Society Update
FROM THE MICHIGAN SUPREME COURT HISTORICAL SOCIETY
SUMMER 2007

Chief Justice Cooley:

A Legal Vignette Presented by Professor Paul Carrington at the Annual Membership Luncheon

Among American judges, only John Marshall might have been more highly regarded in the 19th century than Thomas McIntyre Cooley.

Cooley was nineteen in 1843 when he settled in Adrian. Raised on a New York farm as one of ten children, he was the one his mother sent to school, but only for a couple of years. He had also spent a year working in the law office of a New York Congressman.

Fifteen years after his arrival in the state, Cooley was a founder and the intellectual leader of the University of Michigan Law School. It was his presence that attracted the students who made it a national institution. He was an extraordinarily lucid lecturer and a forceful moralist. Thousands of students came for a year or two to listen to his lectures, and those of Justice Campbell. Then they were sworn into the profession. At least twenty-five of them went on to sit on the highest courts of their state, and almost as many served as members of the United States Senate. And there was Clarence Darrow.

Cooley was first elected to the Supreme Court of Michigan in 1865. In 1868, he published Constitutional Limitations, the most widely cited American law book written in the 19th century. And he wrote numerous other books that were widely acclaimed. A premier law journal of the time declared his qualifications for appointment to the Supreme Court of the United States to be "transcendent."

In 1885, his 20-year career on the Supreme Court of Michigan came to an end as a result of a sweep of statewide elections by the Democratic Party. He was offered the presidency of a railroad at a monumental salary, but declined and remained at the University.

In 1887, Congress enacted the Interstate Commerce Act. It was the first major step of the federal government in the regulation business. The industry to be regulated was the railroads. The standards prescribed for their regulation were unsurprisingly vague. On advice from all sides, President Cleveland importuned Cooley to serve on the Commission. He reluctantly agreed despite the fact that his health, and that of his wife, were failing. In three years on the Commission, he not only established its role as an agency that understood both its responsibilities and its limitations, but set a standard for administrative rulemaking that Judge Henry Friendly would later acclaim for its clarity as a model to be followed by all future pregulatory agencies.

Why was Thomas Cooley not appointed to the Supreme Court of the United States by his fellow Republican Presidents: Grant, Hayes, Garfield, or Arthur, who together appointed nine Justices while Cooley was in his prime? One reason may have been that Cooley was not known for his partisan loyalty. He became a Republican because he was strongly op-

IN THIS ISSUE

MICHIGAN SUPREME COURT HISTORICAL SOCIETY

posed to slavery, but he was never in tune with his party's capture in the gilded age by the interests of big business.

His independence from partisanship was marked by one of the first opinions he wrote for the Supreme Court of Michigan. The decision cost several of his fellow Republicans the offices that they thought they had won in the election of 1864. Specifically, Cooley led the court in holding that the provision of the state constitution limiting the right to vote to residents of the state invalidated the law enacted by the legislature to enable Union soldiers to vote by mail. Regretfully, he explained that to depart from the plain meaning of the words of the constitution "would loosen the anchor of our safety." His decision won the admiration of citizens of diverse politics as a signal of their Court's integrity.

"[Cooley's] independence from partisanship was marked by one of the first opinions he wrote for the Supreme Court of Michigan."

Compare this decision with that of the Supreme Court of the United States in the notorious case of Bush v. Gore. The Founding Fathers plainly intended to keep their Supreme Court out of election disputes and they assigned the duty of judging the qualifications of the state's electors to the House of Representatives, thereby eliminating any need for the Court to engage in the selection of the President who chooses them and their colleagues. But the Court disregarded the plain text of the Constitution to vote for Bush by overruling the Florida Supreme Court. The five Justices voting to award Bush the presidency were easily recognized as persons who preferred Bush to Gore as the President more likely to appoint new Justices who would vote with them, while the dissenters were equally recognizable as persons who preferred Gore to Bush for the same self-serving reason. It seems clear that if Cooley had been on the Court in 2000 he would have refused to consider the case and would have left it to be resolved in the manner prescribed by the Constitution.

