



The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

Chambers of
Justice Nathan L. Hecht

April 16, 2009

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Rules Advisory Committee
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Rules Issues

Via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on several proposed changes to the Rules of Civil Procedure. These proposals are summarized in the attached correspondence from the Poverty Law Section of the State Bar of Texas, the Texas Access to Justice Commission, and Charles Herring, Jr. — a former member of the Advisory Committee.

The Court greatly appreciates the Advisory Committee's thoughtful consideration of these issues and its dedication to the rules process. Thank you for your continued leadership on the Advisory Committee. I look forward to seeing you tomorrow.

Sincerely,

A handwritten signature in black ink that reads "Nathan L. Hecht".

Nathan L. Hecht
Justice



THE POVERTY LAW SECTION

OF THE STATE BAR OF TEXAS

www.povertylawsection.com

January 23, 2009

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Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Room 104
Austin, Texas 78701

RECEIVED
IN SUPREME COURT
OF TEXAS

JAN 26 2009

BLAKE HAWTHORNE, Clerk
BY _____ Deputy

Re: Follow-up to December 10, 2008 Supreme Court Hearing on Legal Services to the Poor in Civil Matters

To the Honorable Justices of the Supreme Court of Texas:

The Poverty Law Section of the State Bar of Texas presented testimony to the Court at the December 10, 2008 hearing on the needs and accomplishments of state legal aid organizations providing civil law services for the poor. We offered our concerns about the current state of e-filing, pauper's affidavits, court access, and other matters that affect poor Texans. At that hearing, the Court requested that the Poverty Law Section supplement its testimony in more detail in letter format.

The Poverty Law Section is composed of diverse members of the bar who provide civil legal services to the thousands of indigent Texans who face domestic violence, wrongful eviction, predatory lending practices, and lack of access to public benefits. Our concerns and proposals for change, many of which were presented at the December 10 hearing, include the following:

1. **Problem: E-filing requires the payment of various fees per filing that can total more than \$10 per document (fees are charged by the state, county, and service provider), and there is no exception for e-filing *in forma pauperis*.**

Because e-filing is quickly becoming a common method of filing court documents in Texas courts (and within the next five years may be the default method of filing), the lack of an exception to the filing fees is a real and growing concern. Some state courts, including those in Travis County, *require* e-filing in many cases (e.g., home equity loan foreclosures). Even when e-filing is a voluntary option, any access that e-filing provides to poor clients who live far away from their lawyers or in rural areas is offset by the financial obstacle of required fees.

HAND DELIVER

This Court has been a steadfast defender of the right of poor persons to access the courts *in forma pauperis*. See, e.g., *Higgins v. Randall County Sheriff's Office*, 257 S.W.3d 684 (Tex. 2008); *Allred v. Lowry*, 597 S.W.2d 353 (Tex. 1980); *Goffney v. Lowry*, 554 S.W.2d 157 (Tex. 1977). The Court's Judicial Committee on Information Technology and the Access to Justice Commission have both recommended e-filing waivers for litigants who qualify under Rule 145 of the Texas Rules of Civil Procedure. However, the entities involved in e-filing (the state, the courts, and private service providers) do not offer indigent litigants a fee waiver.

Proposed Solution: The Court should issue a miscellaneous order enabling free e-filing access for poor litigants. This will provide important court access to poor Texans and avoid inevitable open courts and due course of law challenges.

2. **Problem: While courts have allowed indigent clients to file new cases with pauper's affidavits and avoid the initial filing fees, some courts are not allowing final judgments or temporary orders to be entered until court fees are paid.**

To require an indigent client to pay additional fees is contrary to the intent of Rule 145 of the Texas Rules of Civil Procedure.

Proposed Solution: The Court could issue a comment or modification to Rule 145, such as "Costs addressed by this rule may not be imposed as a prerequisite to entry or rendition of a temporary or final order, or other activity in the case."

