



Date: January 10, 2020
To: Members, Legal Services Trust Fund Commission Rules Committee
From: Brady R. Dewar, Assistant General Counsel
Subject: Procedural Rules Applicable to Rulemaking Regarding the Legal Services Trust Fund Program

I. Executive Summary

At the November 22, 2019 Legal Services Trust Fund Commission Rules Committee (Committee) meeting, members raised two procedural questions: (1) whether California’s Administrative Procedure Act (APA) —and in particular, its notice and comment provisions and its prohibition of “underground rulemaking”—apply to rulemaking regarding the Legal Services Trust Fund; and (2) if not, what rules apply to such rulemaking.

This memorandum addresses these questions and sets forth the following:

- By statute, the State Bar is exempt from the APA
- The Rules of the State Bar require that proposed substantive changes to the Rules of the State Bar must be posted online for public comment
- The Rules of the State Bar do not specify what must be codified in a Rule of the State Bar and what may be addressed through guidelines, policies, or other governing documents.

Finally, this memorandum suggests several considerations for the Committee to weigh as it develops proposed changes to the Legal Services Trust Fund Program’s governing authorities and determines whether such changes should be accomplished through revisions to the Rules of the State Bar or through guidelines or policies not subject the formal public comment requirement.¹

¹ Pursuant to the functional matrix approved by the Board of Trustees in January 2019 at the conclusion of the Legal Services Trust Fund Commission (LSTFC) Stakeholder Process Working Group process, policy changes approved by the Commission (e.g., amended guidelines) are subject to Board of Trustee approval. See “Recommendations From the Legal Services Trust Fund Commission (LSTFC) Stakeholder Process Working Group (Working Group)” (State Bar of California 2019), *available at* <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000023570.pdf> (last visited Jan. 9, 2020).

II. Background on the APA and the State Bar’s Exemption from the Same

In general, the APA requires state agencies to follow strict notice and comment procedures whenever they promulgate regulations, with regulation defined broadly:

Regulation means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Gov. Code § 11342.600.

When a state agency covered by the APA issues a regulation within the definition above without following the APA’s notice and comment procedures, that constitutes an “underground regulation,” which is prohibited by the APA and is unenforceable.²

Because the guidelines the Legal Services Trust Fund Commission (Commission) has issued regarding the Legal Services Trust Fund Program constitute standards of general application that implement and/or interpret the IOLTA statute and/or govern the Commission’s procedure,

² The APA states:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Gov. Code § 11340.5(a).

The Office of Administrative Law (OAL)—the state agency that reviews draft regulations subject to the APA for compliance with the same before they are sent to the Secretary of State for publication in the California Code of Regulations—explains underground regulations as follows: “If a state agency issues, utilizes, enforces, or attempts to enforce a rule without following the APA when it is required to, the rule is called an ‘underground regulation.’ State agencies are prohibited from enforcing underground regulations.” “Underground Regulations” (California Office of Administrative Law 2020), available at https://oal.ca.gov/underground_regulations/ (last visited Jan. 8, 2020).

the guidelines would, if the State Bar were subject to the APA, be subject to its procedural requirements. If those requirements were not filled, the guidelines would be unenforceable.³

However, pursuant to an explicit exemption contained in the State Bar Act, the APA—and its prohibition of underground regulations—does not apply to the State Bar:

No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in Division 3 (commencing with Section 11000), Division 4 (commencing with Section 16100), and Part 1 (commencing with Section 18000) and Part 2 (commencing with Section 18500) of Division 5, of Title 2 of the Government Code, shall be applicable to the State Bar, unless the Legislature expressly so declares.

Bus. & Prof. Code § 6001 (emphasis added).⁴

III. Substantive Changes to the Rules of the State Bar Must Be Circulated for Public Comment, but There is No Such Requirement for Interpretive Guidelines or Policies

The State Bar Act empowers the Board of Trustees to formulate regulations: “Subject to the laws of this state, the board may formulate and declare rules and regulations necessary or expedient for the carrying out of this chapter.” Bus. & Prof. Code § 6025. It also specifically directs the Board of Trustees to adopt regulations implementing the IOLTA statute:

The Board of Trustees of the State Bar shall adopt the regulations and procedures necessary to implement this article and to ensure that the funds allocated herein are utilized to provide civil legal services to indigent persons, especially underserved client groups

³ Notably, federal law regarding rulemaking is much less strict than the APA. For instance, the “Federal APA exempts interpretative rules, general statements of policy and procedural rules from notice and comment requirements.” Asimow, Strumbwasser, Bolz & Tuleja, *Cal Prac. Guide: Administrative Law* ¶ 25:40 (The Rutter Group 2017) (citing 5 U.S.C. § 553(b)(A)). Also, unlike the APA, “federal APA rulemaking provisions do not apply to matters relating to ‘public property, loans, grants, benefits, or contracts.’” *Id.* ¶ 26:87 (quoting 5 U.S.C. § 553(a)(2)) (emphasis added).

