



# Society Update

The Official Publication of the Michigan Supreme Court Historical Society

Fall 2016

## Report to the Court: State of the Society 2016

President Charles R. Rutherford \* Wednesday, October 5, 2016

Mr. Chief Justice  
Associate Justices,  
Society Board Members,  
Members of the Bar in attendance,  
Ladies and Gentlemen.

My name is Charles Rutherford, President of the Michigan Supreme Court Historical Society. On behalf of the Michigan Supreme Court Historical Society, it is my pleasure to welcome you to the Court's opening session here in the Old Supreme Court Chambers in the State Capitol Building.

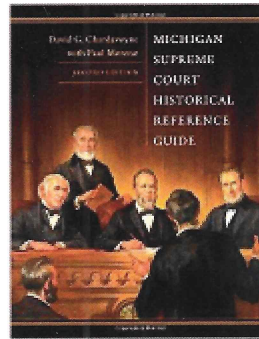
We thank the Court for permitting the Society this opportunity to briefly report on our activities.

Today is not only the start of a new session of the Michigan Supreme Court; it is also the beginning of a new membership drive for the Society. There are over 45,000 attorney members of the State Bar of Michigan, but membership in the Society is less than one percent of that total. This membership drive is chaired by our Director and Treasurer John P. Jacobs.

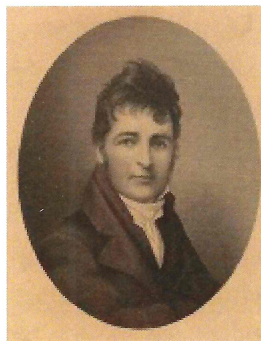
Our MSCHS is a nonprofit, 501(c)(3) organization dedicated to preserving documents, records and memorabilia relating to the Michigan Supreme Court. The Society produces publications, hosts special events, and sponsors other projects to achieve its goals in education and restoration.

Our Society belongs to the American Association for State and Local History (AASLH), which held its annual meeting in Detroit in September 2016. Approximately 900 people attended. Representing our Society at the meeting were our Executive Director Carrie Sampson, our Vice President Carl Herstein, and yours truly. The Society submitted our publication entitled *Michigan Supreme Court Historical Reference Guide, Second Edition* for nomination for the 2016 Leader-

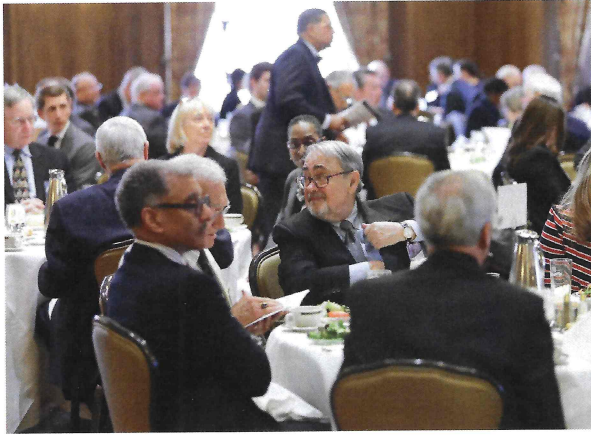
ship in History Awards Program sponsored by the American Association for State & Local History. I am pleased to report that, while we did not bring home "Gold," we were selected as "a national finalist" for the award. The committee viewed over 130 nominations and was quite impressed with the strength of the nominations and the impact America's history institutions are making in their communities.



Attorney Frederick Baker Jr., a retired Michigan Supreme Court Commissioner, wrote a letter in support of the *Reference Guide* nomination. His written review of the *Guide* appears on page 58 of the *Michigan Bar Journal* for September 2016. The *Reference Guide* continues to be sold online and in bookstores thanks to the distribution by Michigan State University Press.



