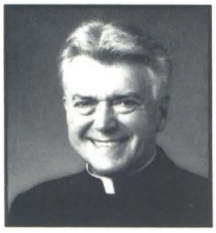
FBA newsletter

Vol. 4 No. 3
Spring 1997

Federal Bar Association - Eastern District of Michigan Chapter - 37 years of service to our Federal Bench and Bar



Focus: HOPE Co-Founder To Receive Wade H. McCree Award

Father William T. Cunningham is this year's recipient of the Wade H. McCree, Jr. Award for the Advancement of Social Justice. The award will be presented at the FBA chapter luncheon on Thursday, February 20, 1997. The award honors individuals in our community who have made significant contributions to the advancement of social justice.

Father Cunningham's name has been synonymous with social justice for many years. He is pastor of the Catholic Church of the Madonna in Detroit and Executive Director of Focus: HOPE, the civil and human rights organization he co-founded with Eleanor Josaitis in 1968.

(cont'd on page 2)

Judges Share Views At Rakow Luncheon

At the Federal Bar Association's annual Rakow Awards Luncheon on November 21, 1996, Judges Horace W. Gilmore, Lawrence P. Zatkoff, Gerald E. Rosen, and John Corbett O'Meara shared their views on a variety of topics. The Judges fielded questions from the audience relating to pretrial procedures, technology in the courts, and the role of their staffs. The most significant comments focused on settlement conference procedures and on the use of computers in courtrooms.

The Judges first addressed settlement conference procedures. Judges Gilmore and Zatkoff indicated that they never speak with the parties during settlement conferences. Judge Rosen indicated that he will speak with the parties, but only in the presence of counsel. Judges Gilmore and Rosen felt that it is inappropriate for a judge to conduct a settlement conference in bench trial cases, but Judge Gilmore stated that another judge or magistrate judge could preside over a

(cont'd on page 2)

INSIDE THIS ISSUE

President's Column

Welcome to 1997! The Federal Bar Association proudly began its year by welcoming Judge Anna Diggs Taylor as our new Chief Judge and wishing Judge Julian Abele Cook, Jr. success as he embarks on the next phase of his career. The Passing of the Gavel Ceremony began what we hope will be a new tradition for our Court. We thank Judge Damon Keith, the families of the judges, and especially Karen Ernst Gibbs, Chuck Rudy, and Ed Ewell for helping us to make the ceremony both memorable and personal. We look forward to working with Chief Judge Taylor on future issues affecting our Court.

The new year promises to be an active one for our Chapter. Our calendar of events *(see page 7)* includes seminars in marketing for [not just] Younger Lawyers, First Amendment issues and the Internet. February 20th is our Wade McCree luncheon with speaker Chief Judge Boyce Martin of the Sixth Circuit and presentation of the Wade McCree Award. FBA National President Dan McDonald is hoping to attend the McCree luncheon as well. Fr. William T. Cunningham, a living legend and tireless warrior for those in need, is this year's McCree Award recipient. We wish him strength and hope in his battle with cancer. This will be truly a special event, so we hope that you will make the effort to attend.

The Rules Committee of the Chapter, chaired by Ed Kronk, remains active and was instrumental in the court's passage of new Local Rule 16.1 which provides for more effective timing in determinations of dispositive motions *(see page 6)*. The court also approved an Administrative Order for Designation of Magistrate Judges to exercise jurisdiction pursuant to 28 U.S.C. 636(c) upon consent of the parties and reference from the district judge *(see page 3)*. These two actions should be positive steps in reducing cost and delay in the litigation process, and we look forward to their utilization.

We have two particular areas which will need attention in the coming year: the FBA Foundation and the Court's Historical Society. Our FBA Foundation provides money for the Rakow scholarships. The Court Historical Society is not associated with the Federal Bar Association chapter, although clearly the history of the court is a special concern of the FBA. If you have any thoughts on this topic, please direct them to Michael Leibson.

So, we end as we began—looking back and looking forward. We are proud of the involvement of many long term volunteers and excited over the active participation of several "younger" lawyers who bring the energy and enthusiasm essential to our mission. Keep up your support!

Hon. VIRGINIA M. MORGAN, President

(Rakow cont'd from page 1)
settlement conference if desired by the parties. Finally, Judge O'Meara indicated that he is more flexible, within reason, to help the parties reach a settlement.