Chief Justice Cooley wrote only one opinion of the court that excited nationwide attention. That case involved the town of Salem that had pledged its credit to aid construction of the Detroit & Howell Railroad in consideration of a promise by the railroad to provide service to the town. The railroad was constructed in reliance upon Salem's pledge and other such pledges. Many towns in Michigan, indeed thousands in the United States, had made such pledges under the duress of being told that a failure to do so would result in a denial of rail service and the almost certain atrophy of their local economies. In 1864, the Michigan legislature, at the insistence of the railroads and after a sustained dispute signaling widespread popular opposition, had authorized municipalities such as Salem to levy taxes to aid railroads. And this Salem had promised to do.

In 1870, the railroad sued the town to compel it to honor that promise by issuing the necessary bonds that would be retired from the town's future tax revenues. Cooley's court denied relief, holding the 1864 legislation unconstitutional on the ground that any payment of interest or principal on such bonds would entail the use of public revenue for a private purpose; and since Salem was unable to pay interest or principal with funds obtained from any other source, it would be fraudulent to issue the bonds. Cooley explained that:

[T]he discrimination between different classes or occupations, and the favoring of one at the expense of the rest, whether that one be farming, or banking, or merchandising, or milling, or printing, or railroading is not legitimate legislation, and is a violation of that equality of right which is a maxim of state government..[W]hen the state once enters upon the business of subsidies, we shall not fail to discover that the strong and the powerful interests are those most likely to control the legislation, and that the weaker will be taxed to enhance the profits of the stronger.

This decision was said to be "the big news of 1870." It horrified those in the railroad and investments industries. And it was not followed in other states. But it was enormously popular with the people of Michigan who felt that they had been coerced into paying taxes to build railroad tracks that often proved to be uneconomic. Indeed, we are told that every member of the court was immediately regarded as a suitable candidate for higher office.

Cooley's opinion distinguished the use of the power of eminent domain to enable the construction of railroads. The railroad was presumed to have paid full value for the easements imposed on private land for the laying of tracks and operation of trains.

Obviously, there are at the present time many state and federal programs that violate Cooley's principle forbidding subsidies to

"He expressed the hope that law might provide an alternative to the economic predation, chaos and violence that he deplored, and called on the profession to take responsibility for fulfilling that hope."

private business enacted in the belief that the subvention will trickle down to enrich many citizens other than the direct beneficiaries.

But Cooley had a point worthy of respect. And his court's position is reflected in the popular reaction to the 2005 decision of the U.S. Supreme Court in Kelo v. City of New London. The Court there held that there was no violation of the federal Constitution if the city employed its power of eminent domain to facilitate a private developer's plan for a commercial and residential facility. A railroad or a pipeline that is regulated as a public utility and serves the general public is distinguished in many minds from a deluxe shopping center that will serve only the privileged members of the community and requires the desolation of homes of citizens unwilling to sell. Cooley's court might well have held that a use of the power of eminent domain in that case was unconstitutional. At least, his opinion in the Salem railroad case might be seen to point in that direction.

In 1893, Thomas Cooley was elected President of the American Bar Association. In his presidential address, his last published utterance, he expressed concern over the incendiary relationship between capital and labor. He expressed the hope that law might provide an alternative to the economic predation, chaos and violence that he deplored, and called on the profession to take responsibility for fulfilling that hope.

Given the enormous respect commanded by Cooley in his lifetime, we may question why his reputation declined in the 20th century. The explanation lies in the fact that Cooley was a lifelong, barnburning Jacksonian who from his high office maintained equal respect for the rights of all his fellow citizens.