There have been a total of 121 Justices who have or are now serving on the Michigan Supreme Court. When the *Reference Guide* went to press, we did not have photographs for five Justices who have served the Court during its 211-year history. Our Executive Director, Carrie Sampson, while attending the AASLH annual meeting obtained a bookmark that contained a photograph of Justice Frederick Bates who joined the Territorial Supreme Court on March 3, 1805. He was appointed by President Thomas Jefferson. He was born in Virginia, read law in Virginia and Michigan, and served on the Court until 1806. Many years later he served as Governor of Missouri.



Our Historical Society hosted its annual luncheon on April 14, 2016, at the Detroit Athletic Club. One hundred seventy-two people attended, a record crowd. The transcripts of the speeches by Justice Joan Larsen and Michigan State Bar President Lori Buiteweg were published in our newsletter and on our website. The portrait of Justice Michael F. Cavanagh was dedi-



cated in May 2016. It now hangs in the Michigan Supreme Court Learning Center. Our Director Stephen K. Valentine, Jr., chairs the Portrait Committee. He is working with other retired justices to either commission the painting of their portraits or to schedule their dedications.

The Society's quarterly newsletter has begun a new series entitled "Portraits of Justice," which takes a closer look at the historic justices. The articles are written by members of the Board of Directors.

The Society was an exhibitor at the recent annual meeting of the State Bar of Michigan, held in Grand Rapids where membership applications were distributed along with our newsletters, etc. I am pleased to report that two of our directors were selected for leadership positions with the State Bar. Our Secretary Larry Nolan was sworn in as the State Bar's new president; and Director and Judge Alfred M. Butz-

baugh, was elected President of the Michigan State Bar Foundation.

A student from Cooley Law School served as our Advocates Guild intern this past summer, providing scholarly research on the Office of Solicitor General. She also wrote a series of articles for publication in our forthcoming newsletter.

Our Society awarded \$500.00 each to two law students, one to an exceptional student at MSU College of Law, and the other to an exceptional student at the University of Michigan Law School.

This evening, we will host our annual Advocates Guild Dinner at the Hall of Justice, and will present the newest Pewabic Pottery tile illustrating the Hall of Justice.

The Society is working with the Michigan Oral History Association to find a qualified interviewer to resume the Society's Oral History Program. Currently, there have been fourteen (14) Justices interviewed. These recordings and the accompanying transcripts have been archived at the G. Robert Vincent Voice Library at Michigan State University. MSCHS Director, Judge Denise Langford Morris, chairs the Society's Oral History Program.

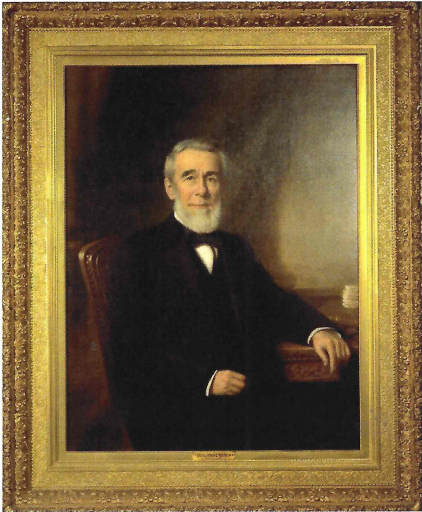
The Society is in the planning state of creating a Directory of Former Michigan Supreme Court Law Clerks, who will become a specialty group of Society members, like the Advocates Guild. Director John Fedynsky is in charge of this project. After the success of the First Women on the Court interactive exhibit located in the Supreme Court Learning Center, the Society is in discussions to create a traveling exhibit directed towards college students and based on the Verdict of History cases which appear in the Reference Guide.

In concluding, the Society presents to Justices McCormack, Viviano, Bernstein, and Larsen a book containing the speeches of John W. Reed, the Thomas M. Cooley Emeritus Professor at the University of Michigan Law School. Professor Reed is one of the Society's original Directors. In 2011, Justices Young, Markman, and Zahra received a copy of Professor's Reed book. The title of the book is "The Trial Lawyer's Calling: Perspectives of John W. Reed."