The Judges next addressed issues relating to technology and the courts. All the panelists expressed opposition to placing television cameras in courtrooms, expressing fears that inaccurate reporting and small, sensational sound bites could harm the public's perception of the courts. With respect to laptop computers, all the panelists said they will allow them if they do not disrupt the proceedings. However, the Judges questioned the usefulness of computers in most situations, and cautioned lawyers against being so caught up in the computer that important parts of the trial are neglected. Judges Rosen and O'Meara were particularly in favor of the "Courtroom of the 21st Century" concept, which would provide computers to the judge and counsel, allowing communication without disruption of the trial and similar benefits.

Hon. John Corbett O'Meara, Hon. Horace W. Gilmore, Hon. Gerald E. Rosen and Hon. Lawrence P. Zatkoff at the Rakow Luncheon

The luncheon honored this year's recipients of the Edward H. Rakow Award, given to one student from each of Michigan's five law schools. This year's recipients were: Robert Sabourin (Thomas M. Cooley Law School), Maryann Frances Pierce (Detroit College of Law at Michigan State University), Suzanne Herman (University of Detroit Mercy Law School), Michael Leffel (University of Michigan Law School), and Timothy D. MacIntyre (Wayne State University Law School).


Chief Judge Anna Diggs Taylor being Sworn In by Judge Damon J. Keith.

Judge Anna Diggs Taylor Sworn In As Chief Judge

At a "Passing the Gavel" ceremony held in the Theodore Levin Courthouse on January 6, Judge Anna Diggs Taylor was sworn in as the 11th Chief Judge of the United States District Court for the Eastern District of Michigan, replacing Judge Julian Abele Cook, Jr., whose term expired on December 31, 1996. Judge Taylor is the first African-American woman to hold the position in this District, and only the third in the nation. This is also the first time that an African-American has succeeded another African-American as chief judge of a federal court.

Federal Bar Association Chapter President and U.S. Magistrate Judge Virginia M. Morgan gave the welcoming address. United States Court of Appeals Judge Damon J. Keith was the master of ceremonies and administered the oath of office. Peter Cook and Julian Abele Cook III, sons of Judge Cook, and Douglas Diggs, son of Chief Judge Taylor, spoke at the ceremony recalling past accomplishments and expressing their love for their parents. Detroit Mayor Dennis Archer and Michigan Supreme Court Chief Justice Conrad Mallet, Jr. were also present and expressed their appreciation of the accomplishments of both Judge Cook and Judge Taylor.

Following the ceremony, the Federal Bar Association hosted a reception at the Detroit Club. At the reception, "A Habeas Chorus Line" performed several numbers, including "If I Were a Chief Judge" and a tribute to Judge Cook, "Julian Cook, Superstar."

Focus: Hope *(cont'd from page 1)*

The luncheon also will feature Chief Judge Boyce F. Martin, Jr. of the United States Court of Appeals for the Sixth Circuit. Chief Judge Martin sits in Louisville, Kentucky, but is no stranger to Detroit, having served on a three-judge panel in the Eastern District of Michigan in a recent Voting Rights Act case, and having attended several Detroit Tigers games during his visits.

The FBA McCree Award luncheon, which coincides with Father Cunningham's birthday, will be held at the Chene/St. Aubin Ballroom of the Doubletree Hotel in the Millender Center. A reception and cash bar are scheduled for 11:30 a.m. with lunch beginning at noon. Tickets to the luncheon are available by contacting Brian Figot or Karen Namee at Jacob &

Weingarten at (810) 649-1900. Tickets are $25 for members, $27 for non-members. All are welcome to share in this memorable occasion.

Father Cunningham's work with Focus: HOPE seeks to help resolve the effects of discrimination and injustice and to build integration. Among Focus: HOPE's programs are industrial training programs for minority youth and others; the Food Prescription Program, which distributes food to 52,000 low-income mothers and children and to 34,000 seniors each month; and Project Trust, a race relations training program for desegregated schools and their communities.

In addition to his work at Focus: HOPE, Father Cunningham's civic service has included the State of Michigan's Task Force on Vandalism and Violence in the Schools, State and City Task Forces on Hunger and Malnutrition, the State Holiday Commission for Martin Luther King, Jr., the Citizens Commission to Improve Michigan Courts, the Detroit Public Schools Dropout Prevention Collaborative, and the State of Michigan 2000 Committee to achieve national education goals.