The issue he presented for his successors in the 20th century was fully revealed in remarks he presented in Cambridge, Massachusetts in 1886. Among the events celebrating the 250th anniversary of Harvard University was an award of an honorary doctorate to Cooley. Of all the persons so recognized by Harvard in the last 372 years, Cooley was, save for President Lincoln, almost surely the person with the most modest formal education. He took the occasion of his receipt of the degree to say that:

We fail to appreciate the dignity of our profession if we look for it either in profundity of learning or in forensic triumphs. Its reason for being must be found in the effective aid it renders to justice and in the sense that it gives public security through its steady support of public order. These are commonplaces, but the strength of law lies in its commonplace character, and it becomes feeble and untrustworthy when it expresses something different from the common thoughts of men.

These words did not sit well with his hosts, President Eliot and Dean Langdell, who shared the aspiration of many others of their time to make measurements of formal education the standard by which we judge our fellow citizens. The idea of human capitalism was then beginning to emerge and his hosts represented those who would make the investments required to elevate their status and maximize their returns.

Another person present on that occasion was the future Justice Holmes. Sixteen years later, a decade after Cooley had passed on, at a similar event at Northwestern University, Holmes clearly replied to Cooley when he characterized law as "a field for the lightning of genius." And when he affirmed that from it may "fly sparks that shall free in some genius his explosive message," Cooley would surely have risen from his seat in protest.

I think it fair to say that we have not yet encountered a legal genius. Instead, we have developed an environment in which high academic and intellectual attainments are deemed to be indispensable qualifications for high judicial office. Knowledge of the common thoughts of men is no longer expected. Consider that Harriet Miers was dismissed as a nominee notwithstanding the very wide range of her political experience and the respect she had won in diverse professional roles, and notwithstanding the fact that the other Justices sitting on the Court are all lacking in the sort of personal and professional experience from which a knowledge of the common thoughts of men might be acquired.

We have freed our Supreme Court Justices to decide only those few cases that seem to them to present issues of sufficient public importance to interest them. We have situated them in a building elegantly designed to foster in them and in their observers an exaggerated sense of their competence and authority. And we have surrounded them with an enormous million-

member profession that treats them as rock stars. Our profession often derives its sense of self-worth from the romantic vision expressed by Holmes that ours is a field for the lightning of genius. Cooley's jurisprudence of intellectual modesty has been substantially abandoned.

A secondary consequence of the elevation of the Supreme Court of the United States has been the subordination of state supreme courts. Yes, the state courts make many important decisions and play a vital role in our government. But seldom do we find occasions to recognize their importance or salute the judges who do their work well and with the restraint and modesty that was characteristic of Cooley's judicial work.

Also, as his University of Michigan Law School evolved to require three years of rigorous study, and to exclude students with inadequate formal credentials, his successors came to hold his teaching in disregard. Cooley Lectures are given annually at the school, but seldom if ever are they an occasion to salute him or to recall the open, democratic practices maintained in his time.

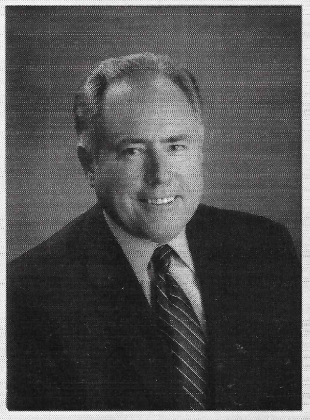
I will leave you with the thought that in important respects Cooley may have been wiser than his 20th century successors were prone to acknowledge. And his insights may be growing in importance in our time. The divisions of class that were threatening the stability of the American social order at the time that Cooley made his presidential address to the ABA may be taking on a new character, one making his jurisprudential modesty increasingly valuable.

In the 1890s, the division was between Marxists at one end of the spectrum and social Darwinists at the other and they contested access to economic power. But, as others have observed, the issue marking class lines in America today are less about money and more about status. Perhaps there are few in this audience who see themselves as objects of resentment directed at their academic attainments. I am, however, not alone in sensing a growing alienation on the part of our fellow citizens who have not excelled at academic work, who feel most threatened by globalization on that account, and who resent the growing empowerment and status of the secure and sometimes arrogant professional class. It was that form of alienation that Cooley sensed, and that led him to caution the profession to observe the common thoughts of men. Maybe we ought to strive harder than we do to respect those ordinary thoughts. Cooley would surely say so.