# PORTRAITS OF JUSTICE

## *Benjamin Franklin Graves*

By Judge Alfred Butzbaugh



Justice Benjamin Graves' portrait hangs to the right of the doors to the Michigan Supreme Court Learning Center in the Hall of Justice in Lansing. It was presented on January 8, 1884.

Benjamin Franklin Graves was born in Gates, New York, a rural community in Monroe County, New York. Graves's early life is described in an article presented by the Calhoun County Bar Association in 1906<sup>1</sup>:

"Benjamin F. Graves was born on a farm at Gates (near Rochester) Monroe Co., N.Y., on the 17th day of October, 1817 of New England parents. He worked on his father's farm while a boy and received the advantages of the common school of the neighborhood. Having become disabled for manual labor by illness, at the age of twenty he selected the law as his profession. In 1837 he commenced his legal studies in the offices of Curtis and Thomas at Albion, N.Y., and after remaining in that office a short period he entered the office of Mortimer F. Delano at Rochester, N.Y. as a law student. Soon after Honorable Addison Gardner, a prominent lawyer and one of New York's most distinguished judges, resigned as judge of the Western District and vice chancellor of the state and formed a lawyer partnership with Mr. Delano. Mr. Graves continued his law studies in the office of this firm, with some intermissions until October 1841, when he was

admitted to the Bar by the Supreme Court of the State of New York, then presided over by Judges Samuel Nelson, Esek Cowan, and Green C. Bronson, of whom a distinguished law writer has said 'Seldom has any court been composed of three such legal giants.' Mr. Graves during a portion of his clerk-ship was a member of the family of Judge Gardner, who as his preceptor and adviser exercised a molding influence over his student and did much towards developing those rare judicial qualities, with which all Michigan and the legal world are now familiar. Judge Graves always referred to Judge Gardner with the utmost respect and the most affectionate regard. It is evident, as a comparison of the biographies of these two great judges will disclose, that the professional and judicial life of Judge Gardner was the model which was closely followed by his student in subsequent life.

"In May 1843 Mr. Graves came to Michigan and located at Battle Creek. Early in his professional life his attention was directed to the judicial service. He served twelve years as Justice of the Peace and several years as Master in Chancery..."

Michigan became a state on January 26, 1837. Its judicial branch, as originally designed, consisted of three justices of the Supreme Court, who also were assigned the responsibility to preside at trials in circuit courts in the State and to fulfill other circuit court responsibilities.

When the electorate adopted the Michigan Constitution of 1850, that structure was reversed. Instead of the Supreme Court justices serving at the trial court level, it provided: "the judges of the several circuit courts shall be judges of the supreme court, four of whom shall constitute a quorum. A concurrence of three shall be necessary to a final decision."<sup>2</sup> Thus, beginning in 1850 circuit judges were assigned Supreme Court responsibilities.

"...[T]hat radically changed the form of the judiciary. Since 1824, the judges and justices of the territo-

rial and state supreme courts had also presided over trials in circuit courts. The constitution of 1850 turned that structure on its head: the state was divided into eight circuits, and the voters of each circuit would elect a single circuit judge. The circuit judges would gather, from time to time, in panels and hear appeals from decisions of other circuit judges, as the supreme court, the decision of any three judges to be binding.”<sup>3</sup>

The Michigan Constitution of 1850 allowed modification by legislation to the structure of the judicial system effective on or after January 1, 1858. In 1857, a statute was enacted which did so. Beginning January 1, 1858, four state-wide elected Supreme Court justices would sit only on the Supreme Court, with no circuit court or other trial court responsibilities.

After enactment of that legislation in 1857, the then sitting Fifth Circuit Court judge, Abner Pratt, chose to run for a seat on the newly created Supreme Court. The election was held in 1857, and Judge Pratt lost that election. Then Judge Pratt announced his resignation as the judge of the Fifth Circuit, effective June 2, 1857. At that time, the Fifth Judicial Circuit consisted of five counties: Allegan, Calhoun, Eaton, Kalamazoo and Van Buren (Allegan was removed in 1859).