Shanty Creek III panel consisting of Judges Hood, Hillman (standing), Rosen, Bell, Duggan, and Chief Judge Enslen.

Magistrate Judges Trying Civil Cases

On December 2, 1996, Judges of the Eastern District of Michigan enacted Administrative Order No. 96-AO-092, which designates magistrate judges to exercise civil consent jurisdiction under 28 U.S.C. 636(c). The Order specifies that a magistrate judge is available to exercise the court's jurisdiction over all proceedings including a jury or non-jury trial, and entry of a final judgment. The Order requires that the parties consent and that the district judge enter an order of referral.

When a civil action is filed, a notice and consent form is given to all parties appearing on the complaint, if it is assigned to a judge who intends to refer cases. For cases assigned to district judges who do not intend to refer cases, parties will not be notified of this option. However, judges may subsequently withhold or grant consent on an individual basis.

While other districts have enacted similar orders, primarily to decrease dockets, this Order is geared more towards streamlining dockets. For example, in social security and civil rights actions filed by state prisoners, the magistrate judge prepares a report and recommendation based on briefs filed by the parties. If there is an objection to the report, new briefs have to be filed for the final determination to be made by the district judge. With consent, the magistrate judge can issue a final judgment avoiding the delay and cost associated with preparing and filing new briefs. An appeal of a magistrate judge's decision would go directly to the 6th Circuit Court of Appeals.

Shanty Creek III Focuses Future

Federal Judges and lawyers from around the state met at the Shanty Creek III retreat in late October 1996 for a two-day conference on practice and procedure in federal district court. It was a time to get to know one another better and to put away case specific concerns and concentrate on the larger picture of federal practice. Participants candidly discussed many concerns in workshop sessions, enjoyed a Sunday morning Bench-Bar interchange and a final banquet with a performance by the Capitol Steps. Some of the highlighted areas of discussion included civility, discovery and delay, access to the court, and contact with represented parties. ADR was also a focus of the conference highlighting the Western District's mediation program and use of ADR in bankruptcy matters. Discovery issues engendered vigorous debate, particularly regarding protective orders and whose interests should be considered. Discovery concerns were voiced regarding effective policing of deposition conduct, and effective sanctions for "late" responses or delay. Practitioners noted that too many local rules and too many Judge specific rules are serious problems. Deciding dispositive motions by referring the motion to a magistrate judge for Report and Recommendation also caused delay where the parties filed objections. Both practitioners and judges sought ways to address conduct which was uncivil. Both recognized the sensitive nature of this, particularly where the conduct of the judge was at issue. Contact with represented parties and persons was a thorny issue which led to interesting discussions among civil and criminal practitioners. Finally, there was agreement that procedural uniformity between Eastern and Western districts and judicial consideration of the decisions of the judges in the other district

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Point CounterPoint

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Yes!

George A. Googasian, Esq.
The Googasian Firm, P.C.

Picture yourself in the courtroom in a civil case being tried by a competent trial judge without a jury. As the evidence is being presented, the trial judge, trained in the law with years of experience, will be seen taking notes. One wouldn't expect it to be any other way nor should it be any other way. In order to remember volumes of testimony, points of reference to exhibits, important questions to be answered, it is necessary to take notes because not all of us can absorb and retain all of the important impressions and facts from testimony over multiple days of a trial. Since memory is fallible, note taking is a valuable aid in recalling evidence at time of deliberation.

The law and presentation of evidence to juries particularly in complex cases is ever-changing and evolving. As society changes, the legal system must keep up with those changes. It may have been appropriate in 1871 to say, "The juror is to register the evidence as it is given, on the tablets of his memory and not otherwise." *Cheek v. State,* 35 Ind 492 (1871). But times have changed since 1871. In modern industrial America, people are literate, matters are complex, and note taking which aids juror recall should be allowed.

In 1960, the judicial conference committee on the operation of the jury system made the following recommendations:

"Trial jurors should, in the discretion of the trial judge, be permitted to take notes for use in their deliberations regarding the evidence presented to them and to take these notes with them when they retire for their deliberations. When permitted to be taken, they should be treated as confidential between the juror making them and his fellow jurors." (*Judicial Conference Committee on the Jury System, The Jury System in the Federal Courts,* 26 F R D 409, 424 (1960)).

