



Society Update

The Official Publication of the Michigan Supreme Court Historical Society

Winter 2017

A Letter From Society President Charles R. Rutherford



MICHIGAN SUPREME COURT
HISTORICAL SOCIETY

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Dear Society Member:

At the end of December, the officers and I sent a letter to you about the budgetary shortfall we currently face. Our funding has traditionally been a mixture of IOLTA funds – we receive a portion by order of the Michigan Supreme Court – and dues from members like you. However, because interest rates have been historically low now for several years that has greatly diminished the overall amount of funding we receive from IOLTA. The last eight years' worth of IOLTA contributions added together still do not equal what we earned in 2008–2009. This is a significant challenge.

Since the Society was founded nearly 30 years ago, the price of membership dues has not increased. Founding members paid the same \$100.00 in annual dues that we asked our members to pay last year. This despite the fact that inflation more than doubled in that timeframe, and \$100.00 from 1988 would be worth nearly \$210.00 today.

Another factor contributing to this unprecedented budgetary crisis is that nearly two-thirds of our membership (more than 200 of our 350 members) have achieved Life Member Status, thus exempting them from having to pay annual dues. We have sought to expand our membership through the Advocates Guild, created in 2007, and with our new law clerk directory, all while continuing to provide programs consistent with our mission.

The Board of Directors, in consideration of these issues, voted at our January meeting to raise the price of dues to \$150.00 per person and to immediately resume charging dues to Life Members. Life members will continue to enjoy that status but with the expectation that they will continue to pay dues. We want to do this as sensitively as we can. Life membership is a badge of loyalty and we will not forget that fact. However, it would be fiscally imprudent for us not to make these changes and modernize to adapt to the current situation.

I thank you for your support of the Society and hope to see you at the Annual Luncheon at the Detroit Athletic Club on Thursday, April 20.

Sincerely yours,

Charles R. Rutherford, President

The Year Ahead: Executive Director's Report by Carrie Sampson



As I write this report, it is the last day of the first month of the new year. Some of our 2017 projects are already underway, and others are just starting to get planned. Projects that are consistent with our mission and that will help us to continue to advance public awareness of Michigan's legal heritage. I am proud of what we have accomplished in the eight years that I have worked as your executive director and I look forward to what the next eleven months will bring for the Society.

This year we will...

- **Update our middle school & high school lesson plans with the assistance of our spring Coleman intern** (*see her story elsewhere in this issue*). Education is an important part of our mission. The lesson plans were first developed for us in 2001, and while that feels like yesterday, it was before the oldest of today's middle schoolers was even born. A lot can change in a decade and a half. Our Coleman intern, who has an extensive background in education, will bring these plans into the new decade for greater appeal to educators and students.
- **Resume the oral history interviews of former justices.** In fact, this has already begun with former Michigan Supreme Court Commissioner and co-founder of the Voelker Foundation Frederick M. Baker, Jr. continuing the interview of Justice Charles Levin (MSC 1973–1997) that was begun in 2002 by renowned oral historian Glenn Ruggles.

The Michigan Supreme Court remained unchanged from 1999–2008. In the eight years since then, the Court has changed eight times. This means that there are now several justices who have retired from the Court. We would love to record their stories for posterity. Determining a standard set of questions, incorporating video as well as audio, and scheduling interviews with these former justices are all high priorities for the Society in the coming months.

- **Likewise, we also anticipate some portrait dedications this year.** Some portraits are done and awaiting presentation; others still need to be commissioned. One that I hope will be painted this year is the posthumous portrait of our first Chief Justice William Asa Fletcher, who was appointed to the Court on July 18, 1836, and served until 1842. You may be familiar with Fletcher from the story of his Michigan Legal Milestone, dedicated by the State Bar of Michigan in 1987, or the story of his grave, which was ignominiously moved and lost, much like that of the man who had appointed him to the Court, Governor



The fifth Michigan Legal Milestone honored the Michigan Supreme Court's first Chief Justice William Asa Fletcher.

