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February 19, 2012

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
PO Box 12248
Austin, Texas 78711

Re: A proposal to help save our precious constitutional right to civil trials by jury

Dear Justice Hecht:

You may remember us buttonholing you right before your presentation to the Houston Trial Lawyers Association on October 13, 2011, and you encouraging submission, directly to you as Liaison to the Texas Supreme Court Rules Advisory Committee, of proposals for recovery of our precious right to civil trials by jury which aspire to be “more than a slicker advertising campaign”¹

Your announcement that you are detecting a trend away from arbitration was encouraging.

Other Texans to whom our profession is profoundly indebted for writing on the “vanishing jury trial” problem include:

- a) Senior US District Judge W. Royal Furgeson²,

¹ Hecht, *Jury Trials Trending Down In Texas Civil Cases*, 69 Tex. B.J. 854 (2006) at 856

² *CIVIL JURY TRIALS R.I.P.? CAN IT ACTUALLY HAPPEN IN AMERICA?*, 40 St Mary's Law Journal 795 (2009)-most recently presented by Dicky Grigg and Judge Craig Smith at the State Bar of Texas 5th ANNUAL BILL OF RIGHTS COURSE May, 2011

- b) Dallas County 192nd District Court Judge Craig Smith, ³
- c) Baylor Law School Professor Gerald R. Powell ⁴,
- d) SMU Law School Professor William V. 'Bill' Dorsaneo III, ⁵, and
- e) Dave Beck and Richard Mithoff of Houston and 5th Circuit Court of Appeals Justice Patrick Higginbotham & First Court of Appeals Justice Terry Jennings ⁶

We are heavily indebted to the authors of the cited articles and the sources cited in the footnotes to this letter and the proposed instructions for warning us about the possible impending loss of our right to a civil jury trial, teaching us its remarkable history and motivating us to do all within our power to save it.

We fervently hope our fellow lawyers are becoming increasingly aware of this threat, and we have faith that all of us working together can rescue it.

The best and brightest of our profession having exhaustively analyzed the problem and suggested ingenious solutions, it would not seem premature to commence further more broad based action.

One measure we know of trying to address this impending catastrophe is by volunteers for the Houston Bar Association's Speakers Bureau Committee's "Importance of Jury Service" presentations program (conducted annually since 2005) seeking to educate the public about the importance of the right to trial by jury.

Hopefully there are other such programs, but the undersigned were unable to find any in a recent cursory check of the websites of the Dallas, Bexar and Tarrant County

³ *THE VANISHING JURY: A VIEW FROM THE BENCH*, State Bar of Texas BILL OF RIGHTS COURSE May 22-23, 2008, Austin

⁴ *THE TEXAS CIVIL JURY TRIAL AND THE CALIFORNIA CONDOR: ENDANGERED SPECIES?*, State Bar of Texas SOAKING UP SOME CLE, May, 2007

⁵ *Reexamining the Right to Trial by Jury*, 54 SMU Law Review 1695 (2001)

⁶ *THE CONSEQUENCES OF THE VANISHING TRIAL: DOES ANYONE REALLY CARE?*, State Bar of Texas 24TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE September, 2011

District Clerks and the Dallas, Tarrant County and San Antonio Bar Associations.

Any civil litigator who has had the opportunity to voir dire jury panels in recent years can attest to the growing skepticism and cynicism of panelists towards our jury system.

This and the other alarming developments highlighted in the cited articles signal to all freedom loving Americans a disheartening retreat from James Madison's view that trial by jury in civil cases:

"... is as essential to secure liberty of the people as any one of the pre-existent rights of nature."⁷

Some thought and discussion of the problem as analyzed in the cited articles, including your admonition that:

"The bar's investments in extolling the jury system and improving its operation are worthwhile, but if the public is paying attention, it does not appear to be convinced."⁸,

and the warning of Dave Beck and Richard Mithoff and Justices Higginbotham and Jennings that:

"The direction we are currently heading will not only result in the re-shaping of our judicial system, but also there are other serious, long-term consequences. If we have fewer jury trials, for example, we don't need as many trial judges or courtrooms. If we have fewer jury trials, we will have fewer appeals, and therefore, we need fewer appellate judges. Fewer appeals mean less development of the common law and that, in turn, means diminished outcome predictability available to assist lawyers in advising their clients."⁹,

⁷ Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 657 (1973) note 258 at 728, 1 Gales, *DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES* (Washington, 1834-also cited as "*Annals of Congress*") at 454, Quoted in Furgeson, *supra*, note 2, Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE, No. 6 (2005) at 307, and Powell, *supra*, note 4