3. **Problem: Some court clerks are requiring clients who have filed an affidavit of indigency to pay court fees set out in Chapter 110 of the Texas Family Code, including for the issuance of withholding orders, suits or motions to modify the parent/child relationship, motions for enforcement, notice of application for judicial writ or withholding, motions to transfer, motions for contempt, and filing transferred cases.**

These are common and routine services provided by legal aid organizations, and such fees impede the delivery of legal services to indigent Texans. While we believe that Rule 145 applies, a comment or modification to the rule making it clear it applies would be helpful.

Proposed solution: The Court could amend Rule 145 (a) as follows: "In lieu of paying or giving security for costs of an original action or any other motion, petition, request for issuance or service of an order, a party who is unable to afford costs must file an affidavit as herein described." The Court could also add the following comment: "*The Rule is amended to clarify that it applies to court fees*"

that apply to initiating and maintaining court proceedings, including but not limited to fees set forth in the Texas Family Code Chapter 110.”

4. **Problem:** In eviction cases, Rule 749a of the Texas Rules of Civil Procedure allows a tenant to appeal a justice court decision by filing a pauper’s affidavit. However, there is no provision in the eviction rules similar to Rule 145 to prohibit contests to the affidavit when an IOLTA Certificate is filed.

The lack of a rule in eviction cases similar to Rule 145 of the Texas Rules of Civil Procedure has resulted in needless challenges to pauper’s affidavits in eviction cases where an IOLTA funded program is providing free legal services to the indigent Texan and the client is clearly poor. We believe Rule 145 applies by virtue of Rule 523, but a rule change could eliminate any uncertainty.

Proposed solution: The Court should issue a rule change or comment to Rule 749a that prohibits contests to the affidavit when an IOLTA Certificate is filed.

5. **Problem:** In the appeal process in eviction cases, a conflict exists between Rule 749b of the Texas Rules of Civil Procedure and Section 24.0053 of the Texas Property Code resulting in indigent tenants being unfairly denied the ability to stay in possession of their homes pending appeal.

In “nonpayment of rent” eviction cases, Rule 749b of the Texas Rules of Civil Procedure requires that an indigent tenant pay one month’s rent into the court registry within five days of filing a pauper’s affidavit in order to stay in possession pending appeal, and then pay rent as it becomes due. The payment of rent five days after the filing of the pauper’s affidavit is problematic if the tenant has already paid the landlord rent for that month. This occurs when an eviction case includes allegations of nonpayment of rent, but actually involves other issues. For example, a tenant might dispute unfair late fees, parking fines, or a utility charge and fail to pay them; however, if the landlord applies rent received to these disputed charges first, the landlord will consider the tenant behind on rent. In another example, a subsidized housing landlord may have unfairly raised a tenant’s income-based rent. Thus, while these evictions may be based on nonpayment in the pleadings, the tenant has actually paid the rent for the month the appeal was filed. The result in such cases is that the tenant is forced to pay rent twice for the same month in order to stay in possession pending appeal, and few indigent tenants possess the funds required by the rule.

Section 24.0053(b) of the Texas Property Code only requires rent payment as it comes due and does not require double payments. Despite the conflict in the rules, failure to pay rent timely in to the court registry can have dire ramifications: Rule

749b(3) requires a writ of restitution to be entered upon a showing of a default for failure to pay rent into the court registry.

Proposed solution: Rule 749b should be modified consistent with the Texas Property Code so that rent is only required to be paid as it comes due after the filing of the affidavit (to protect the landlord during the pendency of the appeal).

6. Problem: Courts are requiring indigent litigants provide information in pauper's affidavits that is not only unnecessary, but intrusive.

Even the Texas Justice Court Training Center suggests that justice courts require indigent Texans use pauper's affidavits that contain the name of the financial institution where the affiant has funds, and the account number, the date and place of birth, and other information that is unnecessary and problematic for a public filing. See the Center's recently adopted forms attached Exhibit A.

