

Society Update

The Official Publication of the Michigan Supreme Court Historical Society

Spring–Summer 2019



Chief Justice McCormack's Opening Remarks at the Society's Annual Luncheon



Thank you, Carl. On behalf of my colleagues, please accept our thanks for your leadership at the Historical Society.

We are all the beneficiaries of Carl's passion for the Society's work.

I have the honor of introducing my colleagues – as well as retired Justi.

Given our meeting's purpose, it is worth noting that Justice Charles Levin is particularly proud today – as one of his former clerks, Lori Lightfoot, was elected Mayor of Chicago a couple of weeks ago – certainly an historic first.

I want to thank our State Bar President Jennifer Grieco for joining us today, and more importantly for the Bar's partnership and leadership around access to justice. In particular, the State Bar's support for Michigan Legal Help has been critical in making the program a national leader. Millions of people have visited michiganlegalthelp.org, thousands have use the tools on the site, filling out hundreds of forms each day. And we

Continued on next page >>

State Bar of Michigan President Grieco's Remarks at the Society's Annual Luncheon



I am honored to be asked to say a few words to you today, not as a scholar like our keynote speaker, but as the 84th President of the State Bar of Michigan. A hundred years ago my presence in that position was literally unthinkable. Suffrage had not yet been achieved, and women lawyers were veritable unicorns of the profession. In 1872, the U.S. Supreme Court upheld an Illinois ban on women practicing law. Here's a bit of what a concurring Justice wrote:

“ [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the

Continued on page 4 >>

are excited about new initiatives to increase access to justice together with the Bar. Stay tuned for more about that.

And we have a number of other big projects on our administrative docket, including a joint elder law taskforce with the AG, a joint taskforce with both of the other branches and the Counties and the Sheriffs on jail population, and some big technology projects including statewide e-filing and online dispute resolution.

The court of the future will use technology and procedural innovation to simplify processes. In our civil and criminal courts where ordinary Americans appear the most, we have to streamline complex procedures; we need a cheaper, simpler, faster justice system.

Fight me!

But enough about the future, today is about the past.

I am eager to hear Professor Helfman on Justice Cooley. In preparing for today I had to come to terms with my own Justice/Professor/Dean Cooley knowledge deficit.

Justice Cooley was the 25th Justice of the MSC and he was very much a native of the UofM Law School. He was one of its founding professors, and some years after he was elected to the court, he served as its Dean. Apparently in those days you could do both jobs at the same time. There is a Cooley bust in the faculty lounge at UM Law, but it's off in a corner and kind of dusty.

You'd expect me to know a whole lot more about him than those topline credits. My friend Justice/Judge Larsen and I were talking about this last week when she was headed to Georgetown to give a lecture about him (there is a Justice Cooley lecture at Georgetown — go figure). We were trying to sort out why we don't know more about Cooley. (It seems he might have a bit of a *Lochner* issue, and not clearly a fair one, but I haven't worked my way through the secondary sources so I'll save that for another talk.)

But it's especially puzzling given what I've learned

just in about the last ten days.

- *Cooley wrote poetry criticizing slavery,
- *He founded the Michigan Branch of the Free Soil Party,
- *He was a committed proponent of local control,
- *In the decade immediately following the ratification of the 14th Amendment, he produced three influential treatises: one on Constitutional Law, one on Tax, and one on Torts,
- *He edited and revised *Blackstone* and also *Story*,
- *The United States Supreme Court has cited his work more than 700 times.

I mean...what a great Twitter follow, am I right?

And listen to this (and don't worry, it's short and will then exhaust my new Cooley knowledge):

In 1869, just one year after the ratification of the 14th Amendment, and eighty-five years before *Brown v Board of Education*, Justice Cooley authored what you might today see as a pretty big opinion, given all that came next.

In April 1868, Joseph Workman, who was Black, attempted to enroll his son in his local public school in Detroit. The school refused him based on his race; he was told he could instead attend one of the city's schools for Black children. Workman sued. He believed that his son had been denied the opportunity to attend the school closest to his home because of his race; and because the schools for Black children did not teach at the higher levels, he had been denied an education that fit his abilities.

