity and a high value placed on collegiality and ethics, there is no doubt that we will remain the premier organization of trial lawyers. Again, thank you for the opportunity to serve as your President.