Proposed solution: The Court should modify Rule 145 and Rule 749a (and other rules allowing these affidavits) so that it is clear that an affidavit calling for information such as this should be avoided; or in the alternative, the Court should provide in the rules the actual form of the affidavit indigent Texans should use.

7. Problem: The variable hours of operation of some justice courts raise serious issues of access to the courts.

In some areas of Texas, justice of the peace courts have different hours of operation, thus limiting Texans from when they can file appeals. For example, each of the different justice of the peace precincts in Williamson County is open at different times during the week. Some of these Williamson County courts only accept civil filings until 3:30; others are open only half-days on various days of the week; and still others close one day a week. In San Patricio County, at least one justice court closes at noon on Fridays. In the Rio Grande Valley, justice courts have different hours and several close before 5:00 p.m. Because timely filing of appeals is jurisdictional, individuals can be deprived of their right to appeal if they attempt to file documents during normally accepted business hours.

Proposed solution: The rules should be amended to provide that the filing deadline for an appeal in justice court extends to the following day the court is open to accept filings when a court closes prior to 5:00 p.m. or is closed (other than weekends and legally recognized holidays).

The Poverty Law Section thanks the Court for its leadership on access to justice issues and the opportunity for additional comments. If you have any questions, or you would like any additional information or guidance on this or any other issues

concerning access to justice by indigent Texans, we are very happy to be of assistance. You can reach our Chair, Brenda Willett, by telephone at (936) 462-7000, and the contact information for each of our officers and council members can be found at our website at <http://povertylawsection.com/Officers.html>.

Respectfully submitted,

A handwritten signature in cursive script that reads "Brenda Willett". To the right of the signature, there are initials "AM" written in a smaller, less distinct cursive hand.

Brenda Willett, *Chair*
Tony Alvarado, *V. Chair*
Julie Balovich, *Secretary*
Nelson H. Mock, *Treasurer*

FORM 102 AFFIDAVIT OF INABILITY TO PAY COSTS – EVICTION APPEAL BY TENANT
V.A.Pr.C. s 24.0052; Rule 749a, T.R.C.P.

Page 1 of 4

NO. _____

_____ (PLAINTIFF) X IN THE JUSTICE COURT

VS. X PCT. _____, PL. _____

_____ (DEFENDANT) X _____ COUNTY, TEXAS

AFFIDAVIT OF INABILITY TO PAY COSTS - EVICTION APPEAL

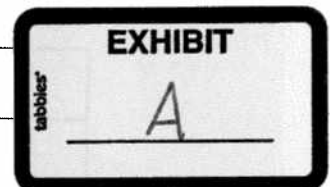
I, _____, Defendant in the above-styled and number cause, am unable to pay the court costs of appeal therein. I verify that the statements made in this affidavit are true and correct, and contain complete information as to the my identity, the nature and amount of governmental entitlement income, the nature and amount of employment income, other income, (interest, dividends, etc.), spouse's income if available to me, property owned (other than homestead), cash or checking account, dependents, debts, and monthly expenses.

Tenant's Identity

Full Name:	
Address: City, State, and Zip Code	
Home Telephone:	Cellular Phone:
Former Address:	
Date of Birth:	Place of Birth:
Employer:	
Employment Address:	
Work Telephone:	Job Title or Duties:
Supervisor's Name:	

Tenant's Income

Monthly earnings:	Amount:
Other income:	Amount:
Description:	



Spouse's Income and Identity

Spouse's monthly earnings:		
Other income: Description:		Amount:
Spouse's Name:		
Spouse's Address: City, State, and Zip Code		
Spouse's Home Telephone:	Spouse's Cellular Phone:	
Spouse's Employer:		
Spouse's Employment Address:		
Spouse's Work Telephone:	Spouse's Supervisor's Name:	

Government Entitlement Income

Unemployment Benefits:	Benefit Amount:
AFDC:	
Social Security:	
Disability:	
Veteran's Benefits:	
Child Support:	
Other -- Description:	Amount:

All Other Income of Tenant

Description:	Amount:
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Accounts in Financial Institutions

Checking Accounts: Name of Financial Institution:	Account Number:	Current Balance:
Saving Accounts: Name of Financial Institution:	Account Number:	Current Balance:

Real Property Owned by Tenant

Description:	Address:	Value:
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Personal Property Owned by Tenant *(other than household furnishings, clothes, tools of a trade, or personal effects)*

Description:	Value:
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Debts

Description:	Total Due:	Monthly Payment:
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Monthly Expenses (for example, food, transportation, child care, health care, etc.)