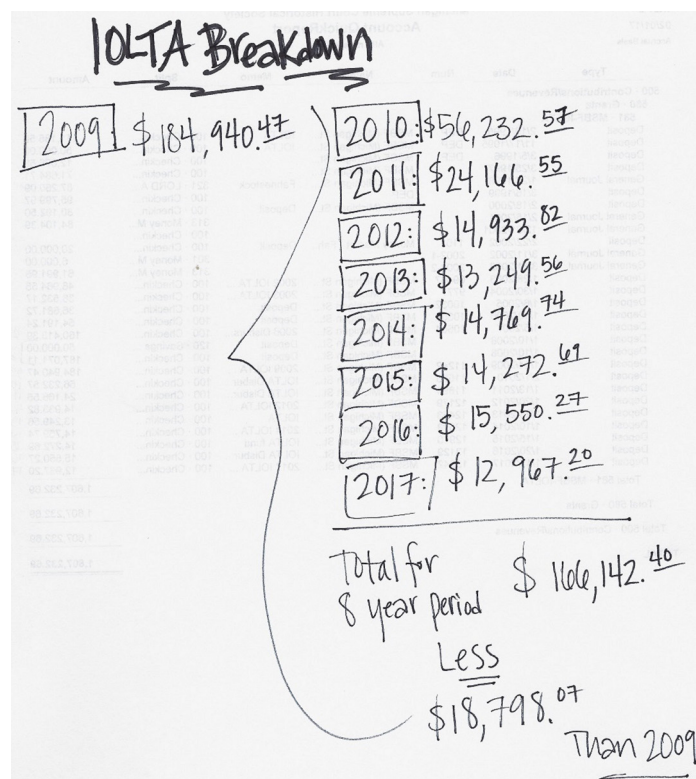
- Stevens T. Mason, whose own grave was moved several times.
- **We will continue to compile the law clerk directory, begun last fall.** The next step is finding new avenues to reach former clerks of the Michigan Supreme Court, particularly those who served our now deceased justices. We owe a huge debt of thanks to those of you who read the fall 2016 newsletter and shared the project with the former clerks that you know! The lawclerks@micourthistory.org email account has been filled with messages from former clerks. We would love to hear from even more "invisible scribes" so please continue to send us your name and the justice(s) for whom you clerked, or refer us to those whom you know clerked for the Michigan Supreme Court.
 - **We will continue to look for new ways to share our mission.** Movie nights have become popular with other nonprofit groups. As the great American movie director Martin Scorsese notably said, "Movies touch our hearts and awaken our vision,

and change the way we see things. They take us to other places, they open doors and minds. Movies are the memories of our life time, we need to keep them alive.” In Michigan, we have a unique connection to the movies, too, as it was Michigan Supreme Court Justice John Voelker (MSC 1956-1960) whose novel *Anatomy of a Murder* was turned into an Academy Award-nominated film. It is #4 on the ABA’s list of the 25 greatest legal movies. Do you have a favorite legal movie?

- **We will also continue to reach out to others.** Our popular Annual Luncheon will be held at the Detroit Athletic Club on Thursday, April 20th this year. We hope to see you there! I also hope to attend the State Bar of Michigan’s Annual Meeting at the Cobo Center in September. Last fall I attended the Bar’s meeting in Grand Rapids as an exhibitor and was pleased to see so many of you in person. I will also reach out once again to my colleagues in court and legal history at the American Association for State and Local History’s annual meeting in Austin, Texas, also in September.

What do you want to see us do more of? What do you think we do well? Please let me know. My email address is carriesampson@micourthistory.org.

Why We Need Your Support: A Visual Representation



IOLTA funding in 2009 was \$184,940.47—nearly \$20,000 more than the totals for years 2010–2017 combined.



On the left are the letters mailed to our members who have achieved Life Status, or contributions amassing more than \$1,000.00. On the right are the letters to everyone else. As you can see, the pile of those who have traditionally been exempted from paying dues has compounded as we approach our 30 year anniversary.



On the right, are the files of our 2016–2017 new members. Twenty-seven people have become members of the Society in the past year. Unfortunately, the pile on the left represents those whose membership has lapsed. Although the pile looks to be doubled, it is actually 31 files. Several of the lapsed members had several years of giving and were close to “leveling up.”

MSU Law Prize Winner



Zoey Mayhew, a third-year law school student at Michigan State University College of Law, won the Society's 2016 law prize for her work in Professor Charles Ten

Brink's American Legal History Seminar. She is seen here receiving the \$500 prize from Society board member Peter Ellsworth.