Society Welcomes New Board Member

At the April 18 board meeting, the Michigan Supreme Court Historical Society elected Scott S. Brinkmeyer as a new board member.

Mr. Brinkmeyer was graduated from DePauw University in 1972 with a B.A. and from the Saint Louis School of Law with a J.D. in 1975. He is a member of the law firm of Mika, Meyers, Beckett & Jones PLC in Grand Rapids. Since joining the firm in 1975, he has focused his law practice in various areas of litigation, dispute resolution, and arbitration. He has represented major corporations, smaller companies, and individuals in lawsuits in federal and state courts throughout Michigan.



Scott is a certified mediator in the U.S. District Court for the Western District of Michigan, a certified civil neutral arbitrator on the national panel of the American Arbitration Association, and a trained and court approved mediator in various circuit courts.

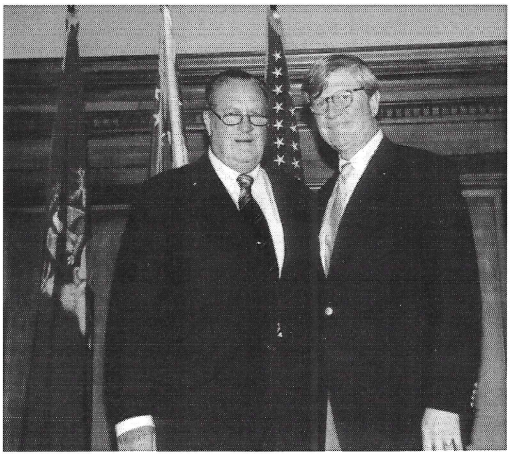
Scott is a past president of the State Bar of Michigan (2003-04), and the past chair of the State Bar Representative Assembly (1997-98). He is a Fellow of the Michigan State Bar Foundation, the American Bar Association Foundation and a Paul Harris Fellow of Rotary International.

Mr. Brinkmeyer replaces Leonard D. Givens on the Board.

Society Hosts 16th Annual Membership Luncheon

On Wednesday, April 18, the Michigan Supreme Court Historical Society once again hosted its Annual Membership Luncheon. The Luncheon, which was attended by a record crowd, featured remarks by Society President Wallace D. Riley, Chief Justice Clifford Taylor, and Professor Paul D. Carrington.

Mr. Riley opened the program with welcoming remarks and then reported on the Society's recent and ongoing activities, including the completion of the oral history of former court clerk Harold Hoag, the creation of the Advocates Guild, and the work of the 2007 Coleman Intern.



Chief Justice Taylor introduced the other members of the Court, all of whom were in attendance, and offered the following remarks:

I thank Wally, Angela Bergman, and everyone else who contributes to the Society's work. You are preserving the Court's institutional memory, in the best sense of the term. It's been said, famously, that those who don't learn from history are doomed to repeat it. I would amend that to add that those who don't learn from history will not repeat all that was best and most inspiring in our past.

Our Michigan Supreme Court heritage includes Justice Thomas M. Cooley, one of the five giants of the profession profiled by Professor Carrington in his book, Stewards of Democracy.

Professor Carrington's challenging, and I think very timely theme, is that we in the bench and bar need to be reminded of the place that the judicial branch properly occupies in a democracy.

There is a moral tradition that American lawyers and judges have an ethical duty to nurture and protect the institutions of self-government, which in turn make possible all of our legal rights.

As a judge, scholar, teacher, and founding chair of the Interstate Commerce Commission, Justice Cooley exemplified this moral tradition, as Professor Carrington explains in his book. Professor Carrington also argues that this moral tradition is threatened by the fact that the U.S. Supreme Court and other high courts, the legal academy, and noted journalists tend to work from the premise that political and moral judgments can best be made by an elite – scholars, judges, and lawyers – and imposed on a passive citizenry. The result is rule by judges – A threatened subversion of the democratic process.