⁸ Hecht, *supra*, note 1 at 856

⁹ Beck, Mithoff, Higginbotham & Jennings, *supra*, note 6 at 12

brought also to mind Benjamin Franklin's observation as he signed our Declaration of Independence that:

"...we must, indeed, all hang together, or most assuredly we shall all hang separately."¹⁰,

and lead us to the conclusion that, over time, a uniform, accurate, concise and uplifting explanation to each jury panel by the appropriate elected official of:

- 1) the history and rationale for civil trials by jury,
- 2) its crucial necessity in preserving our other fundamental freedoms enshrined in our Bill of Rights,
- 3) the countless sacrifices of our citizens both in war and in peacetime throughout our Nation's history to preserve it and our other personal freedoms, and
- 4) the irreparable damage to our free society which would inexorably result from its loss,

would likely help educate the public about our right to civil trials by jury and our jury system and dispel cynicism and skepticism towards it, in a manner not yet tried.

Despite massive demands for services other than reminding jurors of the importance of jury service, our Harris County District Clerk (and presumably the District Clerks of other Counties) does give summoned citizens brief and general reminders in a video and the Texas Uniform Jury Handbook, and in the Harris County District Clerk's brochure entitled "On the Importance of Jury Service".¹¹

Certainly our District Clerks are doing the best they can with available resources, but is this sufficient to provide a reasonable expectation of winning back the confidence

¹⁰ Wikipedia article *Benjamin Franklin* available at http://en.wikipedia.org/wiki/Benjamin_franklin, at 13)

¹¹ Harris County District Clerk's brochure entitled "*On the Importance of Jury Service*", available online at: <http://www.hcdistrictclerk.com/common/Juror/pdf/On%20the%20Importance%20of%20Jury%20Service.pdf>, and "*Texas Uniform Jury Handbook*", available online at http://www.hcdistrictclerk.com/common/juror/pdf/Texas%20Uniform%20Jury%20Handbook_English%20Version.pdf

of the public in civil jury trials?

Americans of all ages are becoming increasingly disengaged from and unfamiliar with civil and political matters and have a decreasing grasp of law, history and government:

“With school cutbacks, the Internet distracting students, and the disappearance of traditional newspapers and TV news shows that objectively report information, youngsters have become increasingly disengaged from civic and political life, experts say.”¹²,

and

“Adults, perhaps unsurprisingly, don’t appear to have a better grasp of law, history or government—all of which could be considered essential to civic responsibilities—than students do.”, *id.* (Emphasis added)

According to recent studies:

“Less than half of America’s eighth graders know the purpose of the Bill of Rights, and only one in 10 show knowledge about checks and balances”,¹³

Of the results of the studies, retired US Supreme Court Justice Sandra Day O’Connor says:

“The scores reveal a very disturbing lack of basic knowledge of our system of government and how and why citizens must be engaged”, *id.* (Emphasis added)

The skepticism and cynicism of jury panelists is more unmistakable evidence of this advancing disengagement of the public from our system of government.

¹² *Flunking Civics: Why America's Kids Know So Little*, ABA Journal, Cover Story, May 2011 Issue, available online at <http://www.abajournal.com/magazine/article/civics/>

¹³ *New Test Results Show Crisis in Civics Education, Say Retired Justice O'Connor, ABA President*, ABA Journal Daily News, May 4, 2011 available online at http://www.abajournal.com/news/article/new_test_results_show_crisis_in_civics_education_says_retired_justice_oconn/

While our capable and diligent District Clerks do a wonderful job of administering our State District Courts, they are definitely not able to speak to our fellow citizens with command of the history and rationale for our right to trial by jury and the importance of their service as jurors, comparable to our District Judges.

Clearly, our fellow citizens need the benefit of a much more comprehensive, authoritative and inspirational elucidation of the history, rationale and importance of our right to civil trials by jury and their service as jurors.

Our District Judges are clothed with the ultimate authority in the context of a trial and our fellow citizens look to them for guidance.

Saving our irreplaceable right to civil trials by jury is so urgent and vital that it must be entrusted to our most articulate and authoritative spokesmen and spokeswoman.

Accordingly:

- 5) our Civil District Judges are the logical elected officials to explain to panelists the history, rationale and importance of our right to civil trials by jury and their service as jurors,
- 6) their courtrooms are ideal venues, and
- 7) the “APPROVED INSTRUCTIONS” referred to in Texas Civil Procedure Rule 226a furnish an absolutely appropriate vehicle to do so.