UM Law Prize Winner



Amy Bergstraesser graduated from the University of Michigan Law School in May. During law school, her focus was on legal history and international law, taking classes from professors William Novak and Martha Jones, and writing pieces regarding the history of international and national

law for her legal history classes and for the *Michigan Journal of International Law*. She also participated in the Human Trafficking Clinic, the International Transactions Clinic, and the Geneva Externship program.



Spring 2017 Coleman Intern

I am Jackie Guzman and I am excited to be this year's Coleman intern. I graduated from Michigan State University in December 2016 with a major in Arts and Humanities and minors in French and Economics and I plan on attending law school in the near future.

The roots of my interest in law go back to my earliest years in school when I fell in love with reading and writing. Before entering college, I won our school's reading contest (220 books in one year), wrote and sold subscriptions to my own newsletter for four years, won a state writing competition where my

short story was published in an anthology, and attended two summer writing programs, including Stanford's Education Program for Gifted Youth – EPGY.

From there, my writing has flourished and I have found many different outlets to continue to hone my craft. One of these outlets was my high school debate team. It was actually on a whim that I joined, but I was immediately convinced that this was the thing for me and I decided to compete in policy debate. I loved being able to read, write, and research in a way that felt meaningful: not only was I able to simply learn more about policy, law, and government, but I was able to translate that knowledge into winning competitions and bettering my own public speaking skills. It was during my freshman year of high school that I decided that this is what I wanted to continue doing and that it would be my goal to make it to law school.

Although I really want to learn more about law opportunities, I am currently very interested in the possibilities of environmental, international, or business law. This past summer I conducted research for my senior thesis on the laws and policies in place in Costa Rica to allow the country to become carbon neutral by their goal of 2021. Studying Spanish over there and learning about the environmental laws and policies of another country allowed me to reflect on the current situations found here in the US and made me see the importance of learning from others and working across borders.

Beyond my study abroad experience, I am also attracted to business law because of my interest in entrepreneurialism. From when I started writing for my family at age six, I always tried to find ways to turn my writing into a business, selling subscriptions and monthly installments to friends and family across the country. My most recent undertaking has been writing my own cookbook and publishing it through Amazon – titled *Jackie's Delectable Delights*. I am interested in learning more about business law to help me with my future ventures and to help others with theirs as a lawyer.

As a Coleman intern, I am eager to learn about the workings of the Michigan Supreme Court and to gain a deeper understanding of the law. This experience will be invaluable to me as I continue on my path in law and I am so grateful to have this opportunity.

Stephen J. Markman Elected Chief Justice



On Friday, January 6, 2017, Justice Stephen Markman was elected chief justice of the Michigan Supreme Court.

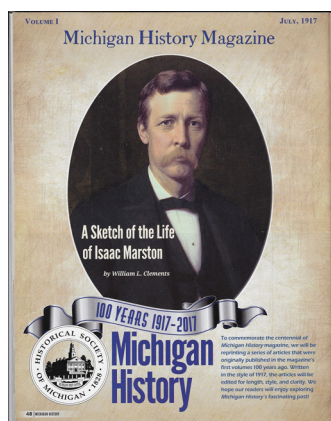
Chief Justice Markman earned his bachelor's degree from Duke University and his law degree from the University of Cincinnati. His professional background includes service as a congressional aide, counsel for the U.S. Senate Subcommittee on the Constitution and Senate Judiciary Committee, Assistant U.S. Attorney General, U.S. Attorney for Eastern Michigan, and private practice with Miller Canfield Paddock & Stone.

He was appointed to the Michigan Court of Appeals on January 1, 1995, where he served until being appointed to the Michigan Supreme Court in 1999 to succeed Justice James Brickley (MSC 1982–1999) upon his retirement from the bench.

Since 1993 Chief Justice Markman has taught Constitutional Law at Hillsdale College each fall semester and he counts fellow Justice David Viviano among his former students.