Sound familiar? Right, but it was 1869!!

Justice Cooley's decision found for Workman.

Now, the question was decided on statutory grounds, but it hinted at constitutional ones too.

An 1867 amendment to the state's Primary School Law, required that:

"All residents of any district shall have an equal right to attend any school

Chief Justice Bridget McCormack's Remarks continued....

therein. Provided that this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when deemed expedient."

Here is what Cooley made of that:

"It cannot be seriously urged [Cooley wrote] that with this provision in force, the school board of any district which is subject to it may make regulations which would exclude any resident of the district from any of its schools, because of race or color, or religious belief, or personal peculiarities. It is too plain for argument that an equal right to all the schools, irrespective of all such distinctions, was meant to be established."

And in 1869, that was quite an opinion.

Justice Cooley: poet, scholar, Dean, Free Soiler, local control-er, justice.

#localcontrol #desegregatetheschools #freesoil

Anyway, we have a Cooley historian here, so let me get out of the way. I am eager to learn more. Thank you.

Amendment XIV (ratified on July 9, 1868)

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

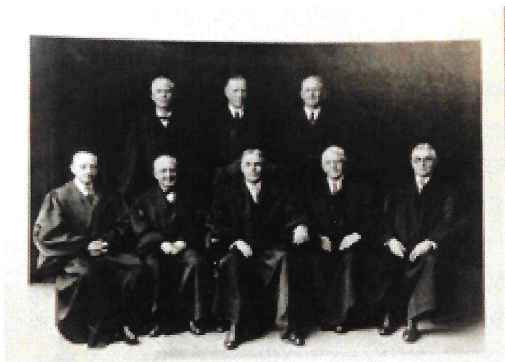
Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.

”

So in the spirit of celebration, let me share with you seven quick stories from the century long journey from this:



This photo represents the 1928 Court with Chief Justice Louis Fead, center. He is flanked on the left by Justices Walter North and Grant Fellows; on the right by Justices Nelson Sharpe and John McDonald. Standing are Justices Howard Wiest,

[Historical note: there is no photographic record of the 1919 court because of the Influenza Crisis.]

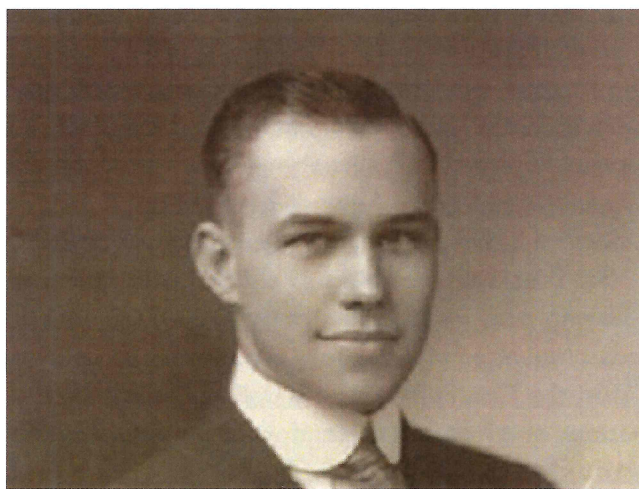
To this:



The 2019 Court, led by Chief Justice Bridget McCormack (center).

Story #1 The Power of Motherhood

At this moment a hundred years ago the constitutional amendment for women's suffrage had not yet passed Congress. That happened on June 4, 1919, and Michigan, Illinois, and Wisconsin quickly followed, ratifying on June 10. By the end of the year, however, only 22 states had ratified. It wasn't until August 18, 1920, that legislators in the last state, Tennessee, gathered to vote on ratification. Supporters and opponents from throughout the world had converged on Nashville.