⁴ The APA is contained within Division 3 of Title 2 of the Government Code. See Gov. Code §§ 11340, *et seq.*

such as but not limited to the elderly, the disabled, juveniles, and non-English-speaking persons.

Bus. & Prof. Code § 6225. The Board of Trustees, in turn, enacted rules governing the Legal Services Trust Fund (Rules of the State Bar 3.660 – 3.692).⁵

While the APA does not apply to the State Bar, the Rules of the State Bar do require that non-emergency substantive changes be circulated for public comment, generally for a period of 45 days. Specifically, Rule of the State Bar 1.10 provides in relevant part:

(A) Proposals for the Rules of the State Bar of California are circulated for public comment before adoption, amendment, or repeal by the Board of Trustees. The State Bar also makes available for public comment its proposals for the California Rules of Court. Proposals are circulated for a forty-five day period, which can be shortened to a minimum of 30 days or extended to a maximum of 90 days, as designated by the board.

(B) Public comment is not required

- (1) to correct clerical errors; clarify grammar; improve organization; conform to specific changes in a law; update references or citations; or make similar editorial changes;
- (2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal; or
- (3) to add or modify an appendix to these rules.

Rules of the State Bar of California, Rule 1.10.

The Rules of the State Bar describe generally the scope of the Rules, stating, as relevant here, that “[t]he rules of the State Bar of California concern ... (B) its programs and services and the requirements for participating in or using them.” Rules of the State Bar of California, Rule 1.3. However, neither the State Bar Act nor the Rules of the State Bar nor any other authority

⁵ Business & Professions Code section 6225 also contains, in subsections (a) and (b), detailed procedural requirements for the adoption of the State Bar’s regulations implementing the IOLTA statute, including requirements for public hearings. Those requirements appear to apply and have been treated as applying to the initial adoption of the IOLTA regulations, but not to amendments thereto.

specifies when a pronouncement of the State Bar must be encapsulated in a Rule versus when it may be accomplished through a guideline, policy, or other governing document.

Because the APA does not apply, directives that merely interpret the Rules of the State Bar can be addressed through a guideline or policy or other document issued by the Commission and approved by the Board of Trustees. However, if the Commission wishes to issue a directive that conflicts with the Rules of the State Bar concerning the Legal Services Trust Fund Commission, it must seek an appropriate amendment to the Rules from the Board of Trustees.

IV. Suggested Considerations for Developing Proposed Changes to the Governing Authorities of the Legal Services Trust Fund Program

In light of the above, the Committee should keep in mind the following considerations as it evaluates possible changes to the governing authorities of the Legal Services Trust Fund Program:

- Directives or pronouncements that interpret or supplement⁶ the Rules of the State Bar may be issued in guidelines, policies, or other documents issued by the Commission and approved by the Board of Trustees.
- If the Committee wishes to modify or contradict a Rule of the State Bar, that may only be accomplished through amendment of the Rules of the State Bar, which must be proposed to the Board of Trustees, and, prior to final approval by the Board, approved by the Board for posting for public comment pursuant to Rule of the State Bar 1.10.
- To strengthen the Commission's position in any appeals of funding decisions, the Committee should seek to enshrine policy guidelines, directives, pronouncements or

⁶ In some instances, the Rules of the State Bar concerning the Legal Services Trust Fund Program implicitly require interpretation by the Commission. For instance, Rule of the State Bar 3.671(C) provides that “[a] qualified legal services project or qualified support center that does not meet the 75% test may ... demonstrate that it meets the primary purpose and function requirement by other means,” leaving the Commission to determine what “other means” are. In other instances, the Rules of the State Bar explicitly reference policymaking by the Commission. *See, e.g.*, Rule of the State Bar 3.680 (an applicant “must submit a timely and compete application for funding in the manner prescribed by the Commission”); Rule of the State Bar 3.661(C) (“The Standards for the Provision of Civil Legal Aid adopted by the American Bar Association’s House of Delegates on August 7, 2006, as limited by the general introduction to the standards, are the guidelines used by the Commission in approving the quality control procedures and reviewing and evaluating the maintenance of quality service and professional standards of applicant and recipient programs. *With due notice, the Commission may also rely on other standards that are consistent with law and generally accepted access to justice principles in the legal aid community.*”) (emphasis added).

interpretations upon which funding decisions are likely to turn as formal Rules of the State Bar.

- While formal public comment period is not required for guidelines, policies, or other governing documents that are not formal Rules of the State Bar, the Commission may choose to suggest that, when proposed changes to the Rules of the State Bar concerning the Legal Services Trust Fund Program are posted for public comment, the associated guidelines, policies, or other governing documents be posted for comment as well.