Upon notification of Judge Pratt’s resignation from the Fifth Circuit, Governor Kinsley S. Bingham appointed Benjamin Franklin Graves, a resident of Calhoun County, as judge of the Fifth Circuit, effective June 2, 1857. Since the effective date of Judge Graves’s circuit court appointment was before the effective date of the modified structure to the Supreme Court (January 1, 1858), Judge Graves was a sitting member of the Supreme Court from June 2 until December 31, 1857.

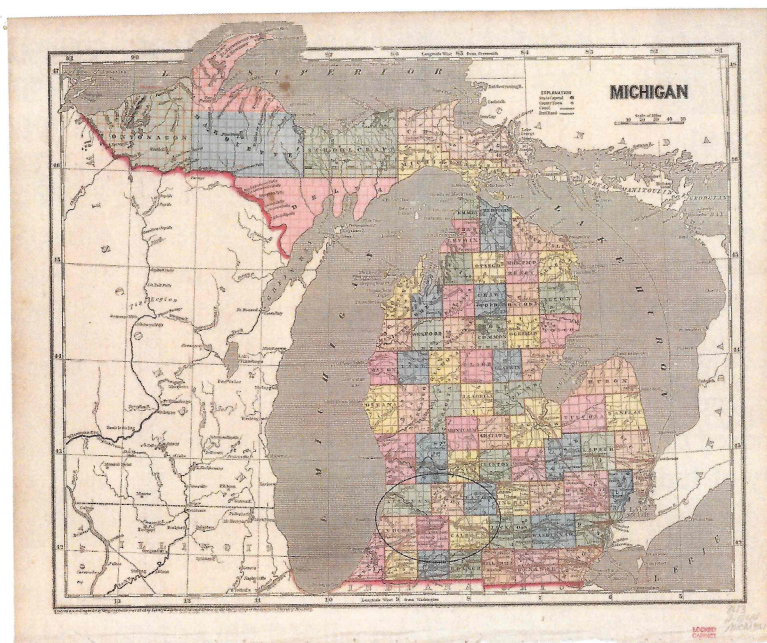
After his appointment to the Fifth Circuit, Judge Graves was elected as judge of the Fifth Circuit for the six year term commencing January 1, 1858, and he was re-elected in 1863 for another six year term commencing January 1, 1864.

While Judge Graves was a circuit judge, by statute the circuit judge was required to sit in each county within the circuit for a minimum of two to six court terms a year, depending on that county’s population. Combining all of the counties in the 5th Circuit, Judge Graves was required to hold a minimum of 16 separate court terms per year. Also, there was no stenographer, and the judge was required to take elaborate notes and hand write his decisions and orders.

During the years that Judge Graves was circuit court judge, there were three methods of transportation: rail, horse or walk. Judge Graves lived in Battle Creek. The courthouse for each county in the Fifth Circuit was located in that county seat. It is estimated that typical travel speed by a horse-drawn stage is 5 miles per hour<sup>4</sup>. During those years, from the

town of Battle Creek there was rail transportation only to and from the county seats of Marshall and Kalamazoo<sup>5</sup>.

Over his years of service as a traveling circuit court judge, Judge Graves was worn out and he became ill. He announced his retirement in June 1866. But the members of the Bar refused to accept his retirement. Politically, Judge Graves was a Republican. A group of Democrats (including Abner Pratt, Judge Graves’s predecessor as Fifth Circuit judge) presented a written petition, requesting that Judge Graves withdraw his resignation and continue his service as circuit judge. The petition stated<sup>6</sup>:



Michigan. By Sidney E. Morse and Samuel Breese. Published in New York by Sidney K. Morse and Samuel Breese, possibly in 1848-1850. Courtesy of MSU Maps Library.