Harry Burn of Tennessee

It came down to one vote. The vote was tied when Harry Burn, a 24 year old legislator who arrived for the vote with a red rose of opposition in his lapel, received this note from his mother: "Hurrah, and vote for suffrage! Don't keep them in doubt. I notice some

SBM President Jennifer Grieco's Remarks continued....

of the speeches against. They were bitter. I have been watching to see how you stood, but have not noticed anything yet." Harry voted for suffrage, thereby changing the constitution by adding the 19th amendment granting women the right to vote.

Story #2 Ideals of Young Womanhood

Suffrage had been achieved, but the law was still an instrument for confining the "weaker sex" within what society deemed her "natural" sphere. In 1922, Alice Tanton was expelled from the Ypsilanti's State Normal College, an almost entirely female teachers' college, for smoking cigarettes.



She appealed all the way to the Michigan Supreme Court. In upholding her expulsion, the Court was not troubled by the fact that the trial judge had rejected testimony that some of the male students and professors at the University smoked. The Court's opinion commended the Dean of Women for "upholding some old-fashioned ideals of young womanhood."

Story #3 Deadbeat Parity

Cultural norms aside, breakthroughs began to come for women in the financial sphere. Before 1932, public policy in Michigan was opposed to holding a woman responsible on a contract of surety. In 1932, the Michi-



gan Supreme Court reversed, and said this: "Nearly

all the common-law disabilities of women to contract have been removed. ... There is little of a business nature which men can do that they cannot do. They have nearly all the rights of men, and some besides, and on all sides are making pressing claims with distinguished support for what is yet withheld not very firmly nor perhaps very logically.

Story #4 Suffrage Matters

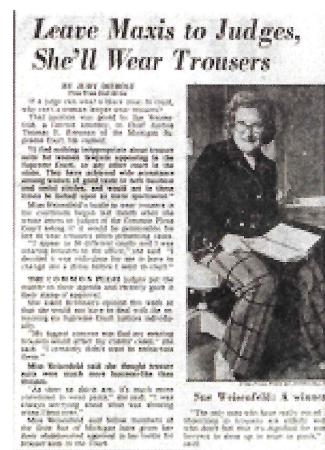


Emilia Schaub elected Leelanau County Prosecutor in 1936.

This story is about a dog that did not bark – no Michigan Supreme Court decision blocked Emilia Schaub (pictured here) from assuming her elected position as prosecutor of Leelanau County in 1936. Schaub was the second woman

to be elected as prosecutor in Michigan, but the first, Merrie Hoover Abbott, who was elected prosecutor of Ogemaw County in 1898, was removed from office by an 1899 Michigan Supreme Court decision which held that women were not entitled to hold office as they were not electors.

Story #5 Pants



Judy Diebolt, "Leave Maxis to Judges, She'll Wear Trousers," *Detroit Free Press*, September 30, 1970. A3.

With story number five we move from the Michigan Supreme Court making women's history in its opinions to justices of the court entering the culture wars. In 1970, this story broke, asking the immortal question, "If a judge can wear a black maxi to court, why can't a woman wear trousers?"

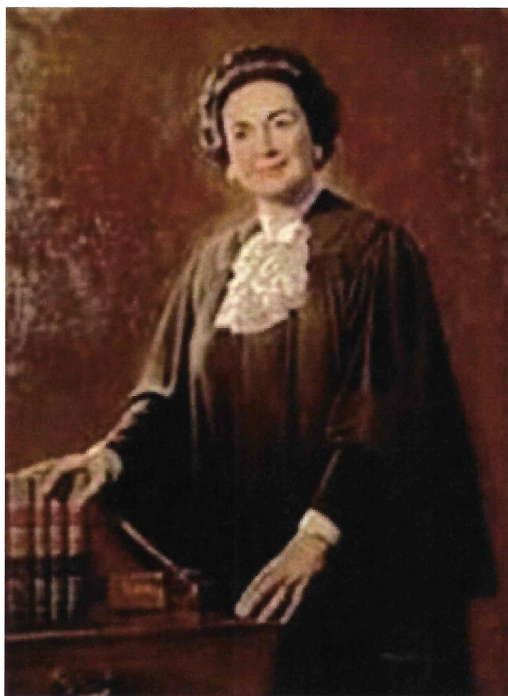
Chief Justice Thomas E. Brennan was decisive:

"I find nothing inappropriate about trouser suits for women lawyers appearing in the Supreme Court, or any other court in the state. They have achieved wide acceptance among women of good taste in both business and social circles, and would not in these times be looked upon as mere sportswear."