Such explanations by our Civil District Judges, as well as the image of our jury system and our courts, cannot help but be enhanced by each Judge leading each jury panel, at the outset of each trial, in our National Pledge of Allegiance.

Our fellow citizens expect our public officials to recite it to begin public service events such as public meetings and trials, and not doing so evidently is disappointing to them.

Reciting our National Pledge of Allegiance is a simple and brief ceremony which takes just 15 seconds.

It is a moving experience, which promises to be very effective in capturing, at the

commencement of each trial, the undivided and thoughtful attention of each panelist, thus increasing the likelihood of faithful compliance with the court's instructions (of course, any panelist who does not wish to participate can be excused, just as students are permitted in our schools ¹⁴).

In upholding the Texas Pledge of Allegiance including "under God", in Croft vs Perry ¹⁵ our Fifth Circuit Court of Appeals noted the United States Supreme Court view that our National Pledge of Allegiance is:

"a public acknowledgment of *the ideals that our flag symbolizes*" and its recitation is "*a patriotic exercise designed to foster national unity and pride in those principles.*" *id.* at 164 (emphasis added).

The preservation of the right to trial by jury in the Sixth and Seventh Amendments to our US Constitution obviously is implicit in "the ideals that our flag symbolizes", *id.*

Plainly, reciting the Pledge of Allegiance at the beginning of each trial cannot fail to be emphatically meaningful to the panelists, avoiding their disappointment from not doing so and setting a very desirable tone for the trial.

Critics of the Pledge of Allegiance, or civil trials by jury, lack incentive for objection, due to the US Supreme Court view and the views of other Circuit Courts (referred to in *Croft, supra*) that the Pledge of Allegiance is constitutional:

"The Supreme Court has never directly addressed the constitutionality of the national pledge, but has suggested in dicta, time and again, that the pledge is constitutional." *id.* at 164,

and:

"On the strength of these Supreme Court cases, the three circuits which have addressed the national pledge have found it constitutional." *Id.* at 164-165

With all this in mind, we have been working on therapeutic language which can be

¹⁴ § 25.082 ©, Texas Education Code

¹⁵ 624 F3d 157,170 (5th Cir. 2010)

incorporated into Rule 226a, and we hereby respectfully submit to you and the Committee for consideration our current draft, entitled: SUGGESTED ADDITION TO TEXAS RULE OF CIVIL PROCEDURE 226a APPROVED INSTRUCTIONS (we realize the Committee may want to revise the language in ways deemed advisable to accomplish the desired objectives, hence copies have also been included on the enclosed flash drive and CDs in both Wordperfect X5 and Word 2007 formats).

Its full recitation, including the Pledge of Allegiance, takes only about 15 minutes (excessive additional demands on our hard working Civil District Judges should, of course, be avoided, and we do not believe this would be a significant extra burden for them).

Anyone who inquires whether the same result might be sought with less detailed instructions, should bear in mind that “if the public is paying attention, it does not appear to be convinced”.¹⁶

Without an adequate amount of pertinent, reasonably specific and preferably inspirational facts, authoritatively revealed, the rich and noble history and rationale of our cherished right to civil trials by jury cannot be sufficiently illuminated to our fellow citizens (the great majority of whom, being neither scholars nor historians, understandably rely on our profession for guidance).

If they knew such facts, we would not be experiencing their skepticism and cynicism in jury panels, or their disengagement from civic and political life,¹⁷ and they would not need convincing.¹⁸

How can we expect to dispel their cynicism and skepticism without at least concisely reminding them of the relevant specifics of the triumphant history of our Nation, of which trial by jury is the very cornerstone?

For example, many clearly do not know or have forgotten Madison’s inspiring declaration that trial by jury in civil cases “... is as essential to secure liberty of the people as any one of the pre-existent rights of nature.”, *supra*, note 7, and they ought to be

¹⁶ Hecht, *supra*, note 1 at 856

¹⁷ *Supra*, Notes 12 & 13

¹⁸ Hecht, *supra*, note 1 at 856

informed or reminded of this sacred pronouncement by our articulate and authoritative Civil District Judges.

Their cynicism and disengagement demonstrate that they do not know that the right to civil trials by jury is equally important as, and an ultimate protection of, our other personal freedoms, and they ought to be informed or reminded of this by our articulate and authoritative Civil District Judges.

Their disengagement and skepticism reveal that they have forgotten about the multitudes of Americans, men and women of every race, color and creed, who have given up their private lives and fortunes, serving in defense of our Nation and personal freedoms, including our right to civil trials by jury, with millions suffering serious injuries or death in doing so, and they ought to be informed or reminded of these sacrifices by our articulate and authoritative Civil District Judges.