“ The first responsibility of the Supreme Court, and the chief justice, is to preserve the responsible and equal rule of law in Michigan and to ensure that our system of justice is made readily and fairly available to all of the people of our state. ”

Marston in Michigan History Magazine



The January/February issue of *Michigan History* magazine features an historic article about Michigan Supreme Court Justice Isaac Marston, written by industrialist/book collector William L. Clements, who founded the eponymous library at the University of Michigan. Marston was the first Michigan Supreme Court justice to have attended law school in Michigan and was a student of Thomas M. Cooley, with whom he would later serve on the Michigan Supreme Court from 1875-1883. For more information about the article, please visit the Historical Society of Michigan's website online at hsmichigan.org.



Spotlight on Solicitors

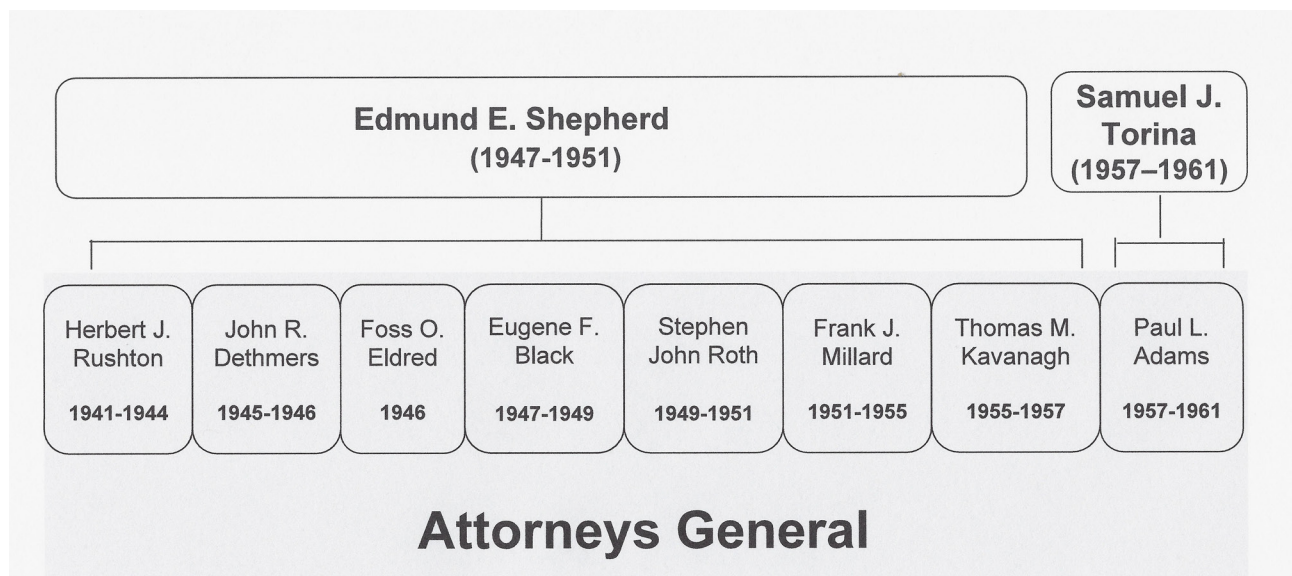
The Story of Michigan's Office of Solicitor General

A special series from the Advocates Guild by Andrea Randall

The Solicitor General is the top appellate attorney in the state. In recognition of those who have held this prestigious post, the Advocates Guild will be running our Spotlight on Solicitors series throughout 2017. In each of our four newsletters this year, we will feature short biographies of Michigan's Solicitors General, starting with the first officeholder (Edmund E. Shepherd) and ending with the most recent (Aaron Lindstrom). Each biography begins with that Solicitor General's personal background, proceeds to an overview of three notable cases on which he or she worked, and concludes with a brief synopsis of his or her life after stepping down from the office. The cases overviewed in these biographies cover everything from criminal procedure and civil rights issues to commerce clause and taxation disputes, demonstrating the wide range of practice areas that a Solicitor General must master. Many of the cases discussed have also had far-reaching constitutional and social implications, showing just how great an impact our Solicitors General can have. The members of the Advocates Guild are truly in a position to appreciate both the challenges faced and the hard work expended by Michigan's Solicitors General, and we hope you enjoy getting to know them better!