Attorney Sue Weisenfeld herself was a clever and powerful advocate:

"As short as skirts are, it's much more convenient to wear pants. I was always worrying about what was showing when I bent over."

Story #6 Where's the Restroom?



Portrait of Michigan's first woman Chief Justice Mary Coleman by Joseph Maniscalco.

As everyone in this distinguished gathering surely already knows, Mary Stallings Coleman, elected in 1972, became the first female Justice of the Michigan Supreme Court. Here's a detail that is not commonly known. With her election, the Court

took the welcoming step of declaring one toilet facility in the robing area at the back of the bench to be unisex. A decade after her election, then Chief Justice Coleman was joined on the court in short order by two women also well known to this audience -- the Society's cofounder, Dorothy Comstock Riley, and Patricia Boyle. None of the three women had an easy path to the Court. When Justice Riley graduated from law school in 1949 she found, as did Sandra Day O'Connor, that potential employers were only inter-

ested in her secretarial skills. Patty Boyle was the only woman in her Wayne State law school class; she graduated first in her class and was the last to get a job. And she's the center of ...

Story #7, (the last story). Tupperware



Justice Patricia Boyle. Portrait by Carl Owens.

Shortly after her appointment to the Court, Justice Boyle, a gifted writer, had the pleasure of authoring her first majority opinion. At the final conference on the opinion, after the justices signaled approval and requested minor changes, Justice Boyle left the conference room to make the requested changes and returned shortly thereafter

with the final product. She was astounded to find that the room was empty, except for one poor staff person who was charged with the unfortunate duty to tell her that the justices had left for the day because they had a prior commitment — a golf outing to which she had not been invited. Justice Boyle went back to her office and dictated a formal memo to each justice which read:

"On today's date you unfortunately had to leave conference early because of a prior commitment. I think it only fair to advise you that at the next week's conference I similarly will have to leave early as I am attending a Tupperware party at Mary Coleman's house."

Toward the end of the century, the milestones for women's equality in the Michigan Supreme Court began to pile up. In 1993, the Court heard the first case in which all the participants (except the male justices) were women. In 1997, with Justices Riley and Boyle joined by Justice Marilyn Kelly and Justice Elizabeth Weaver, the Michigan Supreme Court had its first female majority Court.

SBM President Jennifer Grieco's Remarks continued....



Michigan's first female majority court. Chief Justice Conrad Mallett, Jr. is standing center with Justice Elizabeth Weaver to the left and Justice Marilyn Kelly to the right. Seated left to right are Justice Michael F. Cavanagh, Justice Patricia J. Boyle, Justice James Brickley, and Justice Dorothy Comstock Riley.

Let me close by offering a bit of perspective.

In this time of national appellate scrutiny about what views an integrated bar may constitutionally express, I need to say that my opinions today are my own, not necessarily those of the State Bar of Michigan. I have, however, received invaluable help from the State Bar's own Michigan legal history expert, Carrie Sharlow, whose Michigan legal history columns in the *Michigan Bar Journal* have become a crowd-pleasing favorite.

I am happy that as President of the State Bar of Michigan in 2019 I can openly celebrate the fact that the law no longer insists that men and women carry out their lives within different spheres and destinies, and that it is no longer controversial that women should be al-

lowed to vote, practice law, and even to serve as justices of Michigan's highest court.

A century feels like an enormous amount of time. But most of the people in this room have had personal relationships with people who were alive in 1919. John Wesley Reed, who served on the Michigan Supreme Court Historical Society's board for many years until his death just last year, was born in 1918. If we were able to make such fundamental changes in the last one hundred years, what might the next one hundred bring if we consciously choose to look beyond the confining spheres of stereotype and implicit bias that lock whole categories of people out of opportunity, service, and fulfillment? I urge us to work together to rise to the challenge. Thank you.

