



# The State Bar *of California*

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**DATE:** August 6, 2020

**TO:** Members, LSTFC Eligibility and Budget Review Committee

**FROM:** Louise Bayles-Fightmaster, Eric Isken, and James Meeker

**SUBJECT:** Social Justice Collaborative: Eligibility Review Conference for 2021 IOLTA and EAF Funding

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## EXECUTIVE SUMMARY

Social Justice Collaborative (SJC) is a new applicant for funding as a Qualified Legal Services Project (QLSP). The organization began operation in 2012 and was incorporated in California that same year. They provide removal (deportation) defense, represent unaccompanied minors, and pursue appellate litigation opportunities on behalf of low-income immigrants in Northern and Central California.

This working group held an Eligibility Review Conference (ERC) with SCJ on July 31. In attendance from SCJ was Gautam Jagannath, Executive Director, and Emily Abraham, Legal Director. The Eligibility and Budget Review Committee's working group included Louise Bayles-Fightmaster, Eric Isken, and James Meeker, as well as staff members Christine Holmes, Erica Carroll, Brady Dewar, and Doan Nguyen.

The issues addressed at the ERC included:

- Whether SCJ's primary purpose is the provision of legal services to indigent persons without charge, including questions regarding:
  - Whether SJC offers services other than "legal services" as defined by the IOLTA statute and the Rules of the State Bar and if so, whether the expenses for these services were properly deducted from qualified expenditures; and
  - If SJC has an appropriate methodology for calculating its qualified expenditures and whether that methodology has been correctly applied in its application.

Based on additional information provided by SCJ at the ERC, this working group recommends SJC be found eligible for IOLTA and EAF funding in 2021.

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## BACKGROUND

## Organizational Description

Social Justice Collaborative (SJC) is a new applicant for IOLTA and EAF formula funding as a QLSP. The organization's "vision is that all immigrants who cannot afford private attorneys in deportation proceedings will have access to high quality legal representation." Working toward that vision, SJC has five programs:

1. Unaccompanied Minor Defense;
2. Deportation Defense;
3. Appellate Litigation;
4. Fostering Stability; and
5. Pro Bono.

SJC's application identifies a staff of three attorneys and four paralegals, seven administrative staff (two of whom are part-time), an office manager, plus undergraduate interns and federal work study students. SJC also reports 810 hours of services volunteered by attorneys and law students.

SJC is headquartered in Berkeley and seeks allocations in five counties as determined by where the largest percentages of their clients are physically located. It has reported total corporate expenditures of \$1,211,882 and qualified expenditures of \$727,409; based on these reported figures, 60.02 percent of SJC's total expenses are for the provision of free civil legal services to indigent persons.

## Governing Authorities

- Business & Professions Code sections 6210 (Preamble to IOLTA Statutes), 6213(a)(1) ("primary purpose"), 6214(b) (eligibility criteria for legal services projects), 6216(b)(1)(A) (allocation calculation methodology), and 6218(a) (requiring grants to be used for legal services)
- State Bar Rules 3.671(A) and (C) ("primary purpose") and 3.672(A) ("legal services")
- Legal Services Trust Fund Program Guidelines – Legal Services (Guidelines) at Guidelines 2.3.1 ("civil legal services"), 2.3.2 ("without charge"), and 2.3.5 ("primary purpose")

## DISCUSSION

IOLTA grants are intended to improve access to civil legal services for indigent people, as stated in the preamble to the IOLTA statute<sup>1</sup>. IOLTA and EAF formula grants must be used to provide civil legal services. To be found eligible for these grants, SJC must have the primary purpose and function of providing civil legal services without charge to indigent persons.<sup>2</sup> It must also have a complete and accurate application to allow staff to confirm that it meets threshold requirements for a legal services project and calculate the correct allocation amount by county.

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<sup>1</sup> Business & Professions Code § 6210 (all statutory references hereafter will be to this statute).

<sup>2</sup> Business & Professions Code §§ 6213(a)(1); Guidelines 2.3.1 – 2.3.5; *see also* Business & Professions Code § 6213(d) (definition of indigent person).

## **A. Primary Purpose**

To be considered a QLSP, SJC must provide “as its primary purpose and function legal services without charge to indigent persons.”<sup>3</sup> To determine primary purpose, the IOLTA and EAF application instructs the applicant to separate out its expenditures devoted to providing such free legal services to indigent persons in the prior fiscal year; these are called “qualified expenditures,” and that amount is then calculated as a percentage of the organization’s total corporate expenditures.<sup>4</sup>

If the applicant organization’s qualified expenditures constitute 75 percent or more of its corporate expenditures, the organization is presumed to meet the primary purpose requirement.<sup>5</sup> If qualified expenditures are less than 75 percent of corporate expenditures, an applicant must provide a narrative response to be reviewed by the Eligibility and Budget Review Committee.<sup>6</sup> Historically, the Committee has found that organizations with qualified expenditures between 50 and 75 meet the primary purpose requirement.

A number of issues impact what an organization may or may not count as a qualified expenditure for purposes of eligibility for IOLTA and EAF funding. This includes whether the services are fee-generating, to non-indigent persons, and/or do not qualify as “civil legal services.” Applicants are not prohibited from charging for services, serving non-indigent persons, or providing services other than legal services, but they must make appropriate deductions to ensure that only qualified expenditures count in the calculation of their grant allocations.

### **1. Deducting Expenses for Services for Which Clients are Charged**

The IOLTA and EAF application asks several questions to prompt applicants to make appropriate deductions from their qualified expenditures. One deduction involves charging for services. Applicants that charge clients in excess of certain specified costs<sup>7</sup>, must deduct the expenses related to that work and must provide a reasonable methodology for calculating that expense.

SJC initially deducted \$562,908 as expenses for deportation defense legal services it provided to clients for a fee of 20 percent or less of the market rate. SJC did not clearly indicate in the application the percentage of their work this amount represents. In SJC’s audit, this amount was reported as “program service revenue.” SJC confirmed prior to the ERC that these

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<sup>3</sup> Business & Professions Code § 6213(a)(1).

<sup>4</sup> The organization’s grant award is also calculated based on the amount of qualified expenditures, not the total corporate expenditures.

<sup>5</sup> State Bar Rule 3.671(A).

<sup>6</sup> State Bar Rule 3.671(C).

<sup>7</sup> Guidelines 2.3.2 (““Costs and expenses” include any out-of-pocket expenses incurred by the organization (or by pro bono attorneys recruited by the organization), including recoverable costs of litigation, copying charges, telephone charges, postage charges, and other out-of-pocket expenses normally charged to clients by attorneys in private practice. An applicant may be considered as providing legal services without charge within the meaning of Guideline 2.3.2 in spite of charges to clients for such items. [Rule 3.673(B)].”)

deductions represented revenue received from clients, rather than expenses for these services. SJC revised their deductions to reflect expenses for the legal services it provided to these fee-paying clients (including the share of staff time dedicated to these services). The revised deduction decreased to \$484,073. In turn, SJC's total qualified expenditures increased from slightly over 53 percent to slightly over 60 percent.

During the ERC, SJC explained its methodology for calculating this deduction. It was calculated based on the average staff time and estimated expenses for SJC's nine most common types of legal cases. SJC estimated the total hourly commitment of all staff roles involved in a case to determine an estimated cost per case. This number was then compared to the total number of cases in 2019 and the total number of cases provided at no charge to clients in 2019. SJC estimated 30.94 percent of expenses were for cases where the clients were charged. This percentage was applied to SJC's total expenditures to approximate the total non-qualifying expenditures. The working group accepted this methodology and calculation as reasonable.

## **2. Deducting Services Provided to Non-Indigent Persons**

SJC reports its mission is to help "low-income" immigrants, and confirmed during the ERC that the majority of its clients fall within the federal poverty guidelines. To determine income eligibility, SJC tracks client income, unemployment information, dependency status, number of dependents, and family employment.

SJC currently receives funding from the California Department of Social Services (CDSS) for the provision of free legal services. In the application, SJC did not indicate if the income eligibility for CDSS funding is the same as IOLTA/EAF funding. During the ERC, SJC clarified that it uses the Poverty Guidelines for Affidavit of Support (HHS Guidelines) published by the Federal Department of Health and Human Services for the 48 contiguous states, the District of Columbia, and U.S. territories.<sup>8</sup> As part of its intake, SJC screens all potential clients for income eligibility. They require all clients report their family income to determine indigency based on the HHS guidelines. These guidelines are aligned with the IOLTA statute and the intake process is appropriate.

As indicated above, the application includes several questions related to necessary deductions from qualified expenditures. One question focuses on expenses for services provided to non-indigent persons. SJC did not make any deductions in response.

SJC explained during the ERC that anyone who does not meet the income eligibility threshold is charged for services.<sup>9</sup> Deductions for the expenditures for the services that are charged were already made in the application, therefore, no additional deductions were necessary.

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<sup>8</sup> <https://www.uscis.gov/i-864p>

<sup>9</sup> SJC also explained that, due to restrictions in its current funding sources, it does not receive funding for services provided to certain categories of indigent persons, and must therefore charge them. If SJC receives IOLTA and EAF formula funding, it intends to use the grant funds to provide such services to indigent persons at no charge. Thus, SJC expects its proportion of qualified expenditures to rise in the future.

### **3. Deducting Non-Qualified Legal Services**

One question in the application prompts applicants to deduct expenses for non-qualifying legal services regardless of the client's indigency. SJC's website states that it "strives to provide holistic representation by ensuring that all clients have access to mental health support and other wrap-around services." In the application, SJC indicates that it engages in non-legal services activities including professional services and wrap-around service clinics like food stamp clinics in partnership with Alameda County Food Bank and mental health referrals. However, SJC did not deduct expenses for these activities. Instead, it noted in the application that all non-legal services are "provided by third-party organizations and government entities." When staff inquired about these activities, SJC revised its application to indicate it does not have expenses for these activities because they are provided to SJC clients off-site by providers who are not affiliated with SJC.

During the ERC, SJC further explained that it refers its clients to organizations for assistance in meeting their non-legal needs. SJC noted that while they do not directly provide these services, they are important for their clients and often positively impact their legal case.

Similarly, there was a question about whether all services provided through SJC's Fostering Stability program are clearly legal in nature. This program includes obtaining work authorization for clients, representing clients in obtaining "green cards" or permanent residency status, and helping clients with asylee family petitions<sup>10</sup>. SJC explained during the ERC that these services directly impact their clients' immigration cases, and the working group thought it reasonable for SJC to count these expenditures as qualifying.

#### **B. Working Group Recommendation**

The working group asked SJC to explain its methodology for deductions made for services to clients who were charged. SJC revised its application to include its methodology and uploaded a spreadsheet with its calculations on August 3. The methodology and calculation were deemed reasonable by staff and the working group.

In addition, the working group was encouraged by SJC's plan, as explained in more detail in Footnote 9, for using 2021 IOLTA and EAF funding to expand the scope of free legal services it can provide which should result in an increase in the percent of its qualified expenditures. The working group is hopeful that SJC will be closer to or clear the 75 percent primary purpose presumption for the next grant cycle.

Furthermore, the working group was satisfied with SJC's clarification regarding its calculations for qualified expenditures and explanation regarding non-legal services. The working group found that SJC meets the primary purpose requirement and recommends that it be found eligible for 2021 IOLTA and EAF funding.