Creation and Evolution of Michigan's Solicitor General Position

Influenced by the office of the United States Solicitor General, Michigan was one of the earliest states to create the position of state Solicitor General.¹ In 1939, the Michigan Legislature enacted Section 14.28 of the Michigan Compiled Laws, which authorizes the Attorney General to appoint a Solicitor General. Under the statute, the Solicitor General's primary task is to represent the State of Michigan in cases before the Supreme Court. However, the statute also allows the Attorney General, at his or her discretion, to delegate other duties to the Solicitor General. Over time, those duties have come to include supervising all appellate filings done by the Attorney General's Office, working with the Attorney General on amicus briefs, and preparing departmental reports. Additionally, the Solicitor General is head of the Attorney General's Appellate and Opinions Divisions. He or she also has a deputy Solicitor General to assist with the vast array of duties. Over the past seven decades, Michigan's Solicitor General Bureau has evolved to tackle the ever-changing landscape of law, making significant impacts on jurisprudence at both the state and national levels.



Four of the Attorneys General of this period went on to serve as Justices of the Michigan Supreme Court: John R. Dethmers (MSC 1946-1971); Eugene F. Black (MSC 1956-1973); Thomas M. Kavanagh (MSC 1958-1975); and Paul L. Adams (MSC 1962, 1964-1973).

Edmund E. Shepherd (1941–1957)

Considered one of the “ablest brief writers in the United States” during his time, Edmund E. Shepherd was a fitting choice for Michigan’s first Solicitor General.² After graduating from the Detroit College of Law in 1906, Shepherd worked in general practice, eventually making a name for himself in the field of appellate law. He then transitioned into the Wayne County Prosecutor’s Office, where he oversaw all criminal appeals to the Michigan Supreme Court, before becoming an Assistant Attorney General in 1935. It was from these ranks that he was chosen to be the state’s first Solicitor General. Shepherd’s passion for the job dominated his life and his thoughts for the sixteen years that he served the public as Solicitor General.³

Equal rights for women was an important issue during the time Shepherd held office. He personally supported the idea of women breaking free of the “common law disabilities” that left her property of her husband, but he still believed that the law could discriminate against a woman if it was “necessary for her own protection and for the welfare of the members of her sex.”⁴ This was the position he argued before the United States Supreme Court on behalf of the Michigan Liquor Control Commission in *Goesaert v. Cleary*, 335 US 464 (1948). The plaintiffs in this case challenged a Michigan law that prohibited a woman from being a bartender in cities with populations over 50,000 unless her husband or father owned the bar.⁵ While the barmaids argued that this was a violation of the Fourteenth Amendment’s Equal Protection Clause, Shepherd contended that the state had the power to enact laws for the protection of women. In this case, he argued, the law protected women from the dangers associated with bartending unless her husband or father was close by to help her if she needed it. The Court agreed with Shepherd, and this decision stood for thirty years until it was overruled by *Craig v. Boren*, 429 US 190 (1978).

The still-unsolved murder of State Senator Warren G. Hooper remains one of Michigan’s greatest murder mysteries. Senator Hooper was assassinated in 1945, three days before he was scheduled to testify before a grand jury convened to investigate corruption and bribery in the legislature. The senator’s murder amped up the investigation, resulting in the conviction of twelve state senators, eleven state representatives, a former lieutenant governor, and several prosecutors and police officers. Unsurprisingly, several of those convicted appealed, and Shepherd defended these convictions in *People v. Hancock*, 326 Mich. 471 (1950) (in conjunction with *People v. Omacht* 326 Mich. 505 (1950) and *People v. Cooper*, 326 Mich. 514 (1950)). Shepherd successfully argued against numerous challenges on appeal, including accusations of an improperly impaneled jury during the trial. The appellants contended that the jury pool was not selected in accordance with the then-current law⁶ and that three of the jurors were not properly qualified.⁷ However, the Michigan Supreme Court ultimately agreed with Shepherd, finding that the county clerk’s method of selecting the jurors was proper and that the three challenged jurors did, in fact, have a right to sit on the jury. The Court’s upholding of these convictions was the upholding of justice in the eyes of Michigan residents, allowing them to begin restoring faith in their government.