2019 Society Member Contribution Form

Please use this form to renew your annual membership or make an additional financial contribution.

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Individual membership \$150.00
Advocates Guild membership \$200.00
Corporate/Law Firm membership \$1,000.00

TOTAL PAYMENT \$ _____

Check Enclosed [☐] Credit Card [☐]

Circle one: Visa MasterCard American Express

Name on card _____

Account Number _____

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Please detach this form and mail to:

Michigan Supreme Court Historical Society, 1st Floor Hall of Justice, 925 W. Ottawa Street, Lansing, MI 48915.

Photos from the Annual Luncheon



Justice Brian Zahra, Society Board member Peter Ellsworth, and Michigan Court of Appeals Judge Michael Gadola.



Society President Emeritus Charles R. Rutherford and Third Circuit Court Judge William Giovan.



Justice Stephen J. Markman has served on the Michigan Supreme Court since October 1, 1999.



Former Justice Charles Levin (MSC 1973–1997), Noel Massie, and Tim Baughman.



Former Justice Marilyn Kelly (MSC 1997–2013), Justice Richard H. Bernstein, and Luncheon guests.



Former Justice Robert P. Young, Jr. (MSC 1999–2017) and Phillip DeRosier at the Dickinson Wright table.

Thursday, April 18, 2019



Society Treasurer John P. Jacobs seated at left with his guest. His law firm, Jacobs & Diemer, hosted a table at the Luncheon.



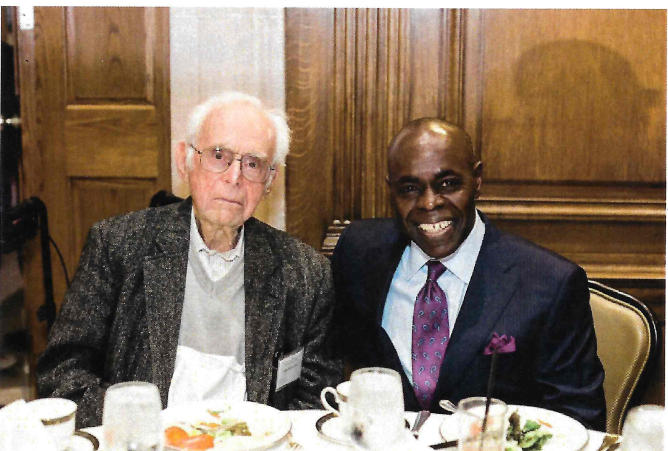
Bridget Brown Powers and Gaetan Gerville-Reache, members of the Society's Advocates Guild sit together at the Appellate Practice Section table.



Society Board member John Fedynsky and Justice Megan Cavanagh.



Justice Elizabeth Clement, former Justice Mary Beth Kelly (2010–2016), and a Luncheon guest.



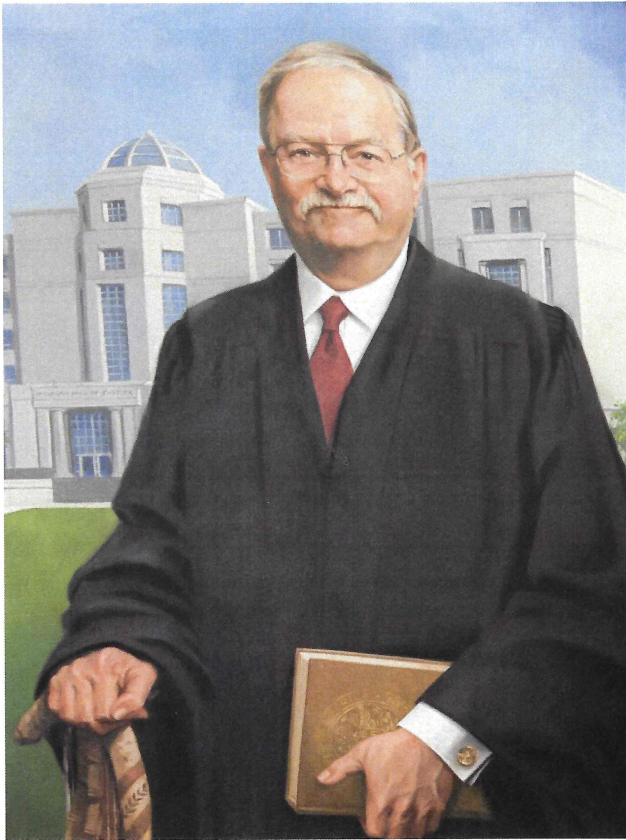
Society Board member Judge Avern Cohn and Judge Donald Allen.



