Legal Services of Northern Michigan Thanks You

To the Editor:

In this issue of the *Michigan Bar Journal* is a thank you from Legal Services of Northern Michigan (LSNM) to all those who have helped LSNM and our clients over the last two years. As a result of the support of these attorneys, LSNM has successfully completed a campaign to raise the $25,000 needed to establish an endowment through the Access to Justice Fund, established an Internet advice service for indigents, and increased our representation by approximately 450 clients. If you gave money anonymously, we thank you. If you have been doing quiet, unreported pro bono, we thank you. If we inadvertently left you off the list, we apologize and thank you here. To all the attorneys of the north, please step up to the plate and do what you can. Our battle to provide adequate representation for those in need is far from over. Thank you again.

Kenneth Penokie
Escanaba

Let "We the People" Speak

To the Editor:

The Supreme Court of Michigan is discussing jury reform, suggesting changes in some of the traditional procedures for trying jury cases, i.e., note taking by jurors (which already exists), questions by jurors (which hopelessly bog down the presentations), deliberations during trial (which dangerously fix jurors' opinions before both sides of the case are heard), dueling expert confrontations (that let the whole trial become a show and elude the grasp of the judge), summing up by the trial judge (which carries great potential for biasing and controlling the jury's verdict and which will needlessly create another entire layer of appellate law, and don't say because they do it in England it makes it okay; we fought a revolutionary war to rid ourselves of English rule), etc. I have previously voiced my objection to the proposed jury reform earlier this year in *Michigan Lawyers Weekly.* The thrust of my prior argument against proposed jury reform was that (based on my 37 years as a trial lawyer), the present procedure for trying jury cases does not need to be reformed. The long enduring tried and true procedure for jury trials is not broke. It doesn't need fixing. It doesn't need reform. And although I recognize that the opinion of trial judges who have used some of these reforms carries weight, I think the opinion of the trial lawyers who are actively involved in participating in jury trials comes from a better perspective and carries more weight.

But the real point. While we are distracted with the concept of jury reform, Rome is burning, i.e., the Michigan courts are taking away the right to jury trial on a wholesale basis—not undermining the right to jury trial, but taking it away.

It is a historically documented fact (e.g., *Lessons of History* by Will Durant) that in an economic system of capitalism, 10 percent of the people have 90 percent of the wealth. Wealth influences elections. The bottom line is that far less than 10 percent in a capitalistic society have the power and control over the rest of us. If you question that fact, just reflect on the obvious. Whatever America's reputation in the world is today, that reputation was created by a handful of people (some elected, some not). The check and balance to that concentration of wealth, power, and control is the jury system, which breathes life into the concept of *"we the people,"* as jurors hold the sword of *"accountability"* over the heads of government, the police, the insurance industry, and corporate America. Without the right to trial by jury, the 10 percent with the wealth, power, and control would have the right to do with us what they want, free from all accountability to the people.

Trial by jury is democracy in its truest form. Unlike the executive or legislative branches of government, the judicial branch's trial by jury brings average citizens together to *participate directly in governing.* Trial by jury protects against the "good old boy" or "country club" abuses that haunt the executive and legislative branches of the government. Lobbyists don't contribute financially to the jurors to influence their vote as they deliberate. Special-interest groups don't whisper in the ears of the jurors as they deliberate. Money, influence, and political power and agendas don't carry the day in jury deliberations. Jurors in the most democratic sense possible directly participate in governing and answer only to the blindfolded symbol of justice and her law as presented by the court when it instructs the jury.

Jurors don't speak only for the 10 percent who hold the wealth, power, and control over our lives. Jurors speak for all of us. Jurors speak for those with the power and those without the power. Jurors speak for those with wealth and those without wealth. Jurors speak for those who control the masses and the masses themselves. Jurors are "we the people," and they have the power to hold the rich, the powerful, the famous, and corporate America and even the government itself accountable for their misdeeds. Trial by jury is the crown jewel of our democratic form of government, and without trial by jury we are left without protection from the blunt force of raw power and left without the protection from the paternalistic protectors who tell us they alone know what is good for us. It is impossible to overestimate the importance of trial by jury in a democratic society and it's impossible to overestimate the temptation by those 10 percent with the wealth, power, and control to perpetuate their own power and control by doing away with trial by jury to avoid that unpleasant business of their own accountability.

