SCAC Subcommittee Follow-up Report on
Poverty Law Problems and Proposals
September 23, 2009

The following report is an edited version of the Subcommittee's original report to the SCAC, annotated to reflect decisions the SCAC made on June 12, 2009 and decisions the Subcommittee and SCAC still need to make.

Problems 1-3, 6: The reported problems are that indigent litigants are charged by some clerks' offices for fees arising after the filing fee, there is no provision for exemption from e-filing fees, and some courts require affidavits of indigence to include unnecessary and sensitive information.

Proposed Redraft of Rule 145 (a) and (b). Affidavit on Indigency

(a) *Affidavit.* In lieu of paying or giving security for costs ~~of an orginal action~~ a party who is unable to afford costs must file an affidavit as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs.

Upon the filing of the affidavit, the clerk must docket the action, issue citation and, throughout the pendency of the suit unless and until any contest to the affidavit is sustained by written order, provide ~~such other~~ all customary services ~~as are provided any party~~ without advance payment. The clerk must also immediately notify Texas Online and all certified EFSP providers of the filing of the affidavit and of the filing of any order sustaining a contest to the affidavit.

The SCAC approved the proposed language, as modified to replace "charge" with "advance payment," except for the last sentence regarding e-filing. The SCAC concluded that the proposed last sentence fails to fix the problem of e-filing fees charged to indigents. The Subcommittee acknowledges that this language does nothing to require any entity to waive e-filing fees for indigents. That requirement would have to come through the contracts with NIC, Inc. and the Electronic Filing Service Providers (EFSPs). If, by contract, NIC and the EFSPs are required to waive fees, the proposed language provides them with the information they will need to do so. The Texas Department of Information Resources (DIR) is currently negotiating a new contract. The Subcommittee proposes that the SCAC vote on the last sentence at its next meeting since it does the most that can be done by rule.

> Regarding subsection (b) "*Contents of Affidavit*," the Subcommittee proposed adding this sentence: "The affidavit must not contain a social security number, a checking account number, or a place of birth."

By a vote of 18-3, the SCAC decided that the Rule should not forbid any particular information from being required in the affidavit. The Subcommittee acknowledges that if the listed information were provided *only in* a "Sensitive Data Form," concerns about identity-theft would be mitigated.

The Subcommittee Chair, who was not present at the June meeting, wishes to address concerns voiced at that meeting about the incontestability of the IOLTA certificate.

Problem 4: 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.

Rule 749a cannot be read alone as the legislature has addressed pauper's appeals on eviction cases also. Section 24.0052 of the Texas Property Code specifies the information a defendant must provide to the justice court when filing a pauper's affidavit to appeal an eviction, and this section does not mention the IOLTA certificate. A rule change alone, therefore, may not be appropriate or effective. To amend the rule, the Subcommittee proposes adding the IOLTA certificate language, paragraph (c) of Rule 145, verbatim, to Rule 749a in the third paragraph.

> **Proposed redraft of Rule 749a paragraph 3:**
> A pauper's affidavit will be considered approved upon one of the following occurrences: the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit, or (4) <u>if the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigency and the attorney is providing services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate confirming that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines. A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.</u>

Justice Hecht asked the Subcommittee if it believes the J.P. rule *should* conform to Rule 145, assuming that the statute is not an obstacle. Four of the five subcommittee members believe the two rules should conform to one another. Judge Lawrence believes that Justices of the Peace should continue to have discretion.

Problem 5: Whenever a landlord's petition includes an allegation of nonpayment of rent, the rules require a tenant wishing to appeal to county court to pay one month's rent into the court registry within five days of filing the affidavit on indigence. When the tenant has already paid rent for the month in which he appeals, the rule nonetheless requires him or her to pay, into the registry, another month's rent. The corresponding Property Code provision, § 24.0053, requires only that rent be paid "as it becomes due." The Property Code also addresses the situation in which the government pays a portion of a tenant's rent, but the rule has no corresponding provision.

The Subcommittee proposes that the problem and the inconsistencies can be resolved by amending Rule 749b as follows.