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<sup>10</sup> This information was taken from SJC's website, rather than the application (<https://www.socialjusticecollaborative.org/fostering-stability>).

### **C. Next Steps**

The Eligibility and Budget Review Committee will review this recommendation at its August 14 meeting and, in turn, make a recommendation to the LSTFC regarding SJC's eligibility for 2021 funding. The LSTFC will then make a final determination of SJC's eligibility at its August 14 meeting.

### **ATTACHMENTS LIST**

- A.** Excerpts from Governing Authorities: Business & Professions Code; State Bar Rules; Eligibility Guidelines

**Social Justice Collaborative (SJC)**  
**2021 ELIGIBILITY REVIEW CONFERENCE**  
**July 31, 2020**

**Excerpts from Governing Authorities**

**California Business and Professions Code section 6210**

The Legislature finds that, due to insufficient funding, existing programs providing free legal services in civil matters to indigent persons, especially underserved client groups, such as the elderly, the disabled, juveniles, and non-English-speaking persons, do not adequately meet the needs of these persons. It is the purpose of this article to expand the availability and improve the quality of existing free legal services in civil matters to indigent persons, and to initiate new programs that will provide services to them. The Legislature finds that the use of funds collected by the State Bar pursuant to this article for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes in the judicial branch of government. The Legislature further finds that the expansion, improvement, and initiation of legal services to indigent persons will aid in the advancement of the science of jurisprudence and the improvement of the administration of justice.

**California Business and Professions Code section 6213**

As used in this article:

(a) “Qualified legal services project” means either of the following:

(1) A nonprofit project incorporated and operated exclusively in California that provides as its primary purpose and function legal services without charge to indigent persons and that has quality control procedures approved by the State Bar of California.

(2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California that meets the requirements of subparagraphs (A) and (B).

(A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars (\$20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.

(B) The program shall have quality control procedures approved by the State Bar of California.

[subsections (b) and (c) omitted]

(d) "Indigent person" means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project that provides free services of attorneys in private practice without compensation, "indigent person" also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.

[subsections (e) through (k) omitted]

**California Business and Professions Code section 6214**

(a) Projects meeting the requirements of subdivision (a) of Section 6213 which are funded either in whole or part by the Legal Services Corporation or with Older American Act funds shall be presumed qualified legal services projects for the purpose of this article.

(b) Projects meeting the requirements of subdivision (a) of Section 6213 but not qualifying under the presumption specified in subdivision (a) shall qualify for funds under this article if they meet all of the following additional criteria:

(1) They receive cash funds from other sources in the amount of at least twenty thousand dollars (\$20,000) per year to support free legal representation to indigent persons.

(2) They have demonstrated community support for the operation of a viable ongoing program.

(3) They provide one or both of the following special services:

(A) The coordination of the recruitment of substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or to qualified legal services projects in California.

(B) The provision of legal representation, training, or technical assistance on matters concerning special client groups, including the elderly, the disabled, juveniles, and non-English-speaking groups, or on matters of specialized substantive law important to the special client groups.

**California Business and Professions Code section 6216**

The State Bar shall distribute all moneys received under the program established by this article for the provision of civil legal services to indigent persons. The funds first shall be distributed 18

months from the effective date of this article, or upon such a date, as shall be determined by the State Bar, that adequate funds are available to initiate the program. Thereafter, the funds shall be distributed on an annual basis. All distributions of funds shall be made in the following order and in the following manner:

(a) To pay the actual administrative costs of the program, including any costs incurred after the adoption of this article and a reasonable reserve therefor.

(b) Eighty-five percent of the funds remaining after payment of administrative costs allocated pursuant to this article shall be distributed to qualified legal services projects. Distribution shall be by a pro rata county-by-county formula based upon the number of persons whose income is 125 percent or less of the current poverty threshold per county. For the purposes of this section, the source of data identifying the number of persons per county shall be the latest available figures from the United States Department of Commerce, Bureau of the Census. Projects from more than one county may pool their funds to operate a joint, multicounty legal services project serving each of their respective counties.

(1) (A) In any county which is served by more than one qualified legal services project, the State Bar shall distribute funds for the county to those projects which apply on a pro rata basis, based upon the amount of their total budget expended in the prior year for legal services in that county as compared to the total expended in the prior year for legal services by all qualified legal services projects applying therefor in the county. In determining the amount of funds to be allocated to a qualified legal services project specified in paragraph (2) of subdivision (a) of Section 6213, the State Bar shall recognize only expenditures attributable to the representation of indigent persons as constituting the budget of the program.

(B) The State Bar shall reserve 10 percent of the funds allocated to the county for distribution to programs meeting the standards of subparagraph (A) of paragraph (3) and paragraphs (1) and (2) of subdivision (b) of Section 6214 and which perform the services described in subparagraph (A) of paragraph (3) of Section 6214 as their principal means of delivering legal services. The State Bar shall distribute the funds for that county to those programs which apply on a pro rata basis, based upon the amount of their total budget expended for free legal services in that county as compared to the total expended for free legal services by all programs meeting the standards of subparagraph (A) of paragraph (3) and paragraphs (1) and (2) of subdivision (b) of Section 6214 in that county. The State Bar shall distribute any funds for which no program has qualified pursuant hereto, in accordance with the provisions of subparagraph (A) of paragraph (1) of this subdivision.

(2) In any county in which there is no qualified legal services projects providing services, the State Bar shall reserve for the remainder of the fiscal year for distribution the pro rata share of funds as provided for by this article. Upon application of a qualified legal services project proposing to provide legal services to the indigent of the county, the

State Bar shall distribute the funds to the project. Any funds not so distributed shall be added to the funds to be distributed the following year.

[subsection (c) omitted]

**State Bar Rule 3.671: Primary purpose and function**

- (A) A qualified legal services project is required by statute to have as its primary purpose and function providing legal services without charge to indigent persons. A qualified legal services project applying for Trust Fund Program funds is presumed to have such a purpose and function if 75% or more of the budget for the fiscal year for which it is seeking funds is designated to provide free legal services to indigents, and 75% or more of its expenditures for the most recent reporting year were incurred for such services. The calculation of 75% of expenditures may include a reasonable share of administrative and overhead expenses.

[subsection (B) omitted]

- (C) A qualified legal services project or qualified support center that does not meet the 75% test may nevertheless apply, provided that the applicant can satisfactorily demonstrate that it meets the primary purpose and function requirement by other means.

**State Bar Rule 3.672: Delivery of Legal Services**

- (A) “Legal services” include all professional services provided by a licensee of the State Bar and similar or complementary services of a law student or paralegal under the supervision and control of a licensee of the State Bar in accordance with law.

[subsection (B) omitted]

**Eligibility Guidelines for Legal Services Projects, Guideline 2.3.1.**

**2.3.1. provides civil legal services**

***Commentary:***

You must provide legal services within the definition of Rule 3.672(A). That rule provides that “legal services include all professional services provided by a member of the State Bar, and similar or complementary services of a law student or a paralegal under the supervision and control of a member of the State Bar in accordance with law.” If your organization provides services in addition to legal services, your application must describe those other activities, identify the percentage of the overall services provided that are not legal services, and state the basis by which you computed that percentage. [Rule 3.671(A)]

## **Eligibility Guidelines for Legal Services Projects, Guideline 2.3.2.**

### **2.3.2. without charge**

#### ***Commentary:***

Payments by clients for costs and expenses or a processing fee of \$20 or less shall not be considered a “charge” for legal services, so long as the processing fee is administered so that it does not prevent indigent persons from receiving services. If you charge a processing fee, you must establish procedures for waiving the fee for all clients who cannot afford it. You must inform prospective clients of the availability of a waiver at the same time and in the same manner that they are informed of the fee, and in a language the client can understand.

If you charge a processing fee, your application must include information about established procedures for waiving the fee for clients who cannot afford it. The maximum of \$10 per processing fee will be regarded as a qualified expenditure.

If you charge some clients amounts in excess of costs, your application must state the percentage of your work in which such charges are made, and the basis for computing that percentage.

If attorneys’ fees are generated through court awards, such fees must be used to provide further civil legal services without charge to indigent persons. [Rule 3.673(B)]

“Costs and expenses” include any out-of-pocket expenses incurred by the organization (or by pro bono attorneys recruited by the organization), including recoverable costs of litigation, copying charges, telephone charges, postage charges, and other out-of-pocket expenses normally charged to clients by attorneys in private practice. An applicant may be considered as providing legal services without charge within the meaning of Guideline 2.3.2 in spite of charges to clients for such items. [Rule 3.673(B)]

## **Eligibility Guidelines for Legal Services Projects, Guideline 2.3.4.**

### **2.3.4. who are indigent**

#### ***Commentary:***

An indigent person is defined by the Business and Professions Code §§6213(d), 6213(g), 6213(h), and 6213(i) as follows: “Indigent person means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free

services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project which provides free services of attorneys in private practice without compensation, indigent person also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in §50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.”

Your application must state the percentage of your organization’s services that were provided during the previous calendar year to clients who did not fall within this definition. You must adopt written financial eligibility guidelines. If your eligibility criteria includes persons who are not indigent within the definition of §6213(d) above, explain how you determined the percentage of clients served that falls outside the definition. If you did not have written financial eligibility guidelines in the prior year, your application must explain the basis of your computation of percentage and supply objective support for the computation. [B&P Code §§6213(d) and 6218]

If you provide legal services for the benefit of a group or class of persons beyond the specific individuals or organizations who are your clients, you may consider the services as “legal services provided to indigent persons” only if the legal matter is primarily for the benefit of indigent persons.

In determining whether a legal matter is primarily for the benefit of indigent persons, the Commission may consider the following factors and any others that aid in making that determination: (1) the forum in which the matter is being pursued, e.g., courts, administrative agency, legislature, etc.; (2) whether named clients are indigent persons or qualifying organizations (under Commentary 2.3.3 above); (3) in the case of a class action, the definition of the class contained in the complaint and proposed or actual class certification orders; (4) a description of the group of individuals that would benefit from a favorable resolution of the legal matter; (5) whether a majority of those who would benefit are indigent persons; (6) the relation of the legal issues raised by the matter to the needs of indigent persons; and (7) whether indigent persons are disproportionately impacted by the legal issues raised by the matter.

If legal services for the benefit of a group or class of persons beyond the specific individuals or organizations who are your clients constitute more than ten percent of your legal services, your application must identify the ten such legal matters on which you expended the largest amount of funds in the prior calendar year. For each of the matters so identified in your application, describe who would benefit from the services, state whether the matter is primarily for the benefit of indigent persons and, if so, explain the reasons you reached that conclusion. For any

such matter that is primarily for the benefit of indigent persons, your description should include the information listed as items (1) through (7) in the preceding paragraph; you must quantify the percentage of your clients who are indigent persons (or organizations qualifying under Commentary 2.3.3 above) and the percentage of the persons who would benefit from the services who are indigent persons. Explain the basis of this information. You need not disclose information protected by the attorney-client privilege.

If some portion of your legal services are for the benefit of a group or class of persons beyond your specific clients and are not primarily for the benefit of indigent persons, identify the percentage of overall services provided in such matters and explain the basis of your computation.