Despite the undeniable logic and the long historical support for trial by jury, the courts in the state of Michigan are dismantling and taking away our right to jury trial. Some cases in point. In the area of slip and fall, the courts now use the formerly discredited defense of contributory negligence as a complete bar to slip and fall lawsuits where the defendant's negligently created dangerous condition is "open and obvious," with the courts dismissing slip and fall cases by the hundreds under the guise that no reasonable juror would find liability. Why isn't the question of "open and obvious" left to the jury? Why do the courts feel they have the cornerstone on the market

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of what's reasonable? Why do the courts feel they can speak for the jurors or read their minds? Whatever happened to the concept *"reasonable minds can differ"*? Even a blind man's slip and fall case in a wet, toilet-paper-strewn bathroom in the Chicken Shack restaurant was dismissed without trial by jury because the dangerous condition was "open and obvious."[1] In the 1980s, lawyers were going to bat for the disabled, and the courts were ordering the bus lines and other businesses to accommodate the disabled. But now the courts have gone full circle in this state and have done away with a blind person's rights by denying his right to jury trial because the condition of the bathroom would have been open and obvious to a person with sight.

The court has also recently decided that it can deny a product liability plaintiff her right to a jury trial because the court itself can decide what warnings a reasonable product user would need to have. Why isn't that the jury's call?[2] Again, "reasonable minds can differ," so why is the court taking away the right to jury trial by engaging in unwarranted mind reading of a jury that was never impaneled?

In cases of gross negligence, the court tells us there is no right to jury trial because "no reasonable juror could honestly conclude that [defendant's] conduct" was reckless.[3] Again, "reasonable minds can differ" (trial court and court of appeals opted for jury resolution)—so why is the court reading the minds of jurors and denying the fundamental right of jury trial?

These cases in which citizens have been denied trial by jury are just the exemplary tip of the iceberg. These civil cases are the law of the land in Michigan, and Michigan citizens lost their right to hold those in charge, the government and corporate America, accountable to us. With the loss of trial by jury, the powers of government and corporate America have gone a long way to insulate themselves from any accountability, basically ensuring the perpetuation of their own self-interest and power.

The federal courts know what's going on in Michigan—at least in criminal cases. In criminal cases, the very narrow window of habeas corpus allows a criminal defendant a limited opportunity to show the federal courts how the Michigan courts are taking away our right to jury trial. In *Barker v Yukins,*[4] the Michigan Supreme Court found that, even though the jury instruction on self-defense was flawed, the error was harmless because no reasonable juror would have believed the defendant's claim of self-defense. The federal court emphatically reversed the Michigan Supreme Court's attempt to read the minds of jurors in violation of "constitutional guarantees." But the 1999 lesson from the federal courts has been ignored by the Michigan courts, who continue day in and day out to ignore the federal court's admonishment not to deprive Michigan citizens of their right to trial by jury by usurping the role of the jury.

So in Michigan, the crown jewel of democracy, our right to jury trial, continues to be taken away by the courts day in and day out as we lose the power to hold government, the police, the insurance industry, and corporate America accountable to us. The courts in Michigan allow the wealthy, the powerful, and those in control to perpetuate their power over us without the checks and balances of the jury system.

Denial of trial by jury is a shortsighted strategy that will at a minimum create disrespect for the law as the people of Michigan eventually realize their rights are being taken away, allowing those in power to perpetuate their own influence, power, and control. At a maximum, taking away our right to jury trial will sow the seeds of revolution against such an unfair elitist system that is all too willing to destroy the concept of "we the people" by telling us they don't have to listen to "we the people" because they can read our minds. It took thousands of years to replace trial by battle and trial by ordeal with trial by jury. But in Michigan, in 10 short years, our court has us marching full speed backwards to the dark ages, where trial by battle looks like the only available option to those hopelessly cornered by the courts.

Now on to the Michigan Supreme Court's introduction of jury reform. Why do I suspect that jury reform is just another strategy aimed at controlling what's left of jury trial, especially the summing up of evidence by the trial court, which is the subtle but ultimate control over the jury's independence? What needs to be reformed is the Michigan courts' wholesale taking away of the right to jury trial. Give us back our juries. Don't be afraid to let "we the people" speak through our juries.

Frederick W. Lauck
Milford

FOOTNOTES

1. See *Sidorowicz v Chicken Shack,* 469 Mich 919 (2003).
2. See *Green v A.P. Products,* 475 Mich 502 (2006) (overruling the court of appeals, who thought the jury should decide the issue of what a reasonable product user would need to know).
3. See *Harris v Rahman,* 474 Mich 1001 (2006) (overruling both the trial court and the court of appeals, who thought the issue of recklessness should go to the jury).
4. *Barker v Yukins,* 199 F3d 867 (CA 6, 1999).