The American Bar Association's Standards Relating to Trial by Jury provide:

"Jurors may take notes regarding the evidence presented to them and keep these notes with them when they retire for their deliberations. Such notes should be treated as confidential between the juror making them and his fellow jurors." (*Minimum Standards for Criminal Justice, Standards Relating to Trial By Jury,* Sec. 4.2 (1968)).

The virtually "unanimous view of federal appellate courts. . . is that whether or not to allow note taking by jurors is a matter committed to the sound discretion of trial judges." *U S v. MacLean* 578 F. 2d 64, 65 (3d Cir. 1978).

In *United States v. Carlisi,* 32 Fed Supp 479 (DC NY 1940), the Court considered objections to the conduct of a juror who made notes regarding dates and witness names. The Court observed:

There is no legal reason why such notes should not be made by jurors. Judges and lawyers make notes, why not jurors? Certainly the making of notes would better aid their memories and thus enable them to more intelligently consider the evidence. While it did not happen in this case, I see no objection to all jurors, if they desire, making notes which could be used by them to refresh their recollections, when we realize that the purpose of a lawsuit is to do justice rather than make it a game of chance. The courts should make progress with the times. (*United States v Carlisi,* 32 Fed Supp 479 (DC NY 1940)).

In Michigan and most jurisdictions, juror note taking is within the discretion of the trial judge. In *People v Young*, 146 Mich App 337 (1985), defense counsel observed a juror taking notes and argued to the court that it was unfair to allow the juror to use the notes during deliberations. The trial court held that it was within the court's discretion and allowed the note taking. On appeal, the Michigan Court of Appeals first quoted the criminal jury instructions wherein it is indicated that "note taking appears to be within the sound discretion of the trial judge in Michigan, whose decision will largely be determined by consideration of the nature and the length of the case being tried." Commentary, Michigan Criminal Jury Instruction, "Note-Taking by Jurors," pp 2-22.

The Michigan Court of Appeals then concludes:

"We join the majority of jurisdictions and hold that it is within the sound discretion of the trial judge to decide whether jurors may take notes and use them during their deliberations. We believe that the advantage of note-taking outweighs the dangers of that practice." (*See The Jury System in the Federal Courts*, 26 F R D 409 (1961), 146 Mich App at p 340.

What Do You Think? In our continuing effort to serve our members and this feature serves as a springboard for constructive discussion among ate Past President, Tom Cranmer, Miro Weiner & Kramer, or our New publication in future newsletters. The FBA Editorial Board reserves fina

Topic Should Jurors Be Allowed To Take Notes During Trial?

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Conclusion

It is without question that in a jury system informed and knowledgeable jurors make better jurors than less informed ones. Juror notes serve as a memory aid and may assist jurors in reaching correct findings. There is, of course, some substantial irony in allowing judges and attorneys to take notes while denying this aid to members of the jury. Clearly, allowing jurors to take notes is logical, practical and, in complex litigation, absolutely necessary.

No!

Eugene Driker, Esq.
Barris, Sott, Denn & Driker, P.L.L.C.

In the long history of jury trials, the practice of permitting jurors to take notes is a relatively recent phenomenon. "Progressive" courts and judges have increasingly permitted this practice, on the theory that it helps jurors follow the evidence, keep track of important points and in general be more engaged in following the evidence.

But there are contrary considerations as well - - considerations which suggest that permitting jurors to take notes can create as many problems as it solves and can encourage jurors to decide cases based upon trivial points, simply because they have memorialized those points in their own notes and attach much greater significance to their recorded recollection than is otherwise justified.

As experienced litigators know, trials often involve vast amounts of testimony that wind up having little or no importance to the outcome of the case. And, discussions with jurors as well as scientific studies of jury deliberations show that jurors often attach disproportionately high significance to insignificant or totally irrelevant evidence.

Permitting jurors to take notes can readily encourage them to focus on matters that at the moment may seem important, but are really not so. In the process, the note taking juror could be completely overlooking significant testimony that is being introduced while she or he is busy writing. In *State of Louisiana v. Ledet,* 298 So.2d 761, 765 (La. 1974), the court cited several reasons why jurors should not take notes:

1) Since all jurors do not possess the same note-taking abilities, the skilled note-taker will have a marked advantage in influencing other jurors;
2) The process of note-taking diverts attention;
3) During deliberation, too much weight may be given to notes;
4) Conflicts of memory may be settled by inaccurate notes;
5) Unimportant evidence may be emphasized; and
6) Evidence as to which notes are taken may be given greater attention than equally important evidence as to which notes are not taken.