> **Proposed Redraft of Rule 749b Pauper's Affidavit in Nonpayment of Rent Appeals**
>
> In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure;
>
> ~~(1) Within five days of the date that the tenant/appellant files his paupers's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.~~
>
> (1) ~~(2)~~During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay rent ~~within five days of the due date under the terms of the rental agreement~~ into the county court registry.
>
> (2) If a government agency is responsible for all or a portion of the rent under an agreement with the landlord, the tenant shall pay only that portion of the rent for which the tenant is responsible, as determined by the justice court.
>
> (3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file

a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall immediately issue a writ of possession.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

The Subcommittee also recommends a minor addition to Rule 748, to provide that the justice court will determine the rent and its due date. Finally, although it is unnecessary to redraft 748 further, or to redraft 749a and 749c, the Subcommittee proposes that they be redrafted to conform to the Property Code as follows:

Rule 748. Judgment and Writ

If the judgment or verdict is in the plaintiff's favor, the court must award the plaintiff possession of the premises and costs. The court may also award the plaintiff attorney's fees, if sought and established by proof, back rent, and post judgment interest, provided that such claims are within the court's jurisdiction. If the judgment or verdict is in the defendant's favor, the court must award the defendant possession of the premises and costs. The court may also award a defendant who prevails on the issue of possession a judgment for attorney's fees, if sought and established by proof, provided that such claim is within the court's jurisdiction. If the judgment is for the plaintiff for possession, the court must issue a writ of possession except that no writ of possession shall issue until the expiration of five days from the day the judgment is signed.

(a) An eviction judgment must be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:

(1) possession of the premises:

(2) back rent, if any, and in what

amount;

(3) attorney's fees, if any, and in what amount;

(4) court costs; and

(5) post judgment interest and at what rate.

(b) An eviction judgment must contain findings that must include the following:

(1) whether there is an obligation to pay rent on the part of the defendant;

(2) a determination of the rent paying period;

(3) a determination of the day the rent is due;

(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the government;

(5) a determination of the date through which the judgment for back rent is calculated; and

(6) a determination of what rate of post judgment interest will apply.

(c) If the judgment of the justice court is not appealed then it remains in force and the prevailing party may enforce the party's rights under the judgment in the justice court. If the appeal from the justice court is perfected in accordance with Rule 749b and the county court's jurisdiction is invoked, then the justice court may not enforce the judgment.

(d) The county court may rely on the justice court's judgment in determining when and in what amount rent is due to be paid by the appellant into the registry of the county court during the pendency of the appeal. The county court may also rely on the justice court's judgment in determining whether or not to issue a writ of possession in the event rents are not timely paid into the registry of the county court. Nothing in this rule prohibits the county court from making an independent determination, either on its own initiative or on sworn motion of either party, as to the amounts and

due dates of rents to be paid into the registry of the county court during the pendency of the appeal.

Rule 749. May Appeal

(a) In eviction cases in which there has been an evidentiary trial on the merits no motions for new trial may be filed. A justice may set aside a default judgment or a dismissal for want of prosecution as justice requires anytime before the expiration of five days from the date the judgment was signed. Any dismissal or default set aside under this rule must be tried within seven days from the date the prior judgment was set aside.

~~(b)~~ A party may appeal from a final judgment in an eviction case to the county court of the county in which the judgment is signed.

(c) A defendant may appeal by filing with the justice, not more than five days after the judgment is signed, an appeal bond, deposit, or security to be approved by said justice in an amount equal to the court costs incurred in justice court.

(d) If an appeal bond is posted it must be:

(1) in an amount required by this rule;

(2) made payable to the county clerk of the county in which the case was heard;

(3) signed by the judgment debtor or the debtor's authorized agent; and

(4) signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the justice court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(e) *Deposit in Lieu of Appeal Bond.* Instead of filing a surety appeal bond, a party may deposit with the justice court:

(1) cash;

(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally

insured and federally or state chartered bank or savings and loan association; or

(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(f) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond must be filed with the county court.