Balancing First Amendment rights with state obscenity laws has always been a challenging endeavor. Shepherd had the opportunity to leave his mark on this ever-evolving area of law by arguing *Butler v. Michigan*, 352 US 380 (1957) in front of the United States Supreme Court. The defendant was charged with violating one of Michigan’s obscenity laws when he sold a copy of John H. Griffin’s *The Devil Rides Outside* to a police officer.⁸ Justice Frankfurter, in his opinion, noted that Shepherd argued that the law was necessary to protect minors “with characteristic candor.”⁹ However, the Court held that this law was not reasonably related to the legitimate state interest of protecting minors, because it ultimately prohibited an adult from selling a book to another adult. Though Shepherd did not prevail in this case, it gave him the chance to appear before the United States Supreme Court one final time as Michigan Solicitor General, arguing a case that has been referred to as “one of the most important free speech cases since 1950.”¹⁰

Shepherd stepped down as Solicitor General in 1957 after twenty-six years of service to the state. He returned to private practice in Lansing at the firm now known as Foster Swift Collins & Smith. He remained active in the legal profession, giving speeches on appellate law and serving on the Michigan State Bar Committee for Criminal Jurisprudence. He passed away in December 1968, shortly after his 86th birthday.

Samuel J. Torina (1957–1961)

Originally from Memphis, Tennessee, Michigan's second Solicitor General moved to Detroit at a young age, making Michigan his home for the rest of his life. Torina received a scholarship from the University of Detroit, graduating with his law degree in 1939. After serving with the Coast Guard during World War II, Torina returned to Detroit to open his own law firm before joining the Wayne County Prosecutor's Office in 1952. During the five years he held this position, he was active on several state bar committees and in the Italian Lawyer's Club of Michigan, reaching the office of president before becoming Solicitor General.

Before the end of his first year as Solicitor General, Torina had the opportunity to appear before the US Supreme Court in *Moore v. Michigan*, 355 US 155 (1957). Moore, a seventeen-year-old black man with a seventh-grade education, confessed to the first-degree murder of an elderly white woman after the interrogating officer falsely told him that a mob had formed outside the police station. The officer told Moore that they could not protect him from potential mob violence unless he confessed to the crime and agreed to plead guilty without the assistance of counsel. On appeal, Torina noted that the trial judge had conferred privately with Moore for five to ten minutes before he entered his guilty plea at the arraignment. The trial judge had stressed to Moore that he should not plead guilty unless he actually committed the crime and reiterated his right to the assistance of counsel.¹¹ The fact that Moore still pleaded guilty after his conversation with the judge, Torina argued, showed that he did so intelligently and had voluntarily waived his right to counsel. However, the Court found that the officer's implied threat of imminent harm to Moore was the motivating factor behind his decision to plead guilty without the assistance of counsel, rendering his plea involuntary. This case was another stepping stone on the road to the landmark case of *Gideon v. Wainwright*, 372 US 335 (1963), which ensured the right to counsel for all indigent defendants.

Though the State Bar of Michigan was established in 1935, the question of whether its property was exempt from taxes was not settled until the Michigan Supreme Court decided *State Bar of Michigan v. City of Lansing*, 361 Mich. 185 (1960). After the city denied the Bar Association's tax exemption petition for its newly constructed headquarters in Lansing, the Bar appealed, arguing that the intent of the legislature in creating the state bar and subjecting it to the supervision of the Supreme Court was to create a public entity.¹² Torina intervened on behalf of the City of Lansing, claiming that the State Bar was a private organization, not a governmental agency entitled to a tax exemption. The Court ultimately sided with the State Bar, finding that it is a public agency and therefore entitled to a tax exemption. Though Torina was not on the winning side in this case, he nevertheless contributed to the settling of an important issue.

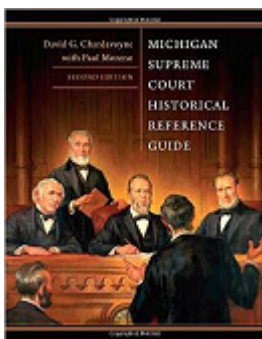
With the dawning of the 1960's cultural revolution just around the corner, it is unsurprising that one of the cases Torina argued in front of the Michigan Supreme Court involved the activities of a local nudist camp. In *People v. Hildabridge*, 353 Mich. 562 (1958), the defendants were charged with violating a Michigan law prohibiting indecent exposure after police entered onto the isolated property of the camp to photograph the nudists.¹³ While Torina fought to uphold the validity of the indecency law, the Court analyzed the police officers' activities under the Fourth Amendment and found that the officer's intrusion onto private property to obtain the evidence without a warrant was an unconstitutional search. The opinion is noted as being one of Justice Voelker's most powerfully written.¹⁴

After leaving the Solicitor General's office, Torina returned to the Wayne County Prosecutor's Office where he served as chief of the appeals division before becoming chief of appeals for the county's corporation counsel. He also taught at the University of Detroit Law School, a fitting profession for a man with a profound love of learning and helping others. Torina passed away in February of 1998, when he was 84.