### **Eligibility Guidelines for Legal Services Projects, Guideline 2.3.5.**

#### **2.3.5. as the primary purpose and function of the corporation.**

##### ***Commentary:***

Your application must state the net percentage of the corporation's overall expenses that were incurred in the previous calendar year to provide civil legal services without charge to persons who are indigent. You are required to demonstrate the corporation's primary purpose, and not simply the primary purpose of a part of the corporation. (If your project is operated by a law school, see the last section of this Commentary on Guideline 2.3.5.) If more than 75 percent of the corporation's expenditure budget for the fiscal year for which it is seeking an allocation is designated for the provision of civil legal services without charge to persons who are indigent, and if 75 percent of its expenditures for the most recent reporting year were incurred for such legal services, the corporation will be presumed to meet the primary purpose and function test. In demonstrating your compliance with this 75 percent test, you cannot include the value of donated services. [Rule 3.671(A)]

An applicant not qualifying for the 75 percent presumption may nevertheless apply for an allocation, demonstrating its purpose and function by other means. An applicant not qualifying for the presumption shall state separately each purpose and function of the corporation, and state what percentage of the expenditures in the most recent calendar year, and what percentage of the budget in the upcoming year, are allocated to each of these separate purposes and functions. The application shall further state the basis for these allocations. [Rule 3.671(C)]

In addition to this submission of expenditure and of budget information, primary purpose and function can be additionally supported by historic expenditure information, by the organization's stated purpose in articles, bylaws or policy statements or case priority guidelines,

or by the demonstrated track record of the applicant in providing legal services without charge to indigent persons.

An applicant that operated in previous years as a project within an organization providing substantial services other than legal services to indigent persons, or as an entity other than a corporation, but which has since become a separate California nonprofit corporation whose primary purpose and function is the provision of legal services without charge to indigent persons, may establish its status as a qualified legal services project and its proportionate entitlement to funds based upon financial statements which strictly segregate that portion of the organization's expenditures in prior years which were devoted to civil legal services for indigents. Thus, if you are recently incorporated and previously operated as a part of an umbrella organization, you may utilize the expenditures of your predecessor organization so long as financial statements strictly segregate the expenditures for such legal services.

If your legal services program is operated by an accredited nonprofit law school, you are required only to demonstrate the program's primary purpose, and not the corporation's primary purpose. Your program must be operated exclusively in California and the law school must be accredited by the State Bar of California. The program must have operated for at least two years at a cost of at least \$20,000 per year, as an identifiable law school unit with the primary purpose and function of providing civil legal services without charge to indigent persons. The program may meet the primary purpose test according to the 75 percent test described above or by demonstrating its purpose and function through other means described above. [B&P Code §6213(a)(2)]



# The State Bar *of California*

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**DATE:** August 6, 2020

**TO:** LSTFC Eligibility and Budget Review Committee

**FROM:** Eric Isken, Zahirah Mann, and Bob Planthold, Eligibility Review Conference Working Group

**SUBJECT:** Community Lawyers Inc.: Eligibility Review Conference for 2021 IOLTA and EAF Funding

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## EXECUTIVE SUMMARY

Community Lawyers Inc. (CLI) is a new applicant for funding as a Qualified Legal Services Project (QLSP). The organization began operation and was incorporated in California in 2005. They provide limited services, self-help support, and community legal education and information through pro bono volunteers in family law, housing, bankruptcy, consumer, immigration, and expungement.

This working group held an Eligibility Review Conference (ERC) with CLI on August 4. In attendance from CLI was Rosa Hirji, Board Chair; Karen Suri, Board member; Haydee Perez, Program Coordinator; and Sarah Wilde, Grant Writer. The Eligibility and Budget Review Committee's working group included Eric Isken, Zahirah Mann, and Bob Planthold, as well as staff members Erica Carroll, Brady Dewar, Christine Holmes, and Doan Nguyen.

The issues addressed at the ERC included:

- Whether CLI submitted a complete application including the required financial statements reviewed by an independent certified public accountant;
- Whether CLI's primary purpose and function is the provision of legal services to indigent persons without charge; and
- Whether CLI has an appropriate methodology for calculating its qualified expenditures and whether that methodology has been correctly applied in this application.

During the ERC, CLI was informed by the working group that its application was deemed incomplete because it failed to submit a financial review conducted by an independent certified public accountant by the August 1 deadline. Therefore, the Committee recommends that CLI be found ineligible for 2021 IOLTA and EAF funding.

The Committee also identified several eligibility and quality control issues that CLI should address should it decide to reapply for IOLTA and EAF funding in future grant years, and that the Committee should consider in the event that CLI reapplies.

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## **BACKGROUND**

### **Organizational Description**

CLI is a new applicant for eligibility as a QLSP. CLI describes its work as providing “low-income people access to affordable legal services and develop[ing] innovative opportunities for attorneys and law students in underserved communities.” CLI uses a pro bono model to annually assist “more than 2,000 individuals and nonprofit organizations and address [] systemic poverty and civil rights issues through education and legal self-help.”

CLI staff consists of two positions, a part-time Executive Director (ED) and a full-time Legal Services Director. The application states that CLI is recruiting for a permanent part-time ED; CLI later confirmed to staff that the ED position is now vacant.<sup>1</sup>

CLI delivers services primarily through volunteers; for 2019, it reported 2,250 hours of services volunteered by 30 attorneys and 1,375 hours of service volunteered by five paralegal and ten law students.

CLI is headquartered in Compton and seeks a pro bono allocation in Los Angeles County. It has reported total corporate expenditures of \$166,709 and qualified expenditures of \$141,709.<sup>2</sup>

### **Governing Authorities**

- Business & Professions Code sections 6210 (Preamble to IOLTA Statutes), 6213(a)(1) (“primary purpose”), 6213(d) (definition of indigent person), 6214(b) (eligibility criteria for legal services projects), 6216(b)(1)(A) (allocation calculation methodology), and 6218(a) (requiring grants to be used for legal services)
- State Bar Rules 3.671(A) and (C) (primary purpose), 3.672(A) (legal services), and 3.680(E)(1) (audit or financial review requirement)
- Legal Services Trust Fund Program Guidelines – Legal Services Projects (Guidelines) 1.4 (complete application) 2.3.1 (civil legal services), 2.3.2 (without charge), 2.3.4 (indigent), 2.3.5 (primary purpose), and 2.7.1(audit or financial review requirement)

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<sup>1</sup> A job posting for the role of Executive Director is available on CLI’s website <http://www.community-lawyers.org/job-opportunities>. CLI’s application indicated it was seeking a full-time E.D. The posting lists a part-time role.

<sup>2</sup> This amount does not include \$10,000 CLI deducted for development consultant services from qualified expenditures. Staff informed CLI that it did not need to deduct this expense, but CLI has not yet revised the application.

- American Bar Association’s Standards for the Provision of Civil Legal Aid 1.2-4 (Governing Body Members’ Conflict of Interest) and 2.7 (Use of Pro Bono Volunteers)

## DISCUSSION

IOLTA grants are intended to improve access to civil legal services for indigent people, as stated in the preamble to the IOLTA statute<sup>3</sup>. IOLTA and EAF formula grants must be used to provide civil legal services. To be found eligible for these grants, CLI must have the primary purpose and function of providing civil legal services without charge to indigent persons.<sup>4</sup> It must also have a complete and accurate application, including financial statements reviewed by an independent certified public accountant (CPA) that will allow staff to determine if it meets threshold requirements as a legal services project and to calculate the correct allocation amount by county, if CLI is found eligible.

### A. Financial Statements Audited or Reviewed by an Independent Certified Public Accountant

State Bar Rule 3.680(E)(1) requires organizations applying for IOLTA grants to submit “an audited financial statement by an independent certified public accountant for the fiscal year that concluded during the prior calendar year” as part of a “timely and complete” application.<sup>5</sup> Since CLI had gross expenditures below \$500,000, it was permitted to submit a financial review in lieu of an audit (State Bar Rule 3.680(E)(1)). Guideline 2.7.1 and the commentary thereto require that such financial review be performed by an independent CPA. Due to the unprecedented situation of COVID-19, applicants were instructed that applications would be accepted without a final audit or financial review<sup>6</sup> but that an extension request must be submitted with the application. Applicants were also notified in the application that eligibility cannot be determined until the State Bar receives the final audit or financial review.

As discussed at the June 26 Eligibility and Budget Review Committee meeting, CLI submitted a document entitled, “Financial Review for 2019 & 2020,” that did not appear to be a financial review conducted by an independent CPA. CLI submitted a formal extension request to submit a financial review conducted by an independent CPA. The Committee granted an extension until August 1, 2020<sup>7</sup>. A document titled, “Profit and Loss January – December 2019,” was uploaded on August 1. CLI confirmed during the ERC that it was unable to obtain a financial

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<sup>3</sup> Bus. & Prof. Code § 6210

<sup>4</sup> Bus. & Prof. Code § 6213(a)(1); Guidelines 2.3.1 – 2.3.5; *see also* Bus. & Prof. Code § 6213(d) (definition of indigent person).

<sup>5</sup> *See also* Bus. & Prof. Code § 6222 (“A recipient of funds allocated pursuant to this article annually shall submit a financial statement to the State Bar, including an audit of the funds by a certified public accountant or a fiscal review approved by the State Bar....”)

<sup>6</sup> State Bar Rule 3.680(E)(1) and the related Schedule of Charges and Deadlines states that the “[t]hreshold amount of gross corporate expenditures requiring submission of an audited financial statement” is \$500,000. Organizations with gross corporate expenditures of less than \$500,000 submit a reviewed financial statement.

<sup>7</sup> CLI requested an extension to July 15, 2020; however, the Committee approved all extension requests with a final deadline of August 1, 2020.

review by an Independent CPA. The document submitted was an internally produced financial statement.

CLI was aware of the financial review requirement prior to applying this year. CLI was a first-time applicant for the 2020 grant cycle and was found ineligible for failing to submit a financial review that was conducted by an independent CPA.

Without a financial review conducted by an independent CPA, CLI's 2021 IOLTA and EAF application is incomplete. Therefore, staff and the working group were unable to verify any reported expenditures.

While its failure to submit the required financial review alone compels finding CLI ineligible, the working group felt that it was important to document other issues that may have impacted CLI's eligibility even if it had provided the required review. Sections B and C, below, address those issues. CLI should consider these issues in the event it reappplies for IOLTA and EAF funding in the future. CLI should also consider that, should it reapply, it will need to meet all eligibility requirements; the issues discussed in Sections B and C are not necessarily inclusive of all outstanding eligibility issues.

## **B. Primary Purpose**

To be considered a QLSP, CLI must provide "as its primary purpose and function legal services without charge to indigent persons."<sup>8</sup> To determine primary purpose, the IOLTA and EAF application instructs the applicant to separate out its expenditures devoted to providing such free civil legal services to indigent persons in the prior fiscal year; these are called "qualified expenditures," and that amount is then calculated as a percentage of the organization's total corporate expenditures.<sup>9</sup>

If the applicant organization's qualified expenditures constitute 75 percent or more of its corporate expenditures, the organization is presumed to meet the primary purpose requirement.<sup>10</sup> If qualified expenditures are less than 75 percent of corporate expenditures, an applicant must provide a narrative response to be reviewed by the Eligibility and Budget Review Committee.<sup>11</sup> Historically, the Committee has found that organizations with qualified expenditures constituting between 50 and 75 percent of total expenditures meet the primary purpose requirement.