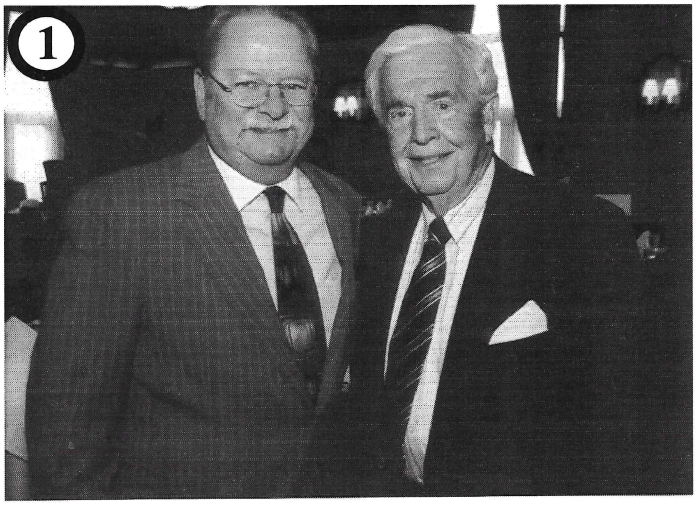
Certainly, that's not how Justice Cooley understood his place in American democracy. Good stewards like Justice Cooley protect and nurture the democratic process, but they are under no illusions that they own it.

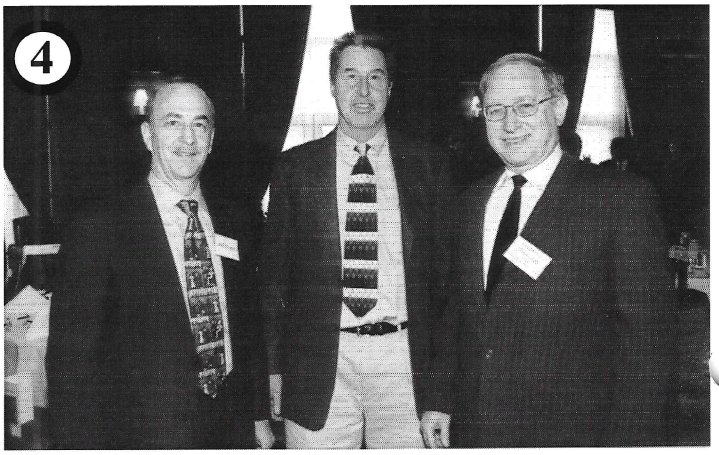
We live in a cynical and a historical age. Many view the idea of the public servant as a quaint notion that has gone the way of eight-track tapes and dial telephones. That is why it is so refreshing, and timely, to return to Justice Cooley as a model of a legal career dedicated to serving the public.

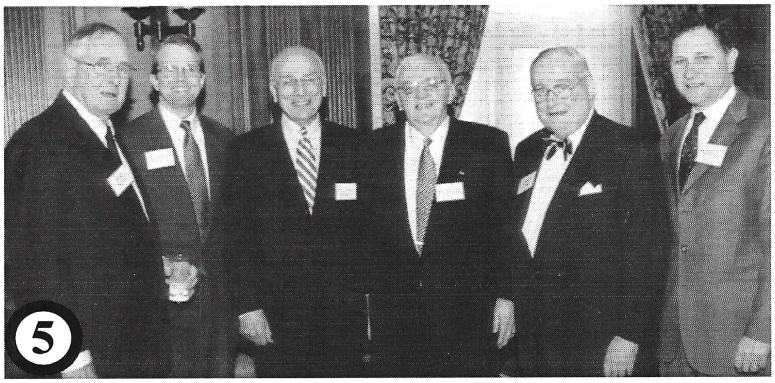
The life of Thomas Cooley raises for all of us the issues of the role of the profession, the conflict between democratic values and intellectual elitism, and the role of the legal profession in the public arena. First and last he reminds us our job is to support the democratic process and not to foist our policy preferences on our fellow citizens. I am looking forward to hearing from Professor Carrington about how we return to a professional tradition that supports rather than subverts democracy, that extremely fragile and high-maintenance creature.