Author Info—Andrea Randall is a third-year law student at Western Michigan University Cooley Law School. She currently works as a law clerk for Speaker Law Firm and as a Graduate Assistant for WMU-Cooley's Academic Resource Center. Her passion for researching and writing motivates her to seek a career in appellate work after she graduates.

End Notes

- ¹ James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, 3 J. App. Prac. & Process 533, 536 (Fall, 2001).
- ² Charles E. George (editor's note for Edmund E. Shepherd, *Jitney's Rights to Road*, 16 Law. & Banker & S. Bench & B. Rev. 9 1923).
- ³ Showing his sense of humor, he once told a newspaper reporter that he was so preoccupied with thoughts of work, that he went upstairs in his East Lansing home to retrieve a book and ended up taking a bath—completely forgetting the book and the fact that he had already bathed less than an hour before. Mark Beltaire, *The Town Crier*, Detroit Free Press, Feb. 27, 1950, at 32.
- ⁴ Edmund E. Shepherd, *The Legal Rights of Women*, 18 Law. & Banker & S. Bench & B. Rev. 175, 180 (1925).
- ⁵ Section 19a of Act 133 of the Public Acts of Michigan 1945, Mich. Stat. Ann. § 18,990(1), Cum. Supp.
- ⁶ The law at the time, C.L.1929, § 13729, Stat. Ann. § 27.252, required the county clerk to select potential jurors by writing their names down on paper, folding it so the names could not be read, and placing the folded papers into a box from which the clerk would then draw the names. In this case, the clerk failed to fold the paper on which the names were written before placing them into the box.
- ⁷ C.L.1948, § 602.121, Stat. Ann. § 27.246 governed juror qualifications at the time of these trials. The law required a juror to be listed on the assessor's tax roll for the year that he or she sat on a jury. Here, three women jurors were challenged under this requirement, since only their husbands' names, with whom they owned their property as tenancies by the entireties, appeared on the tax roll.
- ⁸ Butler, the manager of a bookstore, was charged with violation of s 343, of the Michigan Penal Code, Comp. Laws Supp. 1954, §750.343, which stated, "Any person who shall . . . sell . . . any book . . . containing obscene, immoral, lewd or lascivious language . . . tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth . . . shall be guilty of a misdemeanor."
- ⁹ *Butler v. Michigan*, 352 US 380, 383 (1957).
- ¹⁰ Calvert, Clay (2012) *Of Burning Houses and Roasting Pigs: Why Butler v. Michigan Remains a Key Free Speech Victory More than a Half-Century Later*, Federal Communications Law Journal: Vol. 64: Iss. 2, Article 2, page 250.
- ¹¹ This was in accordance with Michigan procedure at the time, under Mich. Stat. Ann. 1954, § 28.1058, Comp. Laws 1948, s 768.35, which required the trial judge to inquire into the voluntariness of a guilty plea.
- ¹² The State Bar of Michigan was initially created by P.A. 1935, No. 58 (C.L. 1948, § 691.51 et seq. [Stat. Ann., § 27.101 et seq.].
- ¹³ (C.L.S.1956, § 750.335a [Stat. Ann. 1954 Rev. § 28.567(1)]), which states, "Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor * * *."
- ¹⁴ In fact, his opinion was originally that of the dissent. After reading his dissent, however, Justice Edwards changed his vote, making the former dissent the new majority opinion.



Read more about the justices mentioned in this story and the case of *People v Hildabridge* in our book *The Michigan Supreme Court Historical Reference Guide, Second Edition*, available to purchase from Amazon and other booksellers! Visit our website at www.micourthistory.org to learn more.

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