A number of issues impact what an organization may or may not count as a qualified expenditures for purposes of IOLTA/EAF eligibility. This includes whether the services are fee-generating, to non-indigent persons, and/or do not qualify as "civil legal services." Applicants are not prohibited from charging for services, serving non-indigent persons, or providing

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<sup>8</sup> Bus. & Prof. Code § 6213(a)(1).

<sup>9</sup> The organization's grant award is also calculated based on the amount of qualified expenditures, not the total corporate expenditures.

<sup>10</sup> State Bar Rule 3.671(A).

<sup>11</sup> State Bar Rule 3.671(C).

services other than legal civil services, but they must make appropriate deductions to ensure that only qualified expenditures count in the determination of eligibility and calculation of their grant allocations.

### **1. Deducting Services Provided to Non-Indigent Persons**

The IOLTA/EAF application asks several questions to prompt applicants to make appropriate deductions from their qualified expenditures. This includes whether civil legal services were provided to non-indigent persons. CLI did not make deductions for this category.

CLI reports in its application that all client's households are "currently receiving means-tested benefits for which the individuals' income/resources have determined eligibility and/or the benefit amount for programs such as MediCal, CalWorks, Earned Income Tax Credits, TANF, and/or U.S. Citizenship and Immigration Services Immigration Fee Waivers."<sup>12</sup> Means-tested benefits are not a substitution for the definition of indigency in the IOLTA statute, which is a "person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act." Some means-tested benefits are available for individuals whose income is above 125 percent of the federal poverty level or do not otherwise qualify under the statutory definition of indigency.<sup>13</sup>

During the ERC, CLI was asked how it verified its clients met the IOLTA definition of indigency. CLI discussed that it conducts income screening through intake forms that are completed and archived for all clients, but it had not reviewed every form to verify indigency before completing the application. CLI further explained it did not have a system in place to determine how many clients were non-indigent. CLI indicated that at this point, it would take a substantial amount of time to review all intake forms and make any necessary deductions.

During the ERC, CLI also advised that it did not collect any income information at its "Know Your Rights"-type community trainings. CLI was advised that while it need not collect income information from all attendees at such events, it needs to obtain some data to allow it to substantiate what portion of attendees at these events do not meet the definition of indigency. Performing screening at a representative sample of such events was suggested as one possible method.

### **2. Deducting Expenses for Services for Which Clients are Charged**

As noted above, the IOLTA and EAF application prompts applicants to make appropriate deductions from their qualified expenditures. Another deduction involves charging for services.

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<sup>12</sup> The quoted sentence seems incomplete but verbatim from the application.

<sup>13</sup> Poverty Guidelines for Immigration Fee Waivers are 150 percent of Health and Human Services Poverty Guidelines. <https://www.uscis.gov/i-912p> Medi-Cal are 138 percent of the poverty level. <https://www.dhcs.ca.gov/services/medi-cal/Pages/DoYouQualifyForMedi-Cal.aspx>

Applicants that charge clients in excess of certain specified costs<sup>14</sup> must deduct the expenses related to that work and must provide a reasonable methodology for calculating that expense. CLI did not make deductions for this category.

During the ERC, CLI stated clients are asked to make donations for services. The amount of the suggested donation depended on the service. The examples included \$30 and \$100 donations. These “suggested donations” likely constitute a charge for services. While applicants are not prohibited from charging for services, they must make appropriate deductions for expenditures related to work for paying clients to ensure that only qualified expenditures count in the determination of primary purpose and calculation of their grant allocations.

### **C. Quality Control Standards**

Quality control issues do not necessarily impact eligibility; however, the Office of Access & Inclusion conducts monitoring visits of grantees to determine compliance with the requirements of the applicable governing authorities which includes the American Bar Association’s Standards for the Provision of Civil Legal Aid (ABA Standards) as quality control guidelines<sup>15</sup>.

CLI informed staff three business days prior to the eligibility review conference that the interim part-time executive director recently separated from the organization for personal reasons. The organization was in the process of recruiting a permanent executive director and now the role is vacant. As mentioned above, when fully staffed, CLI has only 1.5 full time employees and its only full-time staff member is the program coordinator who is not an attorney. CLI delivers legal services through pro bono volunteers. CLI stated the Board is currently supervising the program coordinator and overseeing the legal services provided while they recruit a permanent executive director.

Pursuant to ABA Standard 2.7, an organization with a pro bono component should have “sufficient staff to recruit members of the bar, to assign cases properly, to follow-up on referrals and to provide appropriate support.” During major staff transitions, CLI should plan accordingly to ensure that competent legal services continue to be provided.

During the ERC, CLI stated board members also volunteer to run limited scope clinics through CLI and will occasionally take on a client from the clinic in their own capacity outside of the organization. The working group is concerned that this may create a conflict of interest. CLI responded that it has a conflict of interest policy. CLI should consider ensuring its policy makes clear “that a governing body member with a conflicting interest also has an obligation to avoid

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<sup>14</sup> Guidelines 2.3.2 (“Costs and expenses” include any out-of-pocket expenses incurred by the organization (or by pro bono attorneys recruited by the organization), including recoverable costs of litigation, copying charges, telephone charges, postage charges, and other out-of-pocket expenses normally charged to clients by attorneys in private practice. An applicant may be considered as providing legal services without charge within the meaning of Guideline 2.3.2 in spite of charges to clients for such items. [Rule 3.673(B)].”)

<sup>15</sup> Bus. & Prof. Code §6225 and State Bar Rule 3.661(C)

influencing the operation of the provider by any indirect means, such as in decisions regarding priorities, allocation of resources or provider structure.”<sup>16</sup>

#### **D. Working Group Recommendation**

This working group recommends that CLI be found ineligible under State Bar Rule 3.680 and Eligibility Guideline 1.4 of the Eligibility Guidelines for Legal Services Projects, for failing to submit a timely and complete application including a financial review conducted by an independent CPA.

The working group did not request additional information from CLI or grant an extension to submit its financial review beyond August 1. The working group also advised CLI to work with staff before and during the application process in the future to ensure compliance with the application requirements.

#### **E. Next Steps**

The Eligibility and Budget Review Committee will review this recommendation at its August 14 meeting and, in turn, make a recommendation to the LSTFC regarding CLI’s eligibility for 2021 funding. The LSTFC will then make a final determination of CLI’s eligibility at its August 14 meeting.

### **ATTACHMENTS LIST**

- A.** Excerpts from Governing Authorities: Business & Professions Code; State Bar Rules; Eligibility Guidelines; and American Bar Association’s Standards for the Provision of Civil Legal Aid

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<sup>16</sup> ABA Standard 1.2-4 On Governing Body Members’ Conflict of Interest

**Community Lawyers Inc (CLI)**  
**2021 ELIGIBILITY REVIEW CONFERENCE**  
**AUGUST 4, 2020**

**Excerpts from Governing Authorities**

**California Business & Professions Code §6210**

The Legislature finds that, due to insufficient funding, existing programs providing free legal services in civil matters to indigent persons, especially underserved client groups, such as the elderly, the disabled, juveniles, and non-English-speaking persons, do not adequately meet the needs of these persons. It is the purpose of this article to expand the availability and improve the quality of existing free legal services in civil matters to indigent persons, and to initiate new programs that will provide services to them. The Legislature finds that the use of funds collected by the State Bar pursuant to this article for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes in the judicial branch of government. The Legislature further finds that the expansion, improvement, and initiation of legal services to indigent persons will aid in the advancement of the science of jurisprudence and the improvement of the administration of justice.

**California Business & Professions Code §6213**

As used in this article:

(a) “Qualified legal services project” means either of the following:

- (1) A nonprofit project incorporated and operated exclusively in California that provides as its primary purpose and function legal services without charge to indigent persons and that has quality control procedures approved by the State Bar of California.

[subsections (a)(2), (b) and (c) omitted]

(d) “Indigent person” means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project that provides free services of attorneys in private practice without compensation, “indigent person” also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.

[subsections (e) through (k) omitted]

**California Business & Professions Code §6214**

[subsections (a) omitted]

(b) Projects meeting the requirements of subdivision (a) of Section 6213 but not qualifying under the presumption specified in subdivision (a) shall qualify for funds under this article if they meet all of the following additional criteria:

(1) They receive cash funds from other sources in the amount of at least twenty thousand dollars (\$20,000) per year to support free legal representation to indigent persons.

(2) They have demonstrated community support for the operation of a viable ongoing program.

(3) They provide one or both of the following special services:

(A) The coordination of the recruitment of substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or to qualified legal services projects in California.

(B) The provision of legal representation, training, or technical assistance on matters concerning special client groups, including the elderly, the disabled, juveniles, and non-English-speaking groups, or on matters of specialized substantive law important to the special client groups.  
(Added by Stats. 1981, Ch. 789, Sec. 1.)

**California Business & Professions Code § 6216**

The State Bar shall distribute all moneys received under the program established by this article for the provision of civil legal services to indigent persons. The funds first shall be distributed 18 months from the effective date of this article, or upon such a date, as shall be determined by the State Bar, that adequate funds are available to initiate the program. Thereafter, the funds shall be distributed on an annual basis. All distributions of funds shall be made in the following order and in the following manner:

(a) To pay the actual administrative costs of the program, including any costs incurred after the adoption of this article and a reasonable reserve therefor.

(b) Eighty-five percent of the funds remaining after payment of administrative costs allocated pursuant to this article shall be distributed to qualified legal services projects. Distribution shall be by a pro rata county-by-county formula based upon the number of persons whose income is 125 percent or less of the current poverty threshold per county. For the purposes of this section, the source of data identifying the number of persons per county shall be the latest available figures from the United States Department of Commerce, Bureau of the Census.

Projects from more than one county may pool their funds to operate a joint, multicounty legal services project serving each of their respective counties.

(1) (A) In any county which is served by more than one qualified legal services project, the State Bar shall distribute funds for the county to those projects which apply on a pro rata basis, based upon the amount of their total budget expended in the prior year for legal services in that county as compared to the total expended in the prior year for legal services by all qualified legal services projects applying therefor in the county. In determining the amount of funds to be allocated to a qualified legal services project specified in paragraph (2) of subdivision (a) of Section 6213, the State Bar shall recognize only expenditures attributable to the representation of indigent persons as constituting the budget of the program.

(B) The State Bar shall reserve 10 percent of the funds allocated to the county for distribution to programs meeting the standards of subparagraph (A) of paragraph (3) and paragraphs (1) and (2) of subdivision (b) of Section 6214 and which perform the services described in subparagraph (A) of paragraph (3) of Section 6214 as their principal means of delivering legal services. The State Bar shall distribute the funds for that county to those programs which apply on a pro rata basis, based upon the amount of their total budget expended for free legal services in that county as compared to the total expended for free legal services by all programs meeting the standards of subparagraph (A) of paragraph (3) and paragraphs (1) and (2) of subdivision (b) of Section 6214 in that county. The State Bar shall distribute any funds for which no program has qualified pursuant hereto, in accordance with the provisions of subparagraph (A) of paragraph (1) of this subdivision.