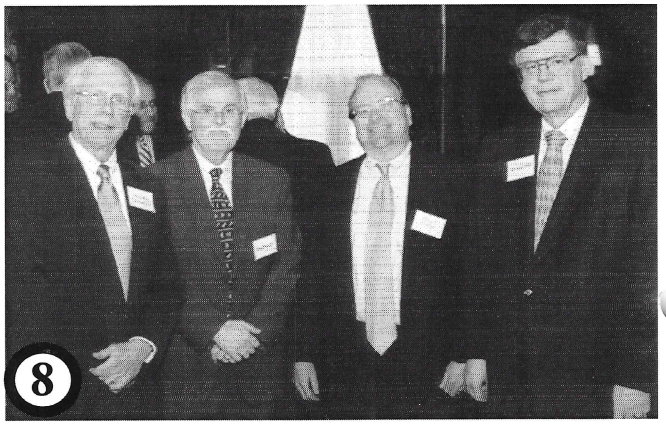
The luncheon concluded with remarks by Professor Paul Carrington.

Images from the 16th Annual Membership Luncheon

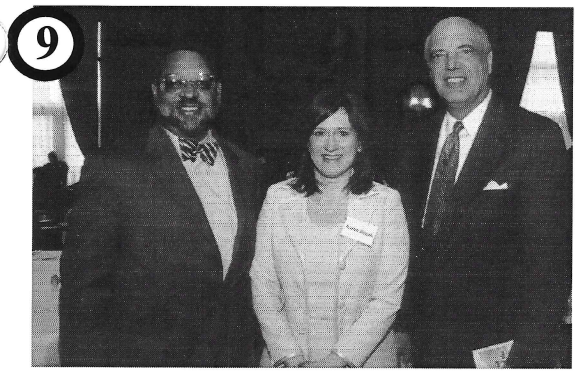


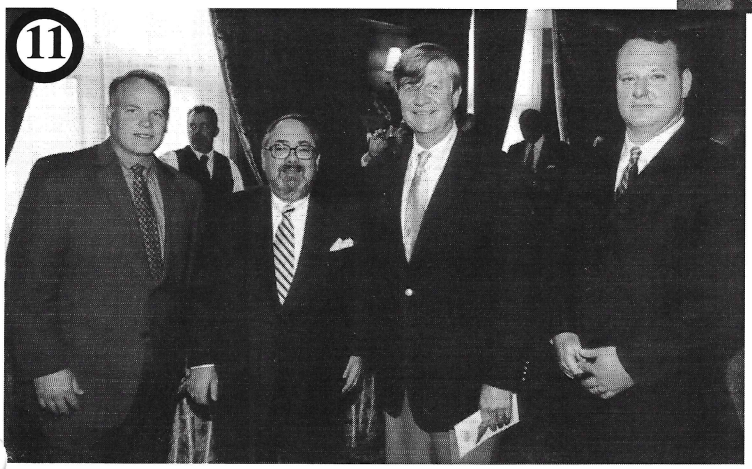


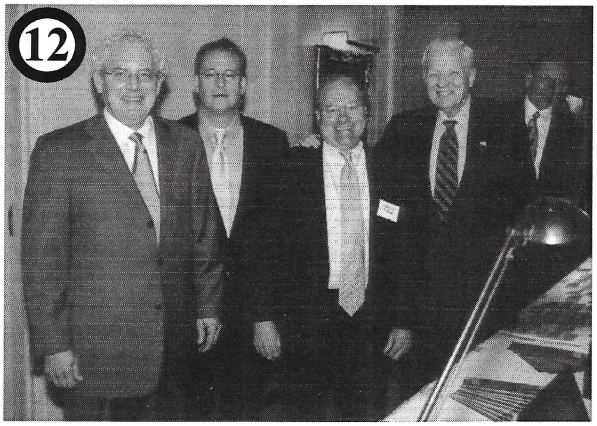


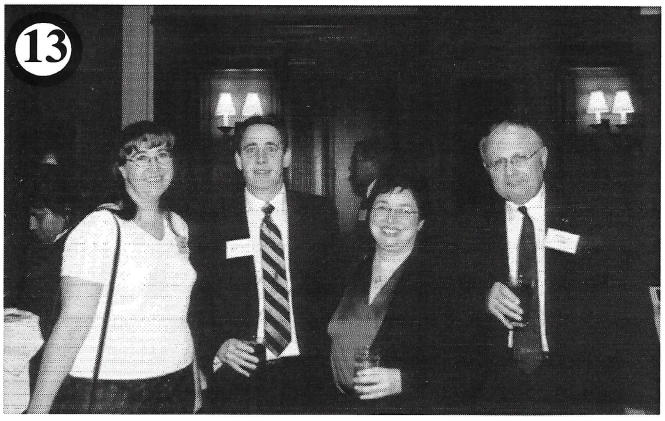


Wednesday, April 18, 2007 — Detroit Athletic Club









Pictured: (1) Justice Michael F. Cavanagh and Society board member Frank J. Kelley (2) Karen Hogan, James Robb, Sue Cooley Sutherland, and John Nussbaumer were among the Cooley Law School representatives (3) Justice Corrigan and Society board members Ronald Keefe, Scott Brinkmeyer, and Judge Michael Harrison (4) Jeff Haynes, Society board member Michael Murray and Justice Markman (5) Society guests mingle during the cocktail reception (6) Society guests pose before the luncheon begins (7) Justice Kelly poses with a luncheon guest, Judge Cornelia Kennedy, and Society board member Eugene Mossner (8) Norman Stockmeyer, Tim Bellanger, Jeffrey Paulsen, and Michael Ellis (9) Justice Young poses with Karen Hogan and Judge William Giovan (10) Society board member Fred Buesser, Judge Maureen Pulte Reilly, Judge Cornelia Kennedy, Martin Critchell and Brad Thompson (11) Lloyd Brown, John P. Jacobs, Chief Justice Taylor, and Timothy A. Diemer (12) Society guests register for the luncheon (13) Society guests enjoy a cocktail before the luncheon begins (14) Justice Weaver dines with luncheon guests

Have you paid your 2007 Dues?