How can we expect to dispel the cynicism and skepticism of panelists without at least concisely giving them basic cogent reasons (which, although obvious to us, plainly are not to them) why civil trial by jury is better than other methods of dispute resolution?

Their cynicism and disengagement confirm that they do not know that civil trial by jury (unlike trial by combat and ordeal which it succeeded) has been developed over centuries into a just and efficient process to search for and reveal the truth relying on objective evidence, and they should be informed or reminded of these facts by our articulate and authoritative Civil District Judges.

A mere 15 minutes of additional relevant, concise and uplifting approved instructions expressed in a chronological narrative commemorating the relevant parts of our Nation's majestic history delivered by our articulate and authoritative Civil District Judges is perfectly appropriate to enlighten our fellow citizens away from their skepticism and cynicism.

Sincere and authoritative delivery by our articulate and authoritative Civil District Judges is sure to effectively improve our citizens' understanding and acceptance of the civil jury system (brief and general treatment of the subject in videos and brochures is obviously not sufficient).

In addition, the proposed instructions promise to benefit the court, parties and counsel in each trial by grabbing the attention of panelists, as nothing else can, for

upcoming technical instructions, voir dire examination, opening statements, presentation of evidence and closing arguments.

To anyone who may propose a case by case approach in which the lawyers would be required to request what we are suggesting, for an instruction to be proper, it must find support in the pleadings and evidence.¹⁹

Thus, compelling parties and counsel to, in every case, furnish pleading and proof of the judicially noticeable undisputed facts stated in the proposed instructions, would have the undesirable potential to unnecessarily complicate trials and precipitate lack of uniformity from trial to trial, especially where the unwanted resulting confusion can easily be avoided by approved instructions by the Judge.

Not having vast resources at our disposal, we have endeavored to thoroughly research and cite impeccable and germane support for the proposed instructions using only individual effort, albeit taking advantage of current computer hardware and software, to access the enormous array of information now available on the internet.

This positively would not have been possible only a few years ago.

A PDF file (made with Adobe Acrobat X) of each source cited as supporting each proposed instruction, as well as each source cited in this letter, is included on the enclosed flash drive and CDs (each source is identified by footnote number at the beginning of the file name).

Assuming that you are going to have your staff review these materials, we have enclosed a flash drive and two CDs-if you need more, they will be promptly forthcoming upon a request from you or your staff.

To access any cited source on the internet, copy and paste the URL (Uniform Resource Locator-a protocol for specifying addresses on the Internet) for the document into the browser's address bar and hit the enter key.

For example, the URL for *New Test Results Show Crisis in Civics Education, Say Retired Justice O'Connor* referred to in note 13 at the bottom of page 5 of this letter is:

¹⁹ *Wal-Mart Stores, Inc. v Middleton*, 982 S.W.2d 468,472 (Tex.App.-San Antonio 1998, review denied) at 470.

“http://www.abajournal.com/news/article/new_test_results_show_crisis_in_civics_education_says_retired_justice_oconnor/”

As to our several references to Wikipedia articles, Wikipedia is cited in courts world wide, including Texas courts, US courts and courts of other states ²⁰.

Some examples of recent Texas cases citing Wikipedia include: *Neeley v. West Orange-Cove Consol. Independent School Dist.*²¹, *Freeman v State*²², *Union Pacific Railroad Company v Cezar*²³, and *In the Interest of K.E.L.*²⁴

Moreover, we think the Committee, upon inspection, will find, under “Notes” and “References” near the end of each Wikipedia article cited, ample support by sources whose accuracy cannot reasonably be questioned, as contemplated, for example, by the Texas judicial notice Rule.²⁵

For our civil jury system to be saved, we think each one of us must become a tireless advocate, quietly and respectfully, with dignity, explaining its virtues and resplendent and glorious history and common sense rationale to our fellow citizens at every opportunity.

Our Civil District Judges have the greatest potential of any of us to most effectively execute this process, dispelling the skepticism and cynicism of our fellow citizens towards the civil jury trial and their misconceptions about it, through the repetitive teaching of jury panelists in their courtrooms afforded by the Approved Instructions of Rule 226a using devastatingly inspiring aids such as our Pledge of

²⁰ *Wikipedia as a court source* available online at http://en.wikipedia.org/wiki/Wikipedia:Wikipedia_as_a_court_source

²¹ 176 SW3d 746,818 (Tex. 2005, review denied) footnote 8 at 801

²² 230 S.W.3d 392 (Tex.App.-Eastland 2007, no pet) footnote 1 at 398

²³ 293 S.W.3d 800 (Tex. App.-Beaumont 2009, no pet) footnote 1 at 806

²⁴ 2008 WL 5671873 (Tex.App.-Beaumont, MEMORANDUM OPINION, Not Reported in S.W.3d) footnote 3 at page 3.