(2) In any county in which there is no qualified legal services projects providing services, the State Bar shall reserve for the remainder of the fiscal year for distribution the pro rata share of funds as provided for by this article. Upon application of a qualified legal services project proposing to provide legal services to the indigent of the county, the State Bar shall distribute the funds to the project. Any funds not so distributed shall be added to the funds to be distributed the following year.

[subsection (c) omitted]

### **California Business & Professions Code § 6218**

All legal services projects and support centers receiving funds pursuant to this article shall adopt financial eligibility guidelines for indigent persons.

(a) Qualified legal services programs shall ensure that funds appropriated pursuant to this article shall be used solely to defray the costs of providing legal services to indigent persons

or for such other purposes as set forth in this article.

[subsection (b) omitted]

**State Bar Rule 3.671: Primary purpose and function**

(A) A qualified legal services project is required by statute to have as its primary purpose and function providing legal services without charge to indigent persons. A qualified legal services project applying for Trust Fund Program funds is presumed to have such a purpose and function if 75% or more of the budget for the fiscal year for which it is seeking funds is designated to provide free legal services to indigents, and 75% or more of its expenditures for the most recent reporting year were incurred for such services. The calculation of 75% of expenditures may include a reasonable share of administrative and overhead expenses.

[subsection (B) omitted]

(C) A qualified legal services project or qualified support center that does not meet the 75% test may nevertheless apply, provided that the applicant can satisfactorily demonstrate that it meets the primary purpose and function requirement by other means.

**State Bar Rule 3.672: Delivery of legal services**

(A) "Legal services" include all professional services provided by a licensee of the State Bar and similar or complementary services of a law student or paralegal under the supervision and control of a licensee of the State Bar in accordance with law.

[subsection (B) omitted]

**State Bar Rule 3.680 Application for Trust Fund Program grants**

To be considered for a Trust Fund Program grant, a qualified legal services project or qualified support center seeking a Trust Fund Program grant must submit a timely and complete application for funding in the manner prescribed by the Commission. The applicant must agree to use any grant in accordance with grant terms and legal requirements.

(A) A qualified legal services project must meet statutory criteria.

[subsections (B) though (D) omitted]

(E) An application must include

- (1) an audited financial statement by an independent certified public accountant for the fiscal year that concluded during the prior calendar year. A financial review in lieu of an audited financial statement may be submitted by an applicant whose gross corporate expenditures were less than the amount specified in the Schedule of Charges and Deadlines;
- (2) information about the maintenance of quality service and professional standards and how the applicant maintains standards, such as internal quality control and review procedures; experience and educational requirements of attorneys and

paralegals; supervisory structure, procedures, and responsibilities; job descriptions and current salaries for all filled and unfilled professional and management positions; and fiscal controls and procedures

[subsections (E)(3) and (E)(4) omitted]

#### **Eligibility Guidelines for Legal Services Projects 1.4**

If the Commission or staff requests any further information relating to an applicant's eligibility, or related to the amount of the allocation under the Legal Services Trust Fund Program, the applicant must supply that information. However, the Commission is not required to notify applicants if their initial application fails to include information sufficient to demonstrate eligibility. Failure to provide information necessary to the Commission's decisions on eligibility or eligible expenditures (or failure to supply requested information relevant to those decisions) will be grounds for denial of eligibility, or for refusal to recognize part of the applicant's expenditures within the allocation formula.

#### **Eligibility Guidelines for Legal Services Projects 2.3**

##### **2.3 The application must demonstrate through objective information that the organization:**

###### ***Commentary:***

Objective information must be provided to assure that you meet the definitional provisions of Guideline 2.3. Such information must describe the organization specifically and factually, using quantitative information where needed, to demonstrate that it meets each of the requirements of Guidelines 2.3.1-2.3.5. [B&P Code §6213(a); Rules 3.670(A), 3.671(A), 3.680(E)(2)]

Quantitative information that may demonstrate how that organization's services meet the requirements includes the following: numbers of clients who were served during the previous year; hours of time spent on different kinds of services, or on services to different clients in the previous year; accounting records for expenses incurred in providing different kinds of services or services to different clients during the previous year.

If you rely on estimates to demonstrate that you have met these requirements, you must demonstrate that the estimates were derived by a method that is reasonably related to the actual expenditure of funds, and explain the basis of the estimates

#### **Eligibility Guidelines for Legal Services Projects 2.3.1**

##### **2.3.1. provides civil legal services**

###### ***Commentary:***

You must provide legal services within the definition of Rule 3.672(A). That rule provides that "legal services include all professional services provided by a member of the State Bar, and similar or complementary services of a law student or a paralegal under the supervision and control of a member of the State Bar in accordance with law." If your organization provides services in 6 addition to legal services, your application must describe those other activities, identify the percentage of the overall services provided that are not legal services, and state the basis by which you computed that percentage. [Rule 3.671(A)]

## **Eligibility Guidelines for Legal Services Projects, Guideline 2.3.2**

### **2.3.2. without charge**

#### ***Commentary:***

Payments by clients for costs and expenses or a processing fee of \$20 or less shall not be considered a “charge” for legal services, so long as the processing fee is administered so that it does not prevent indigent persons from receiving services. If you charge a processing fee, you must establish procedures for waiving the fee for all clients who cannot afford it. You must inform prospective clients of the availability of a waiver at the same time and in the same manner that they are informed of the fee, and in a language the client can understand.

If you charge a processing fee, your application must include information about established procedures for waiving the fee for clients who cannot afford it. The maximum of \$10 per processing fee will be regarded as a qualified expenditure.

If you charge some clients amounts in excess of costs, your application must state the percentage of your work in which such charges are made, and the basis for computing that percentage.

If attorneys’ fees are generated through court awards, such fees must be used to provide further civil legal services without charge to indigent persons. [Rule 3.673(B)]

“Costs and expenses” include any out-of-pocket expenses incurred by the organization (or by pro bono attorneys recruited by the organization), including recoverable costs of litigation, copying charges, telephone charges, postage charges, and other out-of-pocket expenses normally charged to clients by attorneys in private practice. An applicant may be considered as providing legal services without charge within the meaning of Guideline 2.3.2 in spite of charges to clients for such items. [Rule 3.673(B)]

## **Eligibility Guidelines for Legal Services Projects, Guideline 2.3.4**

### **2.3.4. who are indigent**

#### ***Commentary:***

An indigent person is defined by the Business and Professions Code §§6213(d), 6213(g), 6213(h), and 6213(i) as follows: “Indigent person means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project which provides free services of attorneys in private practice without compensation, indigent person also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in §50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.”

Your application must state the percentage of your organization's services that were provided during the previous calendar year to clients who did not fall within this definition. You must adopt written financial eligibility guidelines. If your eligibility criteria includes persons who are not indigent within the definition of §6213(d) above, explain how you determined the percentage of clients served that falls outside the definition. If you did not have written financial eligibility guidelines in the prior year, your application must explain the basis of your computation of percentage and supply objective support for the computation. [B&P Code §§6213(d) and 6218]

If you provide legal services for the benefit of a group or class of persons beyond the specific individuals or organizations who are your clients, you may consider the services as "legal services provided to indigent persons" only if the legal matter is primarily for the benefit of indigent persons.

In determining whether a legal matter is primarily for the benefit of indigent persons, the Commission may consider the following factors and any others that aid in making that determination: (1) the forum in which the matter is being pursued, e.g., courts, administrative agency, legislature, etc.; (2) whether named clients are indigent persons or qualifying organizations (under Commentary 2.3.3 above); (3) in the case of a class action, the definition of the class contained in the complaint and proposed or actual class certification orders; (4) a description of the group of individuals that would benefit from a favorable resolution of the legal matter; (5) whether a majority of those who would benefit are indigent persons; (6) the relation of the legal issues raised by the matter to the needs of indigent persons; and (7) whether indigent persons are disproportionately impacted by the legal issues raised by the matter.

If legal services for the benefit of a group or class of persons beyond the specific individuals or organizations who are your clients constitute more than ten percent of your legal services, your application must identify the ten such legal matters on which you expended the largest amount of funds in the prior calendar year. For each of the matters so identified in your application, describe who would benefit from the services, state whether the matter is primarily for the benefit of indigent persons and, if so, explain the reasons you reached that conclusion. For any such matter that is primarily for the benefit of indigent persons, your description should include the information listed as items (1) through (7) in the preceding paragraph; you must quantify the percentage of your clients who are indigent persons (or organizations qualifying under Commentary 2.3.3 above) and the percentage of the persons who would benefit from the services who are indigent persons. Explain the basis of this information. You need not disclose information protected by the attorney-client privilege.

If some portion of your legal services are for the benefit of a group or class of persons beyond your specific clients and are not primarily for the benefit of indigent persons, identify the percentage of overall services provided in such matters and explain the basis of your computation.

### **Eligibility Guidelines for Legal Services Projects 2.3.5**

### **2.3.5. as the primary purpose and function of the corporation.**

#### ***Commentary:***

Your application must state the net percentage of the corporation's overall expenses that were incurred in the previous calendar year to provide civil legal services without charge to persons who are indigent. You are required to demonstrate the corporation's primary purpose, and not simply the primary purpose of a part of the corporation. (If your project is operated by a law school, see the last section of this Commentary on Guideline 2.3.5.) If more than 75 percent of the corporation's expenditure budget for the fiscal year for which it is seeking an allocation is designated for the provision of civil legal services without charge to persons who are indigent, and if 75 percent of its expenditures for the most recent reporting year were incurred for such legal services, the corporation will be presumed to meet the primary purpose and function test. In demonstrating your compliance with this 75 percent test, you cannot include the value of donated services. [Rule 3.671(A)]

An applicant not qualifying for the 75 percent presumption may nevertheless apply for an allocation, demonstrating its purpose and function by other means. An applicant not qualifying for the presumption shall state separately each purpose and function of the corporation, and state what percentage of the expenditures in the most recent calendar year, and what percentage of the budget in the upcoming year, are allocated to each of these separate purposes and functions. The application shall further state the basis for these allocations. [Rule 3.671(C)]

In addition to this submission of expenditure and of budget information, primary purpose and function can be additionally supported by historic expenditure information, by the organization's stated purpose in articles, bylaws or policy statements or case priority guidelines, or by the demonstrated track record of the applicant in providing legal services without charge to indigent persons.

An applicant that operated in previous years as a project within an organization providing substantial services other than legal services to indigent persons, or as an entity other than a corporation, but which has since become a separate California nonprofit corporation whose primary purpose and function is the provision of legal services without charge to indigent persons, may establish its status as a qualified legal services project and its proportionate entitlement to funds based upon financial statements which strictly segregate that portion of the organization's expenditures in prior years which were devoted to civil legal services for indigents. Thus, if you are recently incorporated and previously operated as a part of an umbrella organization, you may utilize the expenditures of your predecessor organization so long as financial statements strictly segregate the expenditures for such legal services.