Supreme Court Chief Commissioner Dan Brubaker, Judge Robert Colombo, Jr., and Justice David Viviano.

All Luncheon photos by Lia Gianotti Photography.

Cavanagh, Gavin Elected to Society's Board



The longest-serving Michigan Supreme Court Justice in modern times, Michael F. Cavanagh, has been elected to the Board of Directors of the Michigan Supreme Court Historical Society. He joins former justices Mary Beth Kelly (MSC 2011–2015) and James L. Ryan (MSC 1975–1985), both of whom he served with in his 32 years on the Michigan Supreme Court (1983–2015). His record for longevity is exceeded only by Big Four Justice James V. Campbell who served for 32 years, 2 months, and 25 days. Campbell died while still in service to the Court on March 26, 1890.

Justice Cavanagh is notable as well because he is the only member of the Board of Directors who is related to a current Justice of the Michigan Supreme Court. His daughter Megan Cavanagh was elected in November 2018 to serve as an associate justice on the Michigan Supreme Court.

Pictured at left is Justice Cavanagh's official portrait painted by Michael Del Priore and presented to the Court in a special session on May 18, 2016. Currently, Justice Cavanagh serves as Of Counsel to Alane Family Law.



Joseph J. Gavin is an attorney with the law firm of Miller Johnson in Grand Rapids. A member of the firm's healthcare reimbursement practice group, Gavin was elected to a three-year term on the Society's Board at the April board meeting. He succeeds Richard D. Reed of Kalamazoo. A former prehearing research attorney with the Michigan Court of Appeals, Gavin has been practicing law since 2005. He wrote about the Michigan Supreme Court's first chief justice William Fletcher in the Society's winter newsletter. He was also involved in recruiting attendees for the Society's first Breakfast with the Michigan Supreme Court, held in Grand Rapids last fall.

Hillsdale Professor Paul Moreno Selected as Society's First Historical Adviser

Hillsdale College Professor Paul Moreno has been selected to serve as the Society's first historical adviser. Moreno is dean of social sciences at Hillsdale College and a professor in the school's history department. He recently concluded a five-year hiatus at the school's Kirby Center in Washington, D.C.

Moreno is familiar to the Society; it was he who wrote the summaries in the "Verdict of History: The History of Michigan Jurisprudence Through Its Significant Supreme Court Cases," first published in 2008–2009 in the *Michigan State Bar Journal* and immortalized in 2015 in the Society's book *The Michigan Supreme Court Historical Reference Guide: Second Edition* with Professor David Chardavoyne.

Among Moreno's duties as the Society's new historical adviser will be to update and expand on the Verdict of History, which left off in 1994 with the *Kevorkian* case.

Michigan Supreme Court Historical Society

2019 Board of Directors



Front row L-R: Peter H. Ellsworth, John P. Jacobs, Mary Massaron, Hon. Avern Cohn, Lori A. Buiteweg, Jill M. Wheaton, Charles R. Rutherford, John G. Fedynsky. Middle row L-R: Joseph J. Gavin, Hon. Mary Beth Kelly, Hon. James L. Ryan, Susan E. Fairchild. Back row L-R: Hon. Denise Langford Morris, Carl W. Herstein, Janet K. Welch, and Gregory J. DeMars. Not pictured: Hon. Fred L. Borchard, Hon. Alfred M. Butzbaugh, Hon. Michael F. Cavanagh, Bruce A. Courtade, Julie I. Fershtman, Matthew C. Herstein, Shenique A. Moss, Lawrence P. Nolan, and Stephen K. Valentine, Jr.