For your convenience, the Society accepts Visa, MasterCard, and American Express. Please call (517) 373-7589 to make your payment by phone, or complete and mail or fax the following information to the Society

Name _____

Address _____

City _____ State _____ Zip _____

Phone _____

* Individual Membership: $100
* Corporate/Law Firm Membership: $1000

Total Payment _____

[] Check enclosed [] Credit Card (Circle one)

Visa MasterCard American Express

Name on Card _____

Acct. No. _____

Exp. Date _____

Signature _____

Mission Statement

The Michigan Supreme Court Historical Society, a non-profit 501(c)(3) corporation, collects, preserves and displays documents, records, and memorabilia relating to the Michigan Supreme Court and the other Courts of Michigan, promotes the study of the history of Michigan's courts, and seeks to increase public awareness of Michigan's legal heritage. The Society sponsors and conducts historical research, provides speakers and educational materials for students, and sponsors and provides publications, portraits and memorials, special events and projects consistent with its mission.

Society Update is published quarterly by the Michigan Supreme Court Historical Society. Writing submissions, article ideas, news and announcements are encouraged. Contact the Society at: 1st Floor Hall of Justice, 925 W. Ottawa Street, Lansing, MI 48915 Phone: 517-373-7589 Fax: 517-373-7592
E-mail ABERGMAN@MICOURTHISTORY.ORG; Website: WWW.MICOURTHISTORY.ORG

MICHIGAN SUPREME COURT
HISTORICAL SOCIETY
1st Floor, Hall of Justice
925 W. Ottawa Street
Lansing, MI 48915