If your legal services program is operated by an accredited nonprofit law school, you are required only to demonstrate the program's primary purpose, and not the corporation's primary purpose. Your program must be operated exclusively in California and the law

school must be accredited by the State Bar of California. The program must have operated for at least two years at a cost of at least \$20,000 per year, as an identifiable law school unit with the primary purpose and function of providing civil legal services without charge to indigent persons. The program may meet the primary purpose test according to the 75 percent test described above or by demonstrating its purpose and function through other means described above. [B&P Code §6213(a)(2)]

### **Eligibility Guidelines for Legal Services Projects 2.7**

**2.7 The application must include a financial statement that includes the total expenditures of the applicant. The financial statement must meet the requirements of Guideline 2.7.1 below.**

#### **Eligibility Guidelines for Legal Services Projects 2.7.1**

2.7.1. The statement must show expenditures for the completed fiscal year ended most recently before the application deadline, and must be audited or reviewed by an independent certified public accountant. A financial review, in lieu of an audited financial statement, may be submitted by an applicant whose gross corporate expenditures were less than the amount specified in the Schedule of Charges and Deadlines. Applicants must submit a financial statement no later than 90 days after the end of their fiscal year. The required financial statement must be received prior to the disbursement of any funds from the Legal Services Trust Fund Program.

#### ***Commentary:***

Independent CPA-audited or reviewed statements are required of organizations with gross expenditures of less than \$500,000. Organizations with gross 13 expenditures in excess of \$500,000 must submit audited statements. If such a statement is unavailable at the time of the application, you may substitute an approximated financial statement, but you must submit an audited or reviewed statement no more than 90 days after the end of their fiscal year. [B&P Code §6222; Rule 3.680(E)(1); Schedule of Charges and Deadlines]

### **American Bar Association's Standards for the Provision of Civil Legal Aid**

#### **STANDARD 2.7: Integrating the Resources of the Legal Profession and Involvement of Members of the Bar**

A legal aid provider should maintain ongoing, effective communication with the lawyers on its panel and strive to fashion a policy that responds to the interests of the lawyers, while maximizing the service offered to clients. The provider should periodically reassess its utilization of members of the bar and should adjust its approach as appropriate to reflect the changing interests of the attorneys and the changing needs of its clients.

*Appropriate institutional support.* A legal aid provider should dedicate resources to support the infrastructure necessary to support its efforts to integrate the resources of the legal

profession in its work. It should make an adequate commitment of its own resources to be used in conjunction with those available from the bar to recruit, train and provide backup assistance to members of the bar who represent legal aid clients. That calls for support from both the governing body of the organization and from senior management. The provider should make certain that adequate financial resources are provided to support the effective operation of its private attorney component. Staff of the component should be well trained and should have the skills and capability to interact effectively private practitioners and with the leadership of the bar. The provider should assure that it has sufficient staff to recruit members of the bar, to assign cases properly, to follow-up on referrals and to provide appropriate support.

### **American Bar Association's Standards for the Provision of Civil Legal Aid**

#### **STANDARD 1.2-4 Governing Body Members' Conflicts of Interest**

Governing body members must not knowingly attempt to influence any decisions in which they have a conflict with the provider or its clients.

#### **COMMENTARY**

##### **General considerations**

No member of the governing body should participate in a decision in which the member has a personal, professional, organizational or institutional interest that is in conflict with the interests of the provider or its clients. The governing body has a responsibility to adopt appropriate policies that protect against conflicts of interest and provide appropriate guidance to its members regarding their responsibilities in the event that a conflict arises.

A potential conflict of interest may arise in a variety of ways:

- When a governing body member has a personal or pecuniary interest in a matter that is under consideration by the provider;
- When a member is employed by or associated with an organization that has a competing or adverse interest with that of the provider;
- When a member has a personal or institutional interest that is in conflict with interests of the low income communities served by the provider;
- When a member represents a client whose interests are adverse to the interests of a client of the provider, although the clients are not direct adversaries in a particular case; or
- When a member represents a client who is a direct adversary of a client of the provider in a specific case.

The provider should adopt policies, consistent with the ethical requirements and the law governing conflicts of interest in the jurisdiction in which the provider operates, that assure that any conflicts are effectively managed. The policies should define what constitutes a conflict of interest. Generally, a conflict of interest exists if a governing body member's judgment is – or may be – influenced by considerations of personal gain or benefit, or of gain or benefit to a third party. When the potential conflict of interest involves a client of the

governing body member, of the provider or of both, ethical considerations may govern whether there is a conflict and the policy should provide guidance regarding the professional obligations of the provider and the governing body member.

The policies should also instruct the governing body and its members regarding what to do in the event that a conflict does arise. Generally, the fact of a conflict must be disclosed and the member cannot participate in any discussion or vote on any matter that gives rise to the conflict. The policy should make it clear that a governing body member with a conflicting interest also has an obligation to avoid influencing the operation of the provider by any indirect means, such as in decisions regarding priorities, allocation of resources, or provider structure. The policy should also prohibit any governing body member with a potential conflict from informally seeking to influence the conduct of legal work or the operation of the provider.



# The State Bar *of California*

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**DATE:** August 14, 2020

**TO:** Members, LSTFC Eligibility and Budget Review Committee

**FROM:** Erica Connolly, Corey Friedman, Kim Savage, Eligibility Review Conference Working Group

**SUBJECT:** Eligibility Review Conference for 2021 IOLTA and EAF Funding for Kids in Need of Defense

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## EXECUTIVE SUMMARY

Kids in Need of Defense (KIND) is a new applicant for funding as a Qualified Legal Services Project (QLSP). KIND is incorporated in the District of Columbia and founded in 2008. KIND is a national organization that provides pro bono legal representation for refugee and migrant children.

The working group held an Eligibility Review Conference (ERC) with KIND on August 4. In attendance from KIND was Wendy Young, President; Vibha Bhatia, Vice President of Finance and Operations; Katie Annand, Managing Attorney, San Francisco/Fresno Office; and Veronica Jeffers, Managing Attorney, Los Angeles Office.

The issues addressed at the ERC included:

- Whether KIND is a qualified legal services project, as defined by Business & Professions Code section 6213(a) and State Bar Rule 3.670(A);
- Whether KIND meets primary purpose and has appropriately reported all non-qualifying activities and work; and
- Whether KIND has an acceptable methodology to accurately track and report qualified expenditures by county.

During the ERC, KIND was informed by members of the working group that it does not meet statutory threshold requirements as a QLSP because it is not incorporated in California. Therefore, the working group recommends that KIND be found ineligible for 2021 IOLTA and EAF funding.

The working group identified two additional eligibility issues should KIND decide to reapply for IOLTA and EAF funding in future grant years. These issues were not discussed at the ERC, as KIND indicated that it had no intentions to change its corporate structure to be separately incorporated in California.

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## BACKGROUND

### Organizational Description

KIND is a new applicant for eligibility as a QLSP. Founded in 2008, KIND is a national organization that provides pro bono legal representation for refugee and migrant children. In order to address the multi-faceted needs of unaccompanied migrant children, KIND offers a comprehensive approach through its various programs: Social Services, Strategies and Special Programs, Regional Policy and Initiatives Policy, Policy and Advocacy, and Communications.

KIND is headquartered in Washington D.C., and has field offices in Atlanta, Baltimore, Boston, Houston, Los Angeles, Newark, New York City, San Francisco, Fresno, Seattle, and Northern Virginia. In addition, KIND has staff at the U.S. southern border and Mexico. It is requesting 2021 IOLTA and EAF funding for 22 California counties.

KIND did not submit its completed audit by the August 1 extension deadline and its application is therefore deemed incomplete. As of August 3, KIND reported estimated total expenditures of \$114,104,750 and total qualified corporate expenditures of \$23,660,741<sup>1</sup>. Of that amount, KIND reported \$14,455,693 in non-qualified expenditures and \$9,205,048 in qualified expenditures. Based on the estimated amounts, KIND's percent of qualified expenditures for free civil legal services to indigent persons is 38.90 percent.

### Governing Authorities

- Business & Professions Code sections 6210 (Preamble to Interest on Lawyer Trust Accounts (IOLTA Statute), 6213(a) (primary purpose), 6213(d) (indigent person), 6216 (allocation calculation methodology)
- State Bar Rules 3.670(A) (operation in California by qualified entities); 3.671(A) and (C) (primary purpose); 3.672(A) (legal services); 3.680(A) and (E) (application requirements)
- Legal Services Trust Fund Program Guidelines – Legal Services Projects, Guidelines 1.4. (application requirements), 2.1 (California nonprofit corporation), 2.3 (objective and quantitative information), 2.3.1 (civil legal services), 2.3.2. (without charge), 2.3.4. (indigent), 2.3.5 (primary purpose), 2.7 (financial statement requirements)

## DISCUSSION

IOLTA grants are intended to improve access to civil legal services for indigent people, as stated in the preamble to the IOLTA statute.<sup>2</sup> IOLTA and Equal Access Fund (EAF) formula grants must be used to provide legal services. To be found eligible for these grants, KIND must have the primary purpose and function of providing legal services without charge to indigent persons.<sup>3</sup> It

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<sup>1</sup> This amount is calculated by subtracting in-kind expenditures and pass-through expenditures from total expenditures.

<sup>2</sup> Business & Professions Code § 6210; "IOLTA statute" refers to Business and Professions Code sections 6210 through 6228, which govern the administration of the IOLTA grants.

<sup>3</sup> Business & Professions Code § 6213(a).

must also have a complete and accurate application, including a complete audit that will allow staff to determine that it meets threshold requirements as a legal services project and calculate the correct allocation amount by county, if found eligible.

During the ERC, KIND indicated that it was not prepared to become separately incorporated and thus would not meet threshold requirements for eligibility. In light of this, KIND asked the working group not to bring to the Committee a discussion of eligibility issues regarding primary purpose and expenditures by county. In addition, KIND's 2021 IOLTA and EAF application is incomplete, as it did not submit a final audit by August 1. Therefore, staff and the working group were unable to verify any reported expenditures.

The working group felt that it was important to document the 2021 IOLTA and EAF application issues regarding primary purpose and expenditures by county, as these were substantive issues that would have impacted KIND's eligibility had it met threshold requirements.

#### **A. Qualified Legal Services Project Definition and Requirements**

According to Business & Professions Code section 6213(a) and State Bar Rule 3.670(A), a QLSP is defined as "a nonprofit project incorporated and operated exclusively in California that provides as its primary purpose and function legal services without charge to indigent persons and that has quality control procedures approved by the State Bar of California."

In order to demonstrate that an organization meets this definition, Eligibility Guideline 2.1 requires organizations to file copies of the following documents 1) Articles of Incorporation certified by the California Secretary of State; 2) current Certificate of Status from the California Secretary of State 3) IRS determination letter and 4) State Franchise Tax Board determination letter.

Although KIND submitted documents 2, 3 and 4 (described above) to demonstrate nonprofit status, its Articles of Incorporation were certified in the District of Columbia, not in California. During the ERC, KIND confirmed that its California field offices are not separately incorporated and therefore does not meet threshold statutory requirements.

#### **B. Primary Purpose and Non-Qualifying Activities**

To be considered a QLSP, KIND must provide "as its primary purpose and function legal services without charge to indigent persons."<sup>4</sup> To determine the organization's primary purpose, the IOLTA and EAF application instructs the applicant to report expenditures designated to the provision of civil legal services without charge to persons who are indigent in the prior calendar year, called "qualified expenditures." An organization's primary purpose is then calculated as a percentage based on amount of qualified expenditures over the organization's total corporate expenditures.<sup>5</sup>

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<sup>4</sup> Business & Professions Code § 6213(a)(1).

<sup>5</sup> The organization's grant award is also calculated based on the amount of qualified expenditures, not the total corporate expenditures.