To like effect, the Court in *Fischer v. Fischer,* 142 N.W. 2d 857, 863 (Wis. 1966), took the position that "jurors should not in the ordinary case be permitted to take notes. While the taking of notes is, for a person trained in that technique, an essential part of the process by which facts are assimilated, in the hands of one who is not skilled in note taking, the practice is likely to be an impediment. It is likely to interfere with his perception and appreciation of what is going on in the courtroom."

In *State of Louisiana v. Groves,* 311 So. 2d 230, (La. 1975), the Court reasoned that "the essential reason for the prohibition is that a note-taker may unduly influence the jury by reference to the notes and that, if the notes are inaccurate and incomplete, the parties before the court may be prejudiced by the jurymen's acceptance of them in preference to actual testimony heard by them and their individual memory, if any, of it."

Recent high profile trials, in which jurors have become instant celebrities, suggest another danger in permitting juror note taking. Even if jurors are required to leave their notes with the court at the end of each day (and at the end of trial), those who crave "celebrity status" may be tempted to duplicate their writings in the privacy of their own homes, thereby hoping to capitalize, either in fame or fortune, from their recorded recollections of a notorious trial.

Historically, jurors have been required to listen to the evidence, observe the demeanor of the witnesses and engage in deliberations without taking notes. This system has worked well for hundreds of years. While some courts and commentators believe that note taking enhances juror performance, it may have exactly the opposite effect. Competent trial lawyers should be more than able to review for the jury, during closing argument, that which is important.

Juror note taking can deflect the jurors from their important duties and therefore should not be permitted.

in the spirit of our District's newly adopted Civility Plan, we hope that
our members. Please send your comments/reactions to our immedi-
sletter Editor, Daniel P. Malone (Butzel Long - Detroit) for possible
l discretion on which letters, or portions of letters, to publish.

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could lower costs and assist in resolving cases. All of the participants hope to continue the dialogue on these and other topics at similar conferences in the future.

Nominations Sought For The Leonard R. Gilman Award

Nominations are now being accepted for the 1997 recipient of the Leonard R. Gilman Award. The Gilman Award is presented annually to an outstanding practitioner of criminal law. As the United States Attorney, Leonard R. Gilman instilled a level of excellence, professionalism and commitment to public service that exists to this day. Leonard Gilman was the paradigm of what a prosecutor should be. He balanced aggressive advocacy with compassion. His guiding principle to many a young prosecutor was "do the right thing." In a time when respect is becoming harder to find, he demanded it from those who worked for him. While he always took his work seriously, he never took himself too seriously. The Leonard R. Gilman Award honors the memory of Leonard Gilman and those outstanding practitioners of criminal law who seek to follow in his footsteps.

Please submit your written nomination for this Award to our Chapter President, the Honorable Virginia M. Morgan, no later than **Friday, March 7, 1997**.

Court Adopts Local Rule 16.1(f)

On December 2, 1996, the Judges of the United States District Court for the Eastern District of Michigan approved Local Rule 16.1(f), pertaining to Pretrial Conferences, with an immediate effective date.

The new local rule postpones the date for filing the final pretrial order and the date of the final pretrial conference when a dispositive motion, which has been timely filed, is still pending 10 days before the date scheduled for submission of the final pretrial order. Both of these dates will be rescheduled to a date that is no earlier than 10 days after the decision on the motion has been made. The trial date will also be rescheduled accordingly.

For the purposes of the new local rule, a "dispositive motion" includes a motion: for judgment on the pleadings, for summary judgment, to certify or decertify a class, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action, and includes motions directed to fewer than all claims, issues or parties.

LR 16.1(f) was widely supported by the bar. It was unanimously endorsed by the United States Courts Committee of the State Bar of Michigan and the Rules and Practice Committee of the Eastern District of Michigan Chapter of the Federal Bar Association.