(g) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing must give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

Rule 749a Affidavit on Indigence

(a) *Establishing Indigence.* A party who cannot pay the costs to appeal to the county court may proceed without advance payment of costs if:

(1) the party files an affidavit on indigence in compliance with this rule within five days after the justice court judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) *Contents of Affidavit.* The affidavit on indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the tenant's identity;

(2) the nature and amount of the tenant's employment income;

(3) the income of the tenant's spouse, if applicable and available to the tenant;

(4) the nature and amount of any governmental entitlement income of the tenant;
(5) all other income of the tenant;
(6) the amount of available cash and funds available in savings or checking accounts of the tenant;

(7) real and personal property owned by the tenant, other than household furnishings, clothes, tools of a trade, or personal effects;

(8) the tenant's debts and monthly expenses; and
(9) the number and age of the tenant's dependants and where those dependants reside.

(c) *When and Where Affidavit Filed.* An appellant must file the affidavit on indigence in the justice court within five days after the justice court judgment is signed

(d) *Duty of Justice of the Peace.* Upon the filing of an affidavit on indigence the justice of the peace shall notice the opposing party, and the county clerk of that county, of the filing of the affidavit on indigence within one working day of its filing by written notification accomplished by first class mail.

(e) *No Contest Filed.* Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) *Contest to Affidavit.* The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the justice of the peace to the opposing party. The contest need not be sworn.

(g) *Burden of Proof.* If a contest is filed, the party who filed the affidavit on indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) *Hearing and Decision in Trial Court; Notice Required.* If the affidavit on indigence is filed in the justice court and a contest is filed, the justice court must set a hearing, notify the parties of the setting, and rule on the matter within five days.

(i) *Appeal From Justice Court Order Disapproving Affidavit on Indigence.*

(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit on indigence.

(2) If a justice of the peace disapproves the affidavit on indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and, on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter. If the affidavit on indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit on indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) *Costs Defined.* As used in this rule, costs means:

(1) a filing fee paid in justice court to initiate the eviction action:

(2) any other costs sustained in the justice court; and

(3) a filing fee paid to appeal the case to the county court.

Rule 749c Appeal Perfected

When the defendant timely files an appeal bond, deposit, or security in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is_paid, or an affidavit on indigence approved in conformity with Rule 749a, the appeal by the

defendant shall be perfected. When the plaintiff timely files a notice of appeal in conformity with Rule 749 and the filing fee required for the appeal of cases to county court is paid, or an affidavit on indigence is approved, the plaintiff's appeal is perfected. When an appeal is perfected, the justice court must make a transcript of all the entries made on its docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the approved affidavit on indigence with the county clerk of the county in which the case was heard. The county clerk must docket the case and the trial must be de novo.

No factual determination in an eviction action, including determination of the right to possession, will be given preclusive effect in other actions that may be brought between the parties.

The SCAC Chair recognized that the bulk of this proposal comes from amendments to the eviction rules that the SCAC recommended to the Court years ago. The Court has not approved those recommendations. Justice Hecht indicated it was unnecessary to reengage in a discussion regarding those recommendations, so the SCAC focused on fixing the specific problem at hand.

Subcommittee member Lamont Jefferson suggested that the problem could be fixed relatively simply by removing the language in Rule of Civil Procedure 749b that refers to the payment of rent within five days of the date the tenant/appellant files the pauper's affidavit. In other words, he suggested striking paragraph (1) and the related five-day payment deadline in paragraph (2) of the rule. The SCAC did not vote on that proposal or the proposal on pages 4-5 of this report, and there was not enough discussion to get a good sense of where the SCAC stands on either proposal. The Subcommittee requests additional feedback from the SCAC.

Problem 7: Some Justice Courts occasionally close before 5:00 pm. Litigants who show up to file documents on such days may, as a result, miss a deadline.

The most obvious approach is to take, as a starting point, appellate Rule 4.1(b), which reads as follows:

4.1. Computing Time

(a) *In General.* The day of an act, event, or default after which a designated period begins to run is not included when computing a period prescribed or allowed by these rules, by court order, or by statute. The last day of the period is included, but if that day is a Saturday, Sunday, or legal holiday, the period extends to the end of the next day that is not a Saturday, Sunday, or legal holiday.