“Sir, the undersigned Democratic members of the bar of the Circuit in which you preside have heard with deep regret of a determination on your part to resign the Office of Circuit Judge.

“We are aware that the duties of the Office are onerous and the compensation entirely inadequate, but these objections lie in the measure as well to the practice at the bar as upon the bench.

“You have for several years occupied the position which you now hold and belonging as we do to a political organization opposed to that which placed you in office we feel at liberty to say I take great pleasuring in saying that your course upon the bench has been eminently successful and satisfactory to us.

“Frequent change except for manifest and urgent reasons are not advisable upon the bench. It results our system in a change of practice in the Courts which is highly prejudicial to the successful administration of justice.

“We can see in your resignation no resulting good to yourself and great detriment to the public interest.

“We therefore respectfully but urgently request that you will continue to occupy the office of Circuit Judge which you now hold.”

But Judge Graves believed that he could not fulfill his duties as circuit judge up to his standards for each of the four counties, and he declined the request to withdraw his resignation as circuit judge.

However, after some time to recover from his illness, Graves was not ready to retire from the judiciary. Sitting Michigan Supreme Court justice George Martin died, an election was held for his open seat, and Graves ran for that seat in a contested election. Graves' opponent was Sanford Moon Green, who as a circuit judge had sat on the Supreme Court from 1848 through 1857. Graves won the election, and on January 1, 1868, he began his service as an elected justice on the Michigan Supreme Court.

<sup>1</sup> Bentley Historical Library, University of Michigan, Ann Arbor, Michigan; Benjamin F. Graves, box 1; Resolutions passed by the Circuit Court for the County of Calhoun on the first day of the May term, 1906.

<sup>2</sup> Constitution of Michigan of 1850, Article 6, Section 2.

<sup>3</sup> *Michigan Supreme Court Historical Reference Guide, Second Edition*, 2015 (David G. Chardavoyne and Paul Moreno), 3

<sup>4</sup> [http://en.wikipedia.org/wiki/Stagecoach#cite\\_note-4](http://en.wikipedia.org/wiki/Stagecoach#cite_note-4)

<sup>5</sup> *Michigan Railroad Lines* (2005) by Graydon M. Meints, volume 1, pages 3-12.

<sup>6</sup> Bentley Historical Library, University of Michigan, Ann Arbor, Michigan; Benjamin F. Graves, box 1.



#### TO PURCHASE AN 8X10 PRINT OF THE PORTRAIT OF THE BIG FOUR

Contact the Society at (517) 373-7589

Email [carriesampson@micourthistory.org](mailto:carriesampson@micourthistory.org)

Visit the website [www.micourthistory.org](http://www.micourthistory.org)

# ADVOCATES GUILD

## MICHIGAN SUPREME COURT HISTORICAL SOCIETY

### Chief Justice Robert P. Young, Jr.'s Remarks from the 2016 Advocates Guild Dinner



Starting with oral argument this morning in the Old Supreme Court room in the State Capitol and continuing with more arguments at the Hall of Justice in the afternoon, this has been a very long day. Ordinarily, I'd be brief but as this will be the last time I preside at a Guild dinner as Chief Justice, I want to make a couple of points.

First, thank you for being here and supporting the Guild and the Supreme Court Historical Society. Thank you in particular to Mary Massaron for your leadership. The Court very much appreciates the hard work of the attorneys who appear before us. At the time, we may not look thankful, but we are truly grateful for your efforts to submit clear and compelling briefs and to make oral arguments that cut to the heart of the matter.

Second, I want to recognize a person who is not here but who has played a critical role in all of our lives. I am talking about Corbin Davis, the former clerk of the Supreme Court and now Reporter of Decisions. After more than 43 years of service, Corbin is retiring this week.