The history of Local Rule 16.1 dates back to the early 1990's. In July 1992, The Civil Justice Reform Act Advisory Group recommended amending LR 7.1 (Motion Practice) to provide for the automatic suspension of all pre-trial case deadlines when any pending motion had not been decided within 60 days. When the Court issued its Plan for Reduction of Expense and Delay in Civil Cases in 1993, it declined to adopt the proposed amendment.

The subject remained a topic of discussion among the bench and practitioners, particularly at the 1993 Shanty Creek Bench/Bar Conference. In December 1995, the Local Rules Advisory Committee, without any request from the Court, recommended that the Court adopt of rule substantially similar to LR 16.1(f) The Advisory Committee's version of the rule did not include discretionary language allowing judges to opt out of the rule. The caused concern to some who viewed this as a possible encroachment on the discretion of federal judges pursuant to Article III of the U.S. Constitution. However, the proposed rule was modified to provide judges with the discretion to opt out of the rule's requirements in appropriate circumstances.

FBA Practice Manual

The 1996 FBA Practice Manual is an informative, practical guide to the Judges of the Eastern District of Michigan bench. Whether you appear regularly in federal court, or on a limited basis, you will find this manual useful. For more information, contact Cindy York at (313) 223-3500.

Sustaining Members

We gratefully recognize the following individuals who are sustaining members of our FBA Eastern District of Michigan Chapter.

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Schedule Of Events

Wade H. McCree, Jr. Award Luncheon, February 20
Honoring Fr. William T. Cunningham
Speaker: Hon. Boyce F. Martin, Jr., Chief Judge, United States Court of Appeals for the Sixth Circuit
11:30 a.m., at Doubletree Hotel
Cost: $25 for FBA members, $27 for non-members
Contact Brian Figot or Karen Namee at (810) 649-1900

Government Practice & Corporate Counsel Section Luncheon, March 6
Topic: Internet Legal Issues and First Amendment Rights
Speakers: Christopher P. Yates, Esq., United States Attorneys Office and Claudia Rast, Esq., Dickinson, Wright, Moon, Van Dusen & Freeman
12:00 noon - 1:30 p.m., at Pontchartrain Hotel
Cost: $18 for FBA members, $25 for non-members
Contact Christine Dowhan at (313) 226-6822 or Kent Cooper at (313) 233-7843

Leonard Gilman Award Nominations Due, March 7
Questions: contact Tom Cranmer at (810) 258-1202

Younger Lawyers Division Marketing Seminar, March 27
2:00 p.m. - 5:00 p.m., at Dearborn Inn
Featuring Judge Wade Harper McCree, Deborah Graham, William Hochkammer, and Julie Fershtman
See reservation form on back page for further information
Contact Pam Zauel at (313) 213-3602

Leonard Gilman Award Luncheon, April 17
Speaker: Hon. Ann Williams, United States District Judge, United States District Court for the Northern District of Illinois
11:30 a.m., at Doubletree Hotel
Cost: $25 for FBA member, $27 for non-members
Contact Brian Figot or Karen Namee at (810) 649-1900

Annual Meeting, Banquet, May 2
Featuring "A Habeas Chorus Line"
Time to be announced, at Pontchartrain Hotel
Contact Julia Blakeslee at (313) 961-8380

Sixth Circuit Judicial Conference, May 14-17
Opryland Hotel, Nashville, Tennessee
Contact Circuit Executive James Higgins at (513) 564-7200

Golf Outing, June
Date, time and location to be announced
Contact Mike Lavoie at (313) 225-7060

The Younger Lawyers Division
Eastern District of Michigan Chapter
Federal Bar Association Presents:

From Green to Gold:

Client and Professional Development for the Younger Lawyer

March 27, 1997
The Dearborn Inn
2:00 - 5:00 p.m.

A major challenge for every lawyer is learning strategies and techniques for client and professional development. This challenge is especially daunting for lawyers in the early phases of their career. Join our panel of accomplished professionals for a dynamic discussion on these issues, and gain the insights you need to help your career go from "Green to Gold."

Speakers: Julie Fershtman, Immediate Past-Chair of YLS, State Bar of Michigan; Deborah Graham, legal journalist and author of *"GETTING DOWN TO BUSINESS: Marketing and Women Lawyers"*; William Hochkammer, Chairman and CEO, Honigman Miller Schwartz & Cohn; Honorable Wade Harper McCree, 36th District Court.

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