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February 21, 2005

The Honorable Nathan L. Hecht
Associate Justice
Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711-2248

Re: Jury Shuffle under ***TRCP*** 223

Dear Justice Hecht:

I understand that the Supreme Court Advisory Committee is scheduled to consider proposed changes to rule 223, ***Texas Rules of Civil Procedure*** when the committee meets on March 4-5, 2005. As you know, this rule gives litigants a right to shuffle the venire panel in civil matters prior to voir dire. This letter addresses why I urge the Committee to recommend abolishing the right to shuffle. These are my personal opinions. I am not speaking on behalf of the Harris County judiciary.

Obviously, litigants and all interested persons want a process that has integrity and fairness. In any given case, one litigant or the other may not like the distribution of the venire panel. The current rule permitting a shuffle after litigants have the opportunity to see the panel and/or read the demographic information about them constitutes an attack on the integrity of the entire process by which jurors are summoned. This redundant shuffle should not be necessary if we indeed have jury statutes that produce lawfully sanctioned juries. My point stated differently is that:

1. We presume (as we must) that the jury selection statutes are constitutional;
2. We presume that the state and county agents charged with implementing and operating under the jury statutes on a daily basis do so in a lawful manner; and
3. The current process of randomly selecting a jury satisfies the constitutional guarantee that every litigant's claim will be decided by a jury of his or her peers. If we are not satisfied that the current system of jury selection meets all constitutional requirements, then we should address those root problems rather than continue to permit a redundant shuffle that does not address problem 1 or 2 above if they are problems and certainly does not cure those problems.

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Whether requested by a civil plaintiff or a defendant, a jury shuffle has enormous potential to discredit the work judges, lawyers and others do to bring a sense of fairness to the administration of justice. This potential blight raises its ugly head when the professionals or the relative low income earners or lesser educated are shuffled from back to front or vice versa and one of the litigants leaves the courthouse wondering whether it was the maneuvering of what was purportedly a random draw of citizens in a venire panel or whether it was the evidence admitted during the course of the trial that was the impetus for the result reached by the jury.

When we deal with the jury shuffle or any jury matter our focus should be on the petit jury statutory scheme and the integrity of the processes by which the statutory scheme is implemented and executed on a daily basis. (I intend to express my observations about our petit jury statutory scheme in a letter to Chief Justice Jefferson in the next few days.) Our focus should not be on contemporizing this blight on Texas law. We will not have served our state well if we but modernize the shuffle rule to bring it into the internet age. Instead, we must kill this germ which infects Texas law for good and devote ourselves to the enactment jury rules and statutes that produce juries that reflect cross sections of all communities in the trial court's venue. Since becoming the Judge of the 215th District Court, I have had a few jury shuffles.[1] Though no explanation is demanded or required, the reasons often expressed for the shuffle relate to a desire to alter the educational and/or vocational distribution of the venire panel. The problem with those reasons is that many Texans believe there to be a correlation between race, education and vocation. Therefore, many perceive any request to shuffle as being motivated by racial or other invidious reasons. This perception is not good for the wonderful civil justice system we are honored to participate in. This perception is an unnecessary distraction to all that is good about the jury system.

This letter would not be complete if I did not also address the shuffle in criminal proceedings. Quite obviously, I recognize that we in Texas have two courts of last resort. The Supreme Court has been the leader in developments in Texas law. I profoundly hope the Court will lead the Legislature and the Court of Criminal Appeals in bringing about long needed change in this area.[2] Jury shuffles and a claimed violation of equal protection rights are almost inseparable twins whenever a reviewing court addresses the jury shuffle in criminal cases. This has been the case approximately six times since 1995 according to my very brief and limited research. Quite often, a person whose skin has been affectionately kissed by the sun, like mine, raises the complaint. Whether the reviewing court found an equal protection violation or not was not my concern. Rather, I concerned myself with the fact that the equal protection argument was a consistent theme raised whenever a complaint on appeal related to a shuffle. This argument distracts from and devalues Texas jurisprudence. It also causes distrust of our civil and criminal justice systems. It leads to the wrong impression regarding our jury selection system. The only remedy for this bad impression is to rid ourselves of the instrument which causes it. If the

[1] I understand that we in Harris County do not maintain statistics on the number of jury shuffles.
[2] I have forwarded a copy of this letter to Judge Sharon Keller, Presiding Judge, Texas Court of Criminal Appeals.

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Supreme Court will lead by abandoning the rule in civil proceedings, perhaps we can cause the Legislature to critically look at the problems and distractions caused by the rule in criminal proceedings.[3]

I urge the Advisory Committee to send the Supreme Court a recommendation to abolish the right to a shuffle. If the Advisory Committee and/or the Court are not prepared to go that far, I hope that it will be abolished in counties that use electronic or mechanical methods of selection of persons for jury service pursuant to sec. 62.011, ***Texas Govt. Code***. If the rule is not abolished, I urge the Court to include equal protection provisions in the rule. Finally, I regret that I have other obligations that will preclude me from attending the March 4-5 meeting. Please bring my concerns and observations to the attention of the Committee. Feel free to call me if you have any questions.

Sincerely,

Levi J. Benton
Judge, 215th District Court

cc: The Honorable Wallace B. Jefferson
The Honorable Sharon Keller
Mr. Charles Babcock, Chairman, Supreme Court Rules Advisory Committee

[3] I am unaware of any appellate opinion addressing alleged equal protection violations arising from a jury shuffle in a civil matter. I have heard of such complaints being made in the trial courts. The absence of appellate complaints is not a good reason to continue to sanction this practice.