Those who know Corbin know he shuns the spotlight, but in his absence, I do want to take a moment to highlight his incredible service to the Court. In this regard, I note that Corbin received the *Frank J. Kelley Distinguished Public Service Award* from the State Bar a couple of years ago. The description of Corbin by appellate attorney John Jacobs who nominated Corbin was absolutely perfect. He wrote that Corbin had: "an indefatigable sense of dedication punctuated by his brilliance, honesty, integrity, and understated evenhandedness, all while retaining his inherent 'niceness' and demonstrating a puckish sense of humor so dry he would make the British appear to be rollicking comedians."

Corbin's dedication to the Supreme Court is truly legendary, almost mythical. At the Hall of Justice, we whisper about the time when roads were impassable because of a massive snowstorm, he actually walked to work. And the clerk's window opened on time.

Here are the amazing facts of Corbin's service:

- 108 Michigan Reports were published during his tenure.
- 113,944 orders were issued. If laid end to end, that is 19 miles of orders.
- And 5,130 Supreme Court opinions were processed, written by 30 Justices.

That's a career unlikely to be matched. We all wish him well as he tends to his garden instead of our opinions and orders. But all is not lost because the Court is pleased to welcome Katie Loomis to the post of Reporter of

Decisions – the first woman to hold that post.

Third, I would like to highlight a trend in the nature of our workload in recent years. For example, in the 2013–14 term, there were 58 argued cases. Of those, 43 were calendar cases and 15 were mini-oral arguments on the application, or MOAAs. In the most recent completed term, 2015–16, there were 59 argued cases. Of those, 24 were calendar cases while 35 were MOAAs. So, you can see the number of MOAAs more than doubled, while the number of calendar cases dropped by almost half.

This change in the composition of our caseload is remarkable, and I think it reflects a fairly profound change. In particular, for almost two decades, this Court has very consistently resolved ambiguities in the law. As a result, there are simply fewer cases worthy of a full grant. And the number of appeals to both the Court of Appeals and this Court are declining.

I often like to explain our job as repairing the fabric of the law, making sure there are no holes and the patterns are even and easily discerned. And right now, the fabric of the law in Michigan is in very good shape.

Finally, I would draw your attention to the brochures on the tables. As noted in the title, during my tenure as Chief Justice, we have been inexorably focused on “driving change” in the judiciary to improve service to the public.

More than three million cases are handled in Michigan’s 243 courts each year, and our goal is to ensure that the courts are efficient and timely in their handling of cases and that the citizens are treated with dignity and respect. On this topic, over the past three years we have asked 75,000 customers who used our trial courts for their feedback, and the vast majority were very satisfied.

As you can see in the brochure, we are implementing technology to increase efficiency and access; we are implementing best practices to improve outcomes; and we are reengineering courts to save money and improve service. As an example of the latter, we are in a multiyear process of eliminating 40 judgeships so that the number of judges will better match the courts’ workloads.

I am very proud of what we have accomplished and believe strongly that Michigan’s third branch is a model for the nation.

Thank you very much for your support of this Court.

## Karl Llewellyn and the Important Role of Appellate Advocates



*By Mary Massaron, First Chair,  
Advocates Guild*

One of my favorite writers about the appellate process is Karl Llewellyn. I return to his writings regularly because they offer a roadmap to appellate advocacy and an inspiration to those of us trying to be the best advocate we can be.

Llewellyn said that good appellate advocacy can increase reckonability in the law because the “explicit issue-drawing directs, narrows, sharpens the deciding process” and the adversaries can then gather and focus the critical authorities, make the fact-picture clear and vivid, illuminate the probable consequences of the divergent decisions contended for, and phrase with power the most appealing of the divers possible solving rules.”

Llewellyn also reported on the regular comment by judges he spoke with that “the general run of briefs which has come before his court - with of course many gratifying exceptions - seems to him barely and scraggly possible, or else inadequate or worse.” And we have certainly heard such comments from justices on this Court.

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Llewellyn bemoaned this situation because “any poor handling of argument sets up roadblocks for the court as they read and feel their way into the record.”

It increases the “chanciness of the outcome.”