Description:	Amount:

Dependants of Tenant

Name:	Address:	Age:	Relationship:

Date Completed: _____

Signature of Tenant

THE STATE OF TEXAS §

COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, who, upon oath stated that he/she is the Tenant making this Pauper's Affidavit and that the information provided is true and correct.

SWORN TO AND SUBSCRIBED before me on the _____ day of _____.

Notary Public in and for
State of Texas

Notary's Name (printed):

My commission expires: _____

FORM 22 AFFIDAVIT OF INABILITY TO PAY COSTS
Rule 145, T.R.C.P.

Page 1 of 3

NO. _____

_____ (PLAINTIFF) X IN THE JUSTICE COURT

VS. X PCT. _____, PL. _____

_____ (DEFENDANT) X _____ COUNTY, TEXAS

AFFIDAVIT OF INABILITY TO PAY COSTS

I, _____, am Plaintiff/Defendant in the above-styled and number cause, and I am unable to pay the court costs therein. I verify that the statements made in this affidavit are true and correct.

Tenant's Identity

Full Name:	
Address: City, State, and Zip Code	
Home Telephone:	Cellular Phone:
Former Address:	
Date of Birth:	Place of Birth:
Employer:	
Employment Address:	
Work Telephone:	Job Title or Duties:
Supervisor's Name:	

Tenant's Income

Monthly earnings:	Amount:
Other income: Description:	Amount:

Spouse's Income and Identity

Spouse's monthly earnings:		
Other income: Description:		Amount:
Spouse's Name:		
Spouse's Address: City, State, and Zip Code		
Spouse's Home Telephone:	Spouse's Cellular Phone:	
Spouse's Employer:		
Spouse's Employment Address:		
Spouse's Work Telephone:	Spouse's Supervisor's Name:	

Government Entitlement Income

Unemployment Benefits:	Benefit Amount:	
AFDC:		
Social Security:		
Disability:		
Veteran's Benefits:		
Child Support:		
Other -- Description:		Amount:

All Other Income of Tenant

Description:	Amount:
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Accounts in Financial Institutions

Checking Accounts: Name of Financial Institution:	Account Number:	Current Balance:
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Saving Accounts: Name of Financial Institution:	Account Number:	Current Balance:
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TEXAS ACCESS TO JUSTICE COMMISSION

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February 26, 2009

The Supreme Court of Texas
Attention: Blake A. Hawthorne, Clerk of the Court
P.O. Box 12248
Austin, Texas 78711

Re: Proposed Rule Change – Texas Rules of Civil Procedure, Rule 749(a)

To the Honorable Justices of the Supreme Court of Texas:

The purpose of this letter is to file with and forward to the Supreme Court of Texas the recommendation of the Texas Access to Justice Commission (“the Commission”) proposing an amendment to Rule 749(a) of the Texas Rules of Civil Procedure, which addresses the appeal of a justice court decision in eviction cases. Specifically, the Commission recommends that the rule be amended to eliminate the need for a hearing to determine indigence when a party represented by an attorney providing free legal services files an IOLTA certificate together with a pauper’s affidavit.