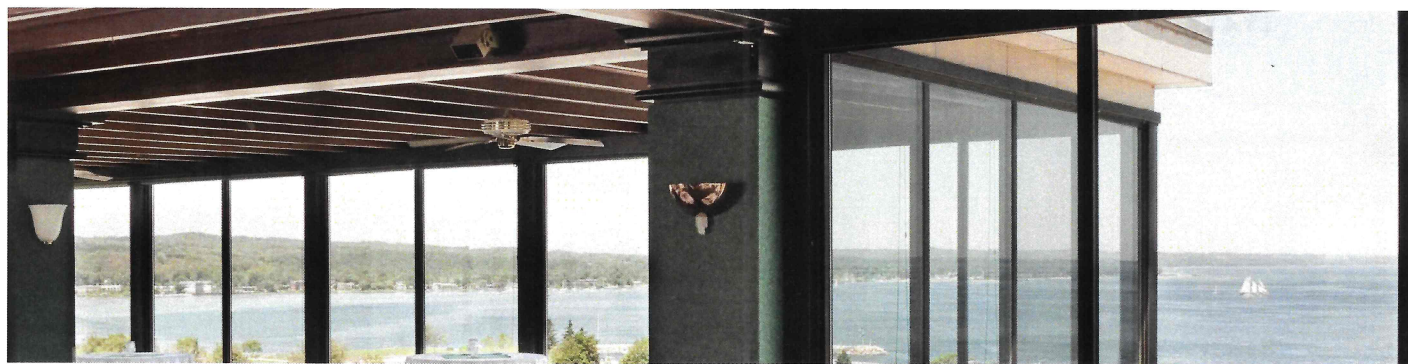
Seven current members of the Society's Board were re-elected at the April Board meeting preceeding the Annual Membership Luncheon. All were re-elected to a three-year term. They include Bruce Courtade, Peter Ellsworth, Carl Herstein, former Justice Mary Beth Kelly (MSC 2011–2015), Judge Denise Langford Morris, Charles Rutherford, and Jill Wheaton.

Additionally, the four officers of the Board were re-elected at the April Board meeting. These officers include President Carl W. Herstein, recently retired from Honigman LLP, Vice President Lawrence P. Nolan, Secretary Susan E. Fairchild, and Treasurer John P. Jacobs.

Michigan's former Attorney General Frank J. Kelley retired from the Board earlier this year.

Law Clerk Directory:

Did you clerk for one of the Michigan Supreme Court justices? Or do you know someone who did? If so, please send us an email at lawclerk@micourthistory.org with the name of the Justice and the dates of service. We are compiling a law clerk directory.



Breakfast with the Michigan Supreme Court Traverse City * October 15

The Society's second annual "Breakfast with the Michigan Supreme Court" will be held on Tuesday, October 15, 2019, from 8:00 a.m. to 9:30 a.m., at the Park Place Hotel, 300 E. State Street, Traverse City, MI 49684. Invitations have been mailed to Society members. If you would like to attend, please use the form included with your invitation or the one below. Please note that capacity is limited and you must register early.

Full name: _____

Preferred first name: _____

Company or firm name: _____

Address: _____

City/State/ZIP: _____

Phone number: _____ Fax: _____

Email address: _____

- ☐ Society member \$35.00
- ☐ Judge \$20.00
- ☐ Non-member \$135.00 (includes one-year of membership + the breakfast, a \$50.00 value)
- ☐ Non-member \$75.00 (breakfast only, no membership)

Total amount due: \$ _____

Checks should be made payable to Michigan Supreme Court Historical Society

Credit cards accepted: Visa / MasterCard / American Express

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Expiration Date: _____ Security code: _____

Signature: _____

Return completed form with payment to: Michigan Supreme Court Historical Society, 925 W. Ottawa Street, Lansing, MI 48915. Questions? Call (517) 373-7589. *Seating is limited, reserve your spot early.*