(b) *Clerk's Office Closed or Inaccessible.* If the act to be done is filing a document, and if the clerk's office where the document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the clerk's office is open and accessible. The closing or inaccessibility of the clerk's office may be proved by a certificate of the clerk or counsel, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner.

Copying this to a new Justice Court Rule, and making appropriate changes, yields this:

> **Proposed Redraft of Rule 523a. Court or Clerk's Office Closed or Inaccessible.**
>
> If the court or the clerk's office where a document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the court or clerk's office is open and accessible. The closing or inaccessibility of the court clerk's office may be proved by a certificate of the clerk or justice, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner.

A more ambitious approach is to amend Rule 4, Tex.R.Civ.P., to read as follows:

Proposed Redraft of Rule 4. Computation of Time

(a) In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

(b) Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purpose of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c.

(c) If the court or the clerk's office where a document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the court or clerk's office is open and accessible. The closing or inaccessibility of the court clerk's office may be proved by a certificate of the clerk or judge, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner.

The SCAC did not make a decision regarding these proposals because Subcommittee member Judge Tom Lawrence expressed concern regarding the proposals and requested additional time to analyze the problem and proposals. The attached memorandum, dated September 9, 2009, contains the results of his survey of justice courts and his recommendation to the SCAC.

Problem – Dwindling IOLTA funds for poverty law programs. The State Bar of Texas Legal Services to the Poor in Civil Matters Standing Committee and Chuck Herring proposed amending Rules of Civil Procedure 191.3 and 215.2 to enable a court to order penalty sanctions 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." The State Bar of Texas Board of Directors approved a resolution to this effect on April 17, 2009.

Trial courts have authority to order sanctions under statute (e.g., Tex. Civ. Prac. & Rem. Code chs. 9 and 10), rule (e.g., Rules 13, 191.3, 215.2), and inherent powers. Chuck Herring asks the Court to consider amending Rules 191.3(e) and 215.2(b)(2) as follows:

> 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. . . "

This wording comes from Tex. Govt Code § 82.0361, regarding pro hac vice fees:

> 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."

The concept raises three issues: (1) statutory authority, (2) standards for separating penalty sanctions from sanctions to compensate a party, and (3) policy.

I. Statutory Authority

Does the proposal require statutory authority?

If so, to what extent does the necessary statutory authority already exist?

Tex. Const. art 8, sec. 6 provides:

"No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; … ."

"The appropriation of state money is a legislative function," the Texas Supreme Court has held, quoting art. 8 sec. 6. *Bullock v. Calvert*, 480 S.W.2d 367, 370 (Tex. 1972). Noting that the Election Code did not expressly authorize the Secretary of State to spend public funds for the purpose, the Court refused to mandamus the Comptroller to pay warrants issued by the Secretary of State as chief elections officer to pay for primary elections.

Tex. Civ. Prac. & Rem. Code §10.004(c)(2) is a statute authorizing penalty sanctions. A court that orders sanctions for violation of §10.001's provisions concerning what the signing of a pleading or motion signifies may include in the sanction:

> "an order to pay a penalty into court."

Chuck Herring advises that there is a statute providing that "court" means "county treasury." He expects that David Escamilla will provide the citation.

Rule 191.3(e) provides that if a signed certification required in any disclosure, discovery request, notice, response, or objection" is "false without substantial justification, the court may … impose … an appropriate sanction as for a frivolous pleading under Chapter 10 of the Civil Practice and Remedies Code."

II. Standards for Penalty Sanctions

Should the Court provide standards for trial courts to use in deciding the amount of penalty sanctions and/or how to divide the minimum total sanctions needed to achieve the goals of sanctions between compensation to the party and penalty paid to the basic legal services fund?

If so, what standards?

Tex. Civ. Prac. & Rem. Code § 10.004(b) provides that

"the sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated."

More generally, any sanction must "be no more severe than necessary to satisfy its legitimate purposes." *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 917 (Tex. 1991).