At the recent Supreme Court Hearing on the Status of Civil Legal Services, the Court provided an opportunity for stakeholders to present testimony that directly addressed access to justice issues in Texas. Among those who testified, the Poverty Law Section presented testimony on a number of proposals necessary for the enhancement of access to justice in Texas. These proposals have been outlined in a separate letter by the Poverty Law Section in response to a request from the Court to provide the details of this proposal. The Commission wholeheartedly supports the Poverty Law Section efforts to increase access to civil legal services for poor and low-income individuals throughout Texas. In particular, the Commission respectfully urges the Court to consider the Section’s proposed modification to Rule 749(a) of the Texas Rules of Civil Procedure.

Rule 749(a) of the Texas Rules of Civil Procedure authorizes a tenant to appeal a justice court’s decision in an eviction case by filing a pauper’s affidavit. Therefore, if appellant is unable to pay appeal costs, he or she is entitled to an appeal

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Houston

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Hon. Aaron Peña
Edinburg

For the Lieutenant Governor
Hon. Rodney Glenn Ellis
Houston

by a showing of strict proof of inability to pay within five days after the judgment is signed. However, the rule also states:

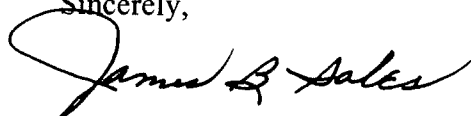
It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold a hearing and rule on the matter within five days.

Under current provisions, a hearing is held when the affidavit is contested, even in circumstances when the litigant is represented by an IOLTA-funded program. However, challenges to pauper's affidavits are unnecessary if an IOLTA-funded program is providing free legal services to the appellant. IOLTA-funded programs are legally obligated to carefully screen applicants pursuant to the strict income restrictions tied to the funding they receive. As the Court noted when it modified Rule 145 of the Texas Rules of Civil Procedure, the rule requirement of a formal hearing to determine a litigant's indigent status constitutes an unnecessary drain on judicial resources and, importantly, creates an unnecessary and serious barrier to a citizen's access to the courts.

The Commission strongly recommends and respectfully requests that the Court amend Texas Rule of Civil Procedure 749(a) in the same manner Texas Rule of Civil Procedure 145(c) was amended by the Court in 2005. The amendment to Texas Rule of Civil Procedure 749(a) will eliminate the need for a hearing when a party represented by an attorney providing free legal services files an IOLTA certificate together with a pauper's affidavit. Amending Rule 749(a) to prohibit contests when an IOLTA certificate is filed will make access to justice available to the poor and low income citizens of this state and, concomitantly, will preserve valuable judicial resources.

I am available at your convenience to discuss this issue further. You may also contact Elma Garcia at 512-427-1858 or egarcia@texasbar.com with any questions or further inquiries. The Commission appreciates the continued strong support of the Court in its efforts to ensure access to justice in Texas. Your consideration of this request is gratefully appreciated.

Sincerely,



James B. Sales, Chair
Texas Access to Justice Commission

JBS/ns

HERRING & IRWIN, L.L.P.
701 BRAZOS STREET, SUITE 650
AUSTIN, TEXAS 78701

TEL: 512-320-0665

FAX: 512-320-0931

March 16, 2009

Chief Justice Wallace B. Jefferson
Texas Supreme Court
Supreme Court Building
201 W. 14th Street, Room 104
Austin, Texas 78701

Dear Chief Justice Jefferson:

I want to thank you for your leadership and strong efforts to increase funding for legal services to the poor in this time of crisis. I have served on the State Bar Legal Services to the Poor in Civil Matters Committee for several years, and this year I again serve on the funding subcommittee. The near-term funding prospects are indeed bleak, and the legislative funding increase that you and others are seeking is critically important. If I or any of our other committee members can be of any assistance in your effort (e.g., letters, testimony, etc.), please let me know.

Also on the funding issue, I offer another proposal for your consideration: to amend Tex. R. Civ. P. 191.3 and 215 to specify a new option for monetary sanctions—essentially to permit an award to be paid to the legal services account of the judicial fund.

I served two terms on your court's Advisory Committee and chaired the court's Statewide Task Force on Sanctions (Justice Brister (then a district judge) also served on the task force). In those capacities, I spent a great deal of time working on sanctions issues.