If the applicant organization's qualified expenditures constitute 75 percent or more of its corporate expenditures, the organization is presumed to meet the primary purpose requirement.<sup>6</sup> If qualified expenditures are less than 75 percent of corporate expenditures, an applicant must provide a narrative response to be reviewed by the Eligibility and Budget Review Committee.<sup>7</sup> Historically, the Committee has recommended organizations with qualified expenditures between 50 and 75 percent as eligible for funding.

As of August 3, KIND's estimated current qualified expenditures constitute 38.90 percent of its corporate expenditures. This amount is below the presumed and historically accepted threshold to meet primary purpose, and does not account for potential additional deductions for non-qualifying work. Out of its \$23,660,741 of estimated total expenditures, KIND made the following deductions for non-qualifying activities, totaling \$14,455,693:

- \$13,563,669 (services outside California)
- \$838,356 (non-legal services; social services)
- \$53,668 (lease or sublease expenses)

Despite having significantly less than 75 percent of its expenditures as qualifying, KIND believes it meets primary purpose because its "mission and primary purpose is to assert the children's rights and protection of unaccompanied immigrant children who migrate alone by providing free, high-quality legal services." It also asserts that its clients are similar to indigent defendants. KIND also states that in California, it provides some limited representation of indigent adult immigrants and their children.

A number of factors, including services to non-indigent persons and services provided outside California, impact what an organization can and cannot count as a qualified expenditure for purposes of eligibility for IOLTA and EAF funding<sup>8</sup>. While organizations are not prohibited from providing these services, it must make appropriate deductions to ensure that only qualified expenditures count towards primary purpose.

### **1. Deducting Services Provided to Non-Indigent Persons**

In its application, KIND indicated that it does not conduct income screening to determine indigency. KIND's reason for this is because its clients are unaccompanied children and immigrant youth, who typically do not earn regular income and most of whom are low-income and would qualify under the federal poverty guidelines.

### **2. Deducting Services Provided Outside California**

In its application, KIND indicated that it is a national organization and made deductions of approximately 57.3 percent of its estimated total corporate expenditures. However, the

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<sup>6</sup> State Bar Rule 3.671(A).

<sup>7</sup> State Bar Rule 3.671(C).

<sup>8</sup> Eligibility Guideline 2.3

explanation provided only lists KIND's domestic offices and it is unclear if additional deductions need to be made for KIND's international work. Staff followed up with KIND on July 22 for clarification, but KIND did not provide supplemental information responsive to confirm if this amount included international work.

### **3. Deducting Non-Legal Services**

In its application, KIND deducted approximately 3.54 percent of its estimated total corporate expenditures for social services. It is unclear if this deduction is only for non-legal services provided in California or include KIND's additional field offices.

#### **C. Determining Expenditures by County**

Business & Professions Code section 6216(b) states that funds will be disbursed on a county-by-county pro rata basis. The application requires specific information regarding qualified expenditures in each county in order to ensure proper allocations are made when the statutory formula is run.

In its application, KIND noted that although it does not have an official method for tracking and reporting county expenditures, it does track clients by county. Again, because KIND was unable to submit its audit by August 1, staff and the working group were unable to verify KIND's estimated by-county expenditures.

#### **D. Working Group Recommendation**

This working group recommends that KIND be found ineligible for 2021 IOLTA and EAF funding under Business & Professions Code section 6213(a)(1) and State Bar Rule 3.670(A) for not meeting threshold eligibility requirements and State Bar Rule 3.680 and Eligibility Guideline 1.4 of the Eligibility Guidelines for Legal Services Projects, for failing to submit a timely and complete application.

The working group did not request additional information from KIND or grant an extension to submit its audit beyond August 1. The working group also advised KIND to work with staff before and during the application process in the future in order to ensure compliance with the application requirements.

#### **E. Next Steps**

The Eligibility and Budget Review Committee will review this recommendation at its August 14 meeting and, make a recommendation to the Legal Services Trust Fund Commission regarding KIND's eligibility for 2021 IOLTA and EAF funding. The Commission will then make a final determination at its August 14 meeting.

## **ATTACHMENT(S) LIST**

- A.** Excerpts from Governing Authorities: Business & Professions Code; Rules of the State Bar of California; Legal Services Trust Fund Program Eligibility Guidelines for Legal Services Projects

**KIDS IN NEED OF DEFENSE (KIND)  
2021 ELIGIBILITY REVIEW CONFERENCE  
AUGUST 4, 2020**

**Excerpts From Governing Authorities**

**California Business & Professions Code §6210**

The Legislature finds that, due to insufficient funding, existing programs providing free legal services in civil matters to indigent persons, especially underserved client groups, such as the elderly, the disabled, juveniles, and non-English-speaking persons, do not adequately meet the needs of these persons. It is the purpose of this article to expand the availability and improve the quality of existing free legal services in civil matters to indigent persons, and to initiate new programs that will provide services to them. The Legislature finds that the use of funds collected by the State Bar pursuant to this article for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes in the judicial branch of government. The Legislature further finds that the expansion, improvement, and initiation of legal services to indigent persons will aid in the advancement of the science of jurisprudence and the improvement of the administration of justice.

**California Business & Professions Code §6213**

As used in this article:

(a) "Qualified legal services project" means either of the following:

- (1) A nonprofit project incorporated and operated exclusively in California that provides as its primary purpose and function legal services without charge to indigent persons and that has quality control procedures approved by the State Bar of California.

[subsections (a)(2), (b) and (c) omitted]

(d) "Indigent person" means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project that provides free services of attorneys in private practice without compensation, "indigent person" also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.

[subsections (e) through (k) omitted]

**California Business & Professions Code § 6216**

The State Bar shall distribute all moneys received under the program established by this article for the provision of civil legal services to indigent persons. The funds first shall be distributed 18 months from the effective date of this article, or upon such a date, as shall be determined by the State Bar, that adequate funds are available to initiate the program. Thereafter, the funds shall be distributed on an annual basis. All distributions of funds shall be made in the following order and in the following manner:

(a) To pay the actual administrative costs of the program, including any costs incurred after the adoption of this article and a reasonable reserve therefor.

(b) Eighty-five percent of the funds remaining after payment of administrative costs allocated pursuant to this article shall be distributed to qualified legal services projects. Distribution shall be by a pro rata county-by-county formula based upon the number of persons whose income is 125 percent or less of the current poverty threshold per county. For the purposes of this section, the source of data identifying the number of persons per county shall be the latest available figures from the United States Department of Commerce, Bureau of the Census. Projects from more than one county may pool their funds to operate a joint, multicounty legal services project serving each of their respective counties.

(1) (A) In any county which is served by more than one qualified legal services project, the State Bar shall distribute funds for the county to those projects which apply on a pro rata basis, based upon the amount of their total budget expended in the prior year for legal services in that county as compared to the total expended in the prior year for legal services by all qualified legal services projects applying therefor in the county. In determining the amount of funds to be allocated to a qualified legal services project specified in paragraph (2) of subdivision (a) of Section 6213, the State Bar shall recognize only expenditures attributable to the representation of indigent persons as constituting the budget of the program.

(B) The State Bar shall reserve 10 percent of the funds allocated to the county for distribution to programs meeting the standards of subparagraph (A) of paragraph (3) and paragraphs (1) and (2) of subdivision (b) of Section 6214 and which perform the services described in subparagraph (A) of paragraph (3) of Section 6214 as their principal means of delivering legal services. The State Bar shall distribute the funds for that county to those programs which apply on a pro rata basis, based upon the amount of their total budget expended for free legal services in that county as compared to the total expended for free legal services by all programs meeting the standards of subparagraph (A) of paragraph (3) and paragraphs (1) and (2) of subdivision (b) of Section 6214 in that county. The State Bar shall distribute any funds for which no program has qualified pursuant hereto, in accordance with the provisions of subparagraph (A) of paragraph (1) of this subdivision.

(2) In any county in which there is no qualified legal services projects providing services, the State Bar shall reserve for the remainder of the fiscal year for distribution the pro rata share of funds as provided for by this article. Upon application of a qualified legal services project proposing to provide legal services to the indigent of the county, the State Bar shall distribute the funds to the project. Any funds not so distributed shall be added to the funds to be distributed the following year.

[subsection (c) omitted]

**State Bar Rule 3.670 Operation in California by qualified entities**

- (A) A qualified legal services project is required by statute to be a nonprofit corporation operating exclusively in California or a program operated exclusively 1 Business & Professions Code § 6213(d). 2 of 9 in California by a nonprofit law school accredited by the State Bar.2 A qualified legal services project that is a California nonprofit corporation with operations outside California may be considered as meeting the statutory requirement if it otherwise meets Trust Fund Requirements and expends Trust Fund Program grant funds only in California.

[subsection (B) omitted]

**State Bar Rule 3.671: Primary purpose and function**

- (A) A qualified legal services project is required by statute to have as its primary purpose and function providing legal services without charge to indigent persons. A qualified legal services project applying for Trust Fund Program funds is presumed to have such a purpose and function if 75% or more of the budget for the fiscal year for which it is seeking funds is designated to provide free legal services to indigents, and 75% or more of its expenditures for the most recent reporting year were incurred for such services. The calculation of 75% of expenditures may include a reasonable share of administrative and overhead expenses.

[subsection (B) omitted]

- (C) A qualified legal services project or qualified support center that does not meet the 75% test may nevertheless apply, provided that the applicant can satisfactorily demonstrate that it meets the primary purpose and function requirement by other means.

**State Bar Rule 3.672: Delivery of legal services**

- (A) “Legal services” include all professional services provided by a licensee of the State Bar and similar or complementary services of a law student or paralegal under the supervision and control of a licensee of the State Bar in accordance with law.

[subsection (B) omitted]

**State Bar Rule 3.680 Application for Trust Fund Program grants**

To be considered for a Trust Fund Program grant, a qualified legal services project or qualified support center seeking a Trust Fund Program grant must submit a timely and complete

application for funding in the manner prescribed by the Commission. The applicant must agree to use any grant in accordance with grant terms and legal requirements.

(A) A qualified legal services project must meet statutory criteria.

[subsections (B) through (D) omitted]

(E) An application must include

- (1) an audited financial statement by an independent certified public accountant for the fiscal year that concluded during the prior calendar year. A financial review in lieu of an audited financial statement may be submitted by an applicant whose gross corporate expenditures were less than the amount specified in the Schedule of Charges and Deadlines;

[subsections (E)(2) through (E)(4) omitted]

#### **Eligibility Guidelines for Legal Services Projects 1.4**

If the Commission or staff requests any further information relating to an applicant's eligibility, or related to the amount of the allocation under the Legal Services Trust Fund Program, the applicant must supply that information. However, the Commission is not required to notify applicants if their initial application fails to include information sufficient to demonstrate eligibility. Failure to provide information necessary to the Commission's decisions on eligibility or eligible expenditures (or failure to supply requested information relevant to those decisions) will be grounds for denial of eligibility, or for refusal to recognize part of the applicant's expenditures within the allocation formula.