²⁵ Rule 201(b)(2) of the Texas Rules of Evidence

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Allegiance, relevant quotes from our Founding Fathers and remembrances of our Nation's awe-inspiring history.

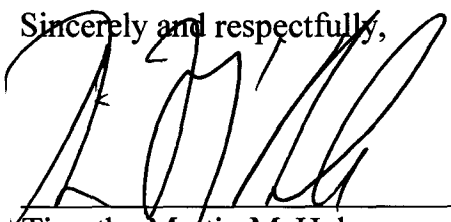
We believe the rest of us can help by, as often as possible, spreading the good news informally and in speaking opportunities, helping with such tasks as simplifying the civil jury trial and reducing its costs as much as possible (while at the same time preserving the reasonable legal fees necessary for our survival) and redoubling our efforts to practice our profession as its ethics mandates.

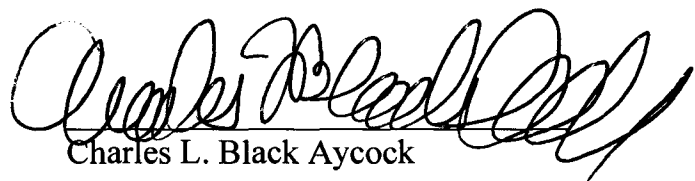
Over time, our Civil District Judges leading each jury panel in our Pledge of Allegiance, followed by a uniform, authoritative, inspirational, concise and accurate explanation of the rationale, history and importance of our treasured right to a civil trial by jury, promises to enlighten our fellow citizens about it, strengthen its public image, improve their understanding of it and dispel their cynicism and skepticism about it, in a way and to an extent that no advertising campaign or critic could possibly match.

Although much more must be done, this proposal does provide a relatively inexpensive and positive "grass roots" remedial measure which could easily be undertaken at an early date with an amendment of Rule 226a.

We stand ready to further help the Committee to the best of our ability in any way requested.

Sincerely and respectfully,



Timothy Martin McHale

Charles L. Black Aycock

PS 1: a copy of this letter, the proposal and a CD containing the cited supporting materials is being sent to each of the addressees on the enclosed list, requesting that they make known their views to the Committee, and we will promptly supply these materials to others upon receipt of a request from you or any Committee member with a list of names with their mailing addresses.

PS 2: Although the enclosed flash drive and CDs are among the fastest commercially available, the PDF files will be easiest to access if copied to the reader's computer's hard

drive. Using Windows XP (Service Pack 3), this is done as follows:

- 1 Insert the CD in the computer's CD ROM drive or the flash drive in one of the computer's USB ports
- 2 left click on My Computer (by default, Windows XP is set to respond to double mouse clicks, but it can be set to work with single clicks-if it is not, double click)
- 3 left click on the CD or flash drive displayed in the My Computer window
- 4 highlight "FLASH DRIVE" displayed in the resulting window
- 5 left click on "copy this folder" or "move this folder" to the left of the file list
- 6 in the resulting "Copy Items" window, left click on and navigate to the location on the computer's hard drive where the files are to be saved
- 7 left click the "Copy" button and wait until the progress bar shows copying is complete
- 8 open Acrobat and navigate to and left click on the copied "FLASH DRIVE" folder, then left click on any PDF displayed in either of the sub directories, and the document will open in the Acrobat window
- 9 to view the bookmarks in the PDF, left click on the bookmarks panel button (looks like a ribbon) in the upper left side of the Acrobat work area

The procedure for Windows 7 & later versions and MAC will be available from their technical support.

PS 3: Problems in viewing a PDF file can often be resolved by "optimizing" the file. First click on the PDF file to open it, then click on "File" in the upper left corner of the Acrobat work area and select "Save As" in the file menu and "Optimized PDF" on the resulting menu and then clicking the "OK" button on the resulting PDF Optimizer window, selecting the file being optimized in the resulting "Save Optimized As" window and clicking the "Save" button . Then reopen the resulting optimized file to view it.

PS 4: Acrobat can be repaired as follows: click on "Help" in the upper left corner of the

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Acrobat work area and select “Repair Acrobat Installation” on the resulting menu. Then wait for “Please wait while Windows configures Adobe Acrobat X” to finish and then restart the computer when prompted