We are here tonight to honor the justices on the Court and to recognize the importance of the role of the advocates – as adversaries in identifying and sharpening the issues, focusing and illuminating them, and powerfully offering a rule for the Court to adopt. And we celebrate the process in which we all are trying to assure reckonability (Llewellyn’s word for predictability and the rule of law) in the decisions of the Court.



Not yet a member of the Advocates Guild? If you have had a calendared appeal before the Michigan Supreme Court, you are eligible to join! Next year this could be you!



The 2016 Pewabic Pottery tile has been unveiled!

A limited number of tiles from previous years are available, beginning with the year 2010. If you are a new member of the Advocates Guild or would like to otherwise complete your collection, please contact the Society at (517) 373-7589 or email [carriesampson@micourthistory.org](mailto:carriesampson@micourthistory.org).



## Two More Elected to Advocates Guild Executive Committee

Former Michigan Solicitor General John Bursch (above) and Michigan Deputy Attorney General Eric Restuccia (below) were recently elected to the Advocates Guild Executive Committee for a three-year term. They join First Chair Mary Massaron, Second Chair Richard McLellan and advocates Timothy Baughman, Professor Mark Cooney, and Rosalind Rochkind.





Justice Bridget McCormack chats with Advocates Guild Chair Mary Massaron and Jill Wheaton during the reception.



Justice Richard Bernstein and Gaetan Gerville-Reache chat during the reception in the Justices' Conference Room.



Justice Brian Zahra and Society President Charles Rutherford sit together at the Dinner.



Advocates Richard Poling, Jr. and Edward Plato stand beneath the portrait of Society founder Dorothy Comstock Riley.



Attorney Martin Critchell and Cooley Law School Professor Gerald Fisher enjoyed the view from the rotunda.



Justice Stephen Markman and attorney Jeffery Stuckey speak with Peter Ellsworth (far right).

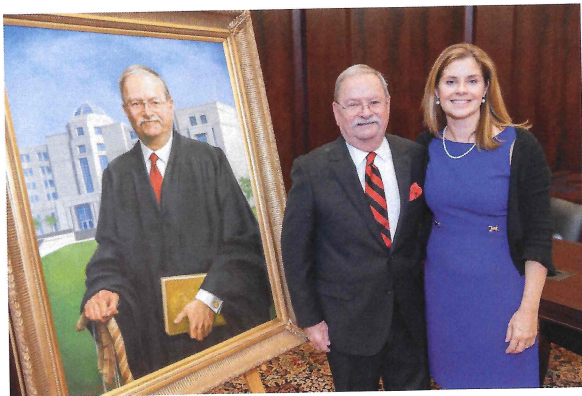
All Photos by Dave Trumpie

# A Portrait Dedication in Pictures

On Wednesday, May 18, 2016, the portrait of Justice Michael F. Cavanagh was dedicated to the Michigan Supreme Court in a special session of the Court. Justice Michael F. Cavanagh was the second-longest serving Justice in Michigan Supreme Court history, following Big Four Justice James Campbell. Justice Cavanagh served from his election in 1982 through 2015.



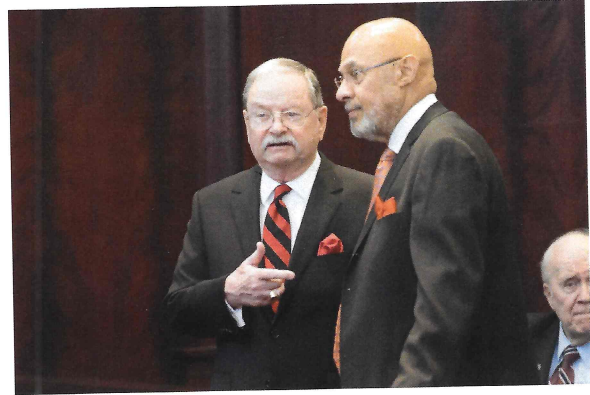
In the 32 years that he was on the Michigan Supreme Court, Justice Cavanagh served with 22 other Justices. Justice Charles Levin attended.