#### **Eligibility Guidelines for Legal Services Projects 2.1**

##### **2.1 The applicant must be a California nonprofit corporation**

###### ***Commentary:***

In order to demonstrate your status as a California corporation, copies of the Articles of Incorporation certified by the California Secretary of State and a current Certificate of Status from the California Secretary of State showing that the corporation is in good legal standing must be filed with the Legal Services Trust Fund Program. To demonstrate your nonprofit status, copies of (1) the determination letter from the Internal Revenue Service granting your application for exemption from the appropriate provisions of subchapter (f) of Chapter 1 of the Internal Revenue Code of 1954, as amended and (2) the determination letter from the State Franchise Tax Board granting your application for exemption from the appropriate section of the California Revenue and Taxation Code must be filed with the Legal Services Trust Fund Program. If you have not received such determination letter(s), attach 5 copy(ies) of your application(s) for exemption, together with an explanation of its/their status. [B&P Code §6213(a)(1); Rules 3.670(A), 3.680(A)]

[para.2 omitted]

#### **Eligibility Guidelines for Legal Services Projects 2.3**

##### **2.3 The application must demonstrate through objective information that the organization:**

###### ***Commentary:***

Objective information must be provided to assure that you meet the definitional provisions of Guideline 2.3. Such information must describe the organization specifically and factually, using quantitative information where needed, to demonstrate that it meets each of the requirements of Guidelines 2.3.1-2.3.5. [B&P Code §6213(a); Rules 3.670(A), 3.671(A), 3.680(E)(2)]

Quantitative information that may demonstrate how that organization's services meet the requirements includes the following: numbers of clients who were served during the previous year; hours of time spent on different kinds of services, or on services to different clients in the previous year; accounting records for expenses incurred in providing different kinds of services or services to different clients during the previous year.

If you rely on estimates to demonstrate that you have met these requirements, you must demonstrate that the estimates were derived by a method that is reasonably related to the actual expenditure of funds, and explain the basis of the estimates

### **Eligibility Guidelines for Legal Services Projects 2.3.1**

#### **2.3.1. provides civil legal services**

##### ***Commentary:***

You must provide legal services within the definition of Rule 3.672(A). That rule provides that “legal services include all professional services provided by a member of the State Bar, and similar or complementary services of a law student or a paralegal under the supervision and control of a member of the State Bar in accordance with law.” If your organization provides services in addition to legal services, your application must describe those other activities, identify the percentage of the overall services provided that are not legal services, and state the basis by which you computed that percentage. [Rule 3.671(A)]

### **Eligibility Guidelines for Legal Services Projects, Guideline 2.3.2**

#### **2.3.2. without charge**

##### ***Commentary:***

Payments by clients for costs and expenses or a processing fee of \$20 or less shall not be considered a “charge” for legal services, so long as the processing fee is administered so that it does not prevent indigent persons from receiving services. If you charge a processing fee, you must establish procedures for waiving the fee for all clients who cannot afford it. You must inform prospective clients of the availability of a waiver at the same time and in the same manner that they are informed of the fee, and in a language the client can understand.

If you charge a processing fee, your application must include information about established procedures for waiving the fee for clients who cannot afford it. The maximum of \$10 per processing fee will be regarded as a qualified expenditure.

If you charge some clients amounts in excess of costs, your application must state the percentage of your work in which such charges are made, and the basis for computing that percentage.

If attorneys’ fees are generated through court awards, such fees must be used to provide further civil legal services without charge to indigent persons. [Rule 3.673(B)]

“Costs and expenses” include any out-of-pocket expenses incurred by the organization (or by pro bono attorneys recruited by the organization), including recoverable costs of litigation, copying charges, telephone charges, postage charges, and other out-of-pocket expenses normally charged to clients by attorneys in private practice. An applicant may be considered as providing legal services without charge within the meaning of Guideline 2.3.2 in spite of charges to clients for such items. [Rule 3.673(B)]

## **Eligibility Guidelines for Legal Services Projects, Guideline 2.3.4**

### **2.3.4. who are indigent**

#### ***Commentary:***

An indigent person is defined by the Business and Professions Code §§6213(d), 6213(g), 6213(h), and 6213(i) as follows: “Indigent person means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project which provides free services of attorneys in private practice without compensation, indigent person also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in §50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.”

Your application must state the percentage of your organization’s services that were provided during the previous calendar year to clients who did not fall within this definition. You must adopt written financial eligibility guidelines. If your eligibility criteria includes persons who are not indigent within the definition of §6213(d) above, explain how you determined the percentage of clients served that falls outside the definition. If you did not have written financial eligibility guidelines in the prior year, your application must explain the basis of your computation of percentage and supply objective support for the computation. [B&P Code §§6213(d) and 6218]

If you provide legal services for the benefit of a group or class of persons beyond the specific individuals or organizations who are your clients, you may consider the services as “legal services provided to indigent persons” only if the legal matter is primarily for the benefit of indigent persons.

In determining whether a legal matter is primarily for the benefit of indigent persons, the Commission may consider the following factors and any others that aid in making that determination: (1) the forum in which the matter is being pursued, e.g., courts, administrative agency, legislature, etc.; (2) whether named clients are indigent persons or qualifying organizations (under Commentary 2.3.3 above); (3) in the case of a class action, the definition of the class contained in the complaint and proposed or actual class certification orders; (4) a description of the group of individuals that would benefit from a favorable resolution of the legal matter; (5) whether a majority of those who would benefit are indigent persons; (6) the relation of the legal issues raised by the matter to the needs of indigent persons; and (7) whether indigent persons are disproportionately impacted by the legal issues raised by the matter.

If legal services for the benefit of a group or class of persons beyond the specific individuals or organizations who are your clients constitute more than ten percent of your legal services, your application must identify the ten such legal matters on which you expended the largest amount

of funds in the prior calendar year. For each of the matters so identified in your application, describe who would benefit from the services, state whether the matter is primarily for the benefit of indigent persons and, if so, explain the reasons you reached that conclusion. For any such matter that is primarily for the benefit of indigent persons, your description should include the information listed as items (1) through (7) in the preceding paragraph; you must quantify the percentage of your clients who are indigent persons (or organizations qualifying under Commentary 2.3.3 above) and the percentage of the persons who would benefit from the services who are indigent persons. Explain the basis of this information. You need not disclose information protected by the attorney-client privilege.

If some portion of your legal services are for the benefit of a group or class of persons beyond your specific clients and are not primarily for the benefit of indigent persons, identify the percentage of overall services provided in such matters and explain the basis of your computation.

### **Eligibility Guidelines for Legal Services Projects 2.3.5**

#### **2.3.5. as the primary purpose and function of the corporation.**

##### ***Commentary:***

Your application must state the net percentage of the corporation's overall expenses that were incurred in the previous calendar year to provide civil legal services without charge to persons who are indigent. You are required to demonstrate the corporation's primary purpose, and not simply the primary purpose of a part of the corporation. (If your project is operated by a law school, see the last section of this Commentary on Guideline 2.3.5.) If more than 75 percent of the corporation's expenditure budget for the fiscal year for which it is seeking an allocation is designated for the provision of civil legal services without charge to persons who are indigent, and if 75 percent of its expenditures for the most recent reporting year were incurred for such legal services, the corporation will be presumed to meet the primary purpose and function test. In demonstrating your compliance with this 75 percent test, you cannot include the value of donated services. [Rule 3.671(A)]

An applicant not qualifying for the 75 percent presumption may nevertheless apply for an allocation, demonstrating its purpose and function by other means. An applicant not qualifying for the presumption shall state separately each purpose and function of the corporation, and state what percentage of the expenditures in the most recent calendar year, and what percentage of the budget in the upcoming year, are allocated to each of these separate purposes and functions. The application shall further state the basis for these allocations. [Rule 3.671(C)]

In addition to this submission of expenditure and of budget information, primary purpose and function can be additionally supported by historic expenditure information, by the organization's stated purpose in articles, bylaws or policy statements or case priority guidelines, or by the demonstrated track record of the applicant in providing legal services without charge to indigent persons.

An applicant that operated in previous years as a project within an organization providing substantial services other than legal services to indigent persons, or as an entity other than a corporation, but which has since become a separate California nonprofit corporation whose primary purpose and function is the provision of legal services without charge to indigent persons, may establish its status as a qualified legal services project and its proportionate entitlement to funds based upon financial statements which strictly segregate that portion of the organization's expenditures in prior years which were devoted to civil legal services for indigents. Thus, if you are recently incorporated and previously operated as a part of an umbrella organization, you may utilize the expenditures of your predecessor organization so long as financial statements strictly segregate the expenditures for such legal services.

If your legal services program is operated by an accredited nonprofit law school, you are required only to demonstrate the program's primary purpose, and not the corporation's primary purpose. Your program must be operated exclusively in California and the law school must be accredited by the State Bar of California. The program must have operated for at least two years at a cost of at least \$20,000 per year, as an identifiable law school unit with the primary purpose and function of providing civil legal services without charge to indigent persons. The program may meet the primary purpose test according to the 75 percent test described above or by demonstrating its purpose and function through other means described above. [B&P Code §6213(a)(2)]

#### **Eligibility Guidelines for Legal Services Projects 2.7**

**2.7 The application must include a financial statement that includes the total expenditures of the applicant. The financial statement must meet the requirements of Guideline 2.7.1 below.**

#### **Eligibility Guidelines for Legal Services Projects 2.7.1**

2.7.1. The statement must show expenditures for the completed fiscal year ended most recently before the application deadline, and must be audited or reviewed by an independent certified public accountant. A financial review, in lieu of an audited financial statement, may be submitted by an applicant whose gross corporate expenditures were less than the amount specified in the Schedule of Charges and Deadlines. Applicants must submit a financial statement no later than 90 days after the end of their fiscal year. The required financial statement must be received prior to the disbursement of any funds from the Legal Services Trust Fund Program.

#### ***Commentary:***

Independent CPA-audited or reviewed statements are required of organizations with gross expenditures of less than \$500,000. Organizations with gross 13 expenditures in excess of \$500,000 must submit audited statements. If such a statement is unavailable at the time of the application, you may substitute an approximated financial statement, but you must submit an audited or reviewed statement no more than 90 days after the end of their fiscal year. [B&P Code §6222; Rule 3.680(E)(1); Schedule of Charges and Deadlines]

### **Eligibility Guidelines for Legal Services Projects 2.7.2**

2.7.2. The financial statement need not distinguish between legal services without charge to persons who are indigent (within the definition of Guideline 2.3.4 above) and other services performed by the project. However, if an applicant does provide other services, the application must include the approximated information requested on the expenditure form(s) identifying expenses incurred providing any of the following services: legal services/other activities, civil/criminal, free/charged, indigent/non-indigent clients, in-state/out-of-state expenditures.

#### ***Commentary:***

The amount of your grant will be based in part on the amount of your expenditures in your previous fiscal year for civil legal services without charge to indigent persons. See Guidelines 2.3.1 through 2.3.4 for the definitions the Commission will use to determine the portion of your expenditures that are qualified to be counted in determining your grant allocation. [B&P Code §6216(b)]

Records that may be used to demonstrate the portion of the organization's expenses that qualify to be counted in determining the grant allocation include the following: records of the numbers of clients served during the previous year; records reflecting time spent on different kinds of services or on services to indigent/non-indigent clients in the previous year; accounting records reflecting expenses incurred providing different kinds of services or on services to indigent/non-indigent clients during the previous year.

If you rely on estimates to establish the amount of your qualified expenditures, you must make the estimates by a method that is reasonably related to the actual expenditure of funds and explain the basis of the estimates.