As you know, Texas appellate courts have upheld some large monetary sanctions awards—as high as \$1 million. Thus, if courts directed some of that money to legal services for the poor, the result could be significant. As you also know, the three principal sources of sanctions are:

1. Chapter 10 of the Civil Practice & Remedies Code (addressing frivolous pleadings/motions).
2. Texas Rules of Civil Procedure. Most significantly: Rule 13 (addressing groundless pleadings/motions, and permitting the sanctions authorized by Rule 215); Rule 191.3 (addressing discovery-certification violations, and authorizing sanctions under Chapter 10); and R 215 (addressing discovery sanctions).
3. Inherent power sanctions (an interstitial doctrine, applicable to misconduct that other specific rules do not reach).

Thus, amending Rules 191.3 and Rule 215 could address both discovery sanctions (which the rules address directly) and frivolous-pleading sanctions (because Rule 13 incorporates the Rule 215 sanctions).

Adding an explicit option to permit a monetary sanction to benefit legal services would not require any court to make such an award. It would simply highlight the option—which seems appropriate in this time of critical need. (Current options under Rule 215 are quite broad. Rule 215.2(b) permits sanctions “orders as are . . . just.” Under that broad authorization, for example, courts have required CLE attendance, pro bono service, and even (my personal favorite) cleaning a cemetery.)

The following is possible language for such amendments, with the additions shown in underlining:

Rule 191.3(e): “*Sanctions.* If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose upon the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code, or impose a monetary sanction to be paid into the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent.”

Rule 215.2(b)(2): authorizing “. . . an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him, or requiring such party or attorney to pay a monetary sanction into the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent. . . .”

Chief Justice Wallace B. Jefferson
March 16, 2009
Page 3

I suggest that specific language because it already appears in Section 82.0361 of the Texas Government Code. Section 82.0361 is the *pro hac vice* fee provision, entitled "Nonresident Attorney Fee." My understanding is that your court approved that language in the *pro hac vice* context. Section 82.0361 provides:

The comptroller shall deposit the fees received under this section to the credit of *the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent.*"

(Emphasis added.) I understand that the court has the Access to Justice Foundation administer that fund. Thus, the suggested rule amendment simply tracks the court approved, legislatively adopted precedent, which I would hope would make this approach non-controversial.

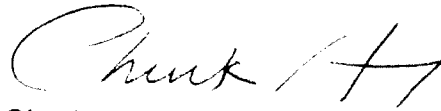
Most monetary sanctions are compensatory, reimbursing an injured party for fees and expenses. That will remain true even if the court adopts this amendment. This additional, explicit option would simply provide an alternative (and perhaps a specific reminder for trial judges) in those occasional instances in which courts choose to assess monetary sanctions as penalties, for punishment or deterrence. For example, Section 10.004(c)(2) of the Civil Practice & Remedies Code permits as a sanction "an order to pay a penalty into court." Currently such penalty funds are paid into the county's general fund and do not directly benefit the court system, much less legal services to the poor.

Having served on the Advisory Committee for several years, I recognize that rule changes can move at a glacial pace. However, given the current crisis, and given the court's strong leadership on this issue, I would hope that this change, or some similar change, could be adopted quickly. I spoke to Chip Babcock, your advisory committee chair, and Chip said that the committee is meeting in April and June. Chip also said that if the court chooses to move in this direction, he thought that the committee could act quickly. The spring-summer timing would seem ideal to me, so that we can see what action the Legislature takes in the interim.

Chief Justice Wallace B. Jefferson
March 16, 2009
Page 4

I greatly appreciate your considering this suggestion. Please let me know if I can be of any assistance in this effort or in any other efforts to increase funding for legal services to the poor.

Sincerely,

A handwritten signature in cursive script that reads "Chuck Herring, Jr." The signature is written in black ink and is positioned above the printed name.

Charles Herring, Jr.

c: Mr. Chip Babcock