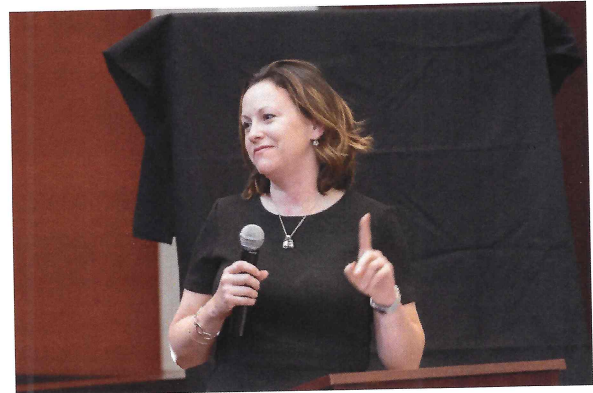
... as did Justice Bridget McCormack ...



The rest of Justice Cavanagh's family was in attendance including his wife Patricia and his grandchildren.



Former Justice Dennis Archer spoke at the dedication ...



... and his daughter Megan K. Cavanagh, an appellate attorney.



Justice Cavanagh received a standing ovation from the crowd. When the special session transcript becomes available, we will publish it on our website [www.micourthistory.org](http://www.micourthistory.org).

# Law Clerk Directory



Justice Cavanagh with some of the more than 50 law clerks who have served him over 32 years.

The Michigan Supreme Court Historical Society is compiling a directory of law clerks who have served the Michigan Supreme Court. We believe this will be a valuable resource for the Court and for the Society.

We are currently gathering the names and contact information of all the law clerks. If you served as a Justice's law clerk, email [lawclerks@micourthistory.org](mailto:lawclerks@micourthistory.org).

Additional biographical information, such as college and law school affiliations and dates of service to the Court, would also be appreciated.

## 2016-2017 Michigan Supreme Court Law Clerks

### Chief Justice Robert P. Young:

Valerie Brannon – University of Michigan Law School  
Sean Dutton – DePaul University College of Law  
Rebecca Rickett – University of Chicago Law School

### Justice Stephen J. Markman

Cheryl Nowak (Senior Law Clerk) – Michigan State University College of Law  
David Loudon – Michigan State University College of Law  
Adam Pavlik – Michigan State University College of Law  
Amanda Urban – University of Michigan Law School

### Justice Brian K. Zahra

Brian Balow (Senior Law Clerk) – University of Detroit Mercy School of Law  
Molly Conway – University of Michigan Law School  
Samantha Cook – Michigan State University College of Law  
Steven Eatherly – University of Detroit Mercy School of Law

### Justice Bridget M. McCormack

David Arnold (Senior Law Clerk) – Hofstra University School of Law (now Maurice A Deane School of Law)

Carrie Floyd – Wayne State University Law School  
Amy Lishinski – University of Michigan Law School  
Phil Mariani – University of Pennsylvania Law School

### Justice David F. Viviano

Jonathon Regal (Senior Law Clerk) – Western Michigan University Cooley Law School  
Brian Anhalt – Michigan State University College of Law  
Alexander Gallucci – Notre Dame Law School  
Brian Nowinski – University of Michigan Law School

### Justice Richard H. Bernstein

Vivian Chang (Senior Law Clerk) – University of Michigan Law School  
Daniel Ellman – University of Michigan Law School  
Michelle Goyke – Northwestern University Pritzker School of Law  
Haba Yono – Wayne State University Law School

### Justice Joan L. Larsen

Adam Dutkiewicz (Senior Law Clerk) – Western Michigan University Cooley Law School  
Jonathan Forman – University of Michigan Law School  
Jesse Kirchner – University of Michigan Law School  
Jessica Kraft – University of Michigan Law School

Were you a law clerk for one of the Michigan Supreme Court Justices? We want to hear from you! Email [lawclerks@micourthistory.org](mailto:lawclerks@micourthistory.org) today!