The Texas Supreme Court held that penalty sanctions were within the trial court's discretion under Tex. Civ. Prac. & Rem. Code §10.004(c)(2), but remanded because "we cannot determine the basis" of the specific amount ordered by the trial court ($25,000 for each of two doctors sued without reasonable inquiry and evidentiary support). *Low v. Henry*, 221 S.W.3d 609, 621 (Tex. 2007).

The Court stated that a trial court "should consider relevant factors in assessing the amount of the sanction." *Id.* It called an ABA 1988 report listing 13 factors "helpful," but noted that list was "non-exclusive", and held "we do not require a trial court to address all of the factors listed in the report to explain the basis of a monetary sanction under Chapter 10 … ." *Id.* at 620-21 and n.5.

Tex. Civ. Prac. & Rem. Code § 10.004(c), in addition to penalty paid into court, authorizes

"(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees."

Rule 215.2(b) sets out a trial court's authority to order many different kinds of discovery abuse sanctions, including but not limited to eight listed ones. The

eighth is payment of "the reasonable expenses, including attorney fees, cause by the failure."

Low v. Henry does not address how a trial court divides the minimum legitimate sanction amount between a penalty sanction and a compensatory sanction.

Neither do the multiple opinions in *Unifund CCR Partners v. Villa*, 273 S.W.3d 385 (Tex. App. – San Antonio 2008) (en banc) (upholding as not excessive $18,685 in ch. 10 sanctions for inconvenience and harassment).

Neither does *Sterling v. Alexander*, 99 S.W.3d 793 (Tex. App. – Houston [14th Dist.] 2003, pet. denied) (reversing $3,340 in sanctions to be paid into the registry of the court for the use and benefit of two minors).

III. Policy Issues

Would rules extending penalty sanctions and requiring payment to the basic legal services fund result in significant funds for basic legal services?

Would such rules risk significant abuses difficult to police under the appellate review abuse of discretion standard?

Are there any reported data on the frequency with which Tex. Civ. Prac. & Rem. Code § 10.004(c)(2) or Rule 191.3(e) penalty sanctions are ordered, or the dollars involved? There are very few appellate opinions on penalty sanctions.

Would adoption of a rule broadening the situations in which penalty sanctions could be ordered and making penalty sanctions payable to basic legal services instead of to county treasuries lead to significantly more and/or larger penalty sanctions?

Would adoption of such a rule significantly increase the risks of the kinds of abuses of sanctions power addressed in *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913 (Tex. 1991)?

At the meeting, Mr. Herring offered additional options for amending the rules to direct the funds to other sources: "a nonprofit provider of legal services to the poor in civil matters," "a nonprofit entity selected by the trial court from a list compiled by the State Bar of Texas of providers of legal services to the poor in civil

matters," and "the State Bar of Texas for use in providing legal services to the poor in civil matters." Also at the meeting, Texas Legal Services Center Executive Director Randy Chapman presented a fifth option: "permitting an award to be paid to the IOLTA grant fund administered by the Texas Access to Justice Foundation."

A majority (18) of the voting SCAC members thought it was a bad idea for a procedural rule to dictate the distribution of penalty sanctions. The general consensus seemed to be that this is a legislative function.

The SCAC continued to discuss the proposals, however, in case the Court wants to proceed and needs additional input. A SCAC member suggested the original proposal—to pay into the basic civil legal services account of the judicial fund—would be good because the money would go to a functioning, regulated system. Other SCAC members seemed to favor Mr. Chapman's IOLTA grant-fund option.

The SCAC discussed the possibility of fixing the amount of the penalty sanction at issue to reduce concerns about judges being encouraged to impose higher sanctions to increase the amount of money available for the indigent. The SCAC voted (20-3) against having the amount fixed as a percentage of a compensatory award. Then, the SCAC took a more general vote about whether the penalty sanction should be unlimited or limited at the court's discretion. A slim majority (10-8) voted in favor of imposing no limits on the amount of the penalty sanction.

Subcommittee member Pete Schenkkan suggested that the SCAC address the bigger question of what measures are within the Court's inherent rule-making authority and could be used to fund legal services for the indigent in civil matters. The SCAC Chair said the SCAC would caucus about that and determine how to proceed. The transcript does not reflect any other decisions on this topic.