

ITEM 702 INSERT: LEGAL SERVICES TRUST FUND COMMISSION STAFF REPORT

THE LEGAL SERVICES TRUST FUND COMMISSION STAKEHOLDER WORKING GROUP AND RECOMMENDATIONS

In its May 2017 Report, the State Bar's Governance in the Public Interest Task Force began a review of the various committees, commissions, boards, and councils (subentities) that operate under the organizational umbrella of the State Bar "to assess whether the structure of the subentities aligns with assigned tasks and appropriate oversight mechanisms are in place." That review, contained in Appendix I of the Report, posed a number of additional questions related to each individual subentity; the Legal Services Trust Fund Commission (LSTFC) was among the subentities included in the review.

At its November 2017 meeting, the Board of Trustees (Board) directed Bar staff and a number of Board committees "to complete the subentity review pursuant to Appendix I" by August 31, 2018.

The staff presentation during the July 2018 Board meeting included a preliminary recommendation regarding the future direction of the grant-making work overseen by the LSTFC. Staff suggested a shift to staff-driven grant making and grant management, under the direct supervision of the Board of Trustees.

Due to concerns raised by both the LSTFC and Interest on Lawyers Trust Accounts (IOLTA) and Equal Access Fund (EAF) grant recipients, recommendations regarding the LSTFC were ultimately not included in the Appendix I review reports to the Board in August and September. Instead, at its September 13, 2018, meeting, the Board's Programs Committee directed staff to initiate an LSTFC stakeholder engagement process.

The LSTFC Stakeholder Process Working Group (LSTFC SPWG), appointed in September 2018 pursuant to Board direction, is co-chaired by a member of the Board and a member of the LSTFC. In addition to the co-chairs, the LSTFC SPWG includes representatives from the following groups:

- LSTFC (3)
- IOLTA grantees (3)
- Non-grantee legal services programs (2)
- Assembly Judiciary Committee (1)
- Senate Judiciary Committee (1)
- Board of Trustees (1)
- Judicial Council (1)
- Legal Aid Association of California (1)

The LSTFC SPWG roster is provided as Attachment A to this Agenda Item Insert. Meeting agendas and materials can be found here: <http://board.calbar.ca.gov/Committees.aspx>.

The Working Group met six times between October 15, 2018, and January 22, 2019, and reviewed a host of issues, including potential changes to the statutory IOLTA formula, non-statutory changes to the allocation formula or methodology, and governance reforms. Ultimately, recommendations were generated in only one of these areas (governance). The LSTFC SPWG recommendations are posted to Item 702 as a stand-alone document for the Board's review.¹

BACKGROUND: LEGAL SERVICES TRUST FUND COMMISSION, IOLTA FORMULA AND BOARD ROLE

The Legal Services Trust Fund Commission (LSTFC) was established by the Board of Trustees in 1982 to administer revenue from the Interest on Lawyers' Trust Accounts (IOLTA) and other funds "remitted to the Legal Services Trust Fund Program of the State Bar." Grants from these funds are made to nearly 100 nonprofit providers of such legal services, including resource centers that provide technical assistance and support to direct providers.

The Commission consists of 21 voting members, and three nonvoting judicial advisors. The Board of Trustees appoints 14 of the 21 voting members, 10 of whom must be members of the State Bar and 4 of whom must be public members. The Chief Justice, who chairs the Judicial Council of California, appoints 7 of the 21 voting members, 5 of whom must be members of the State Bar and 2 of whom must be public members, as well as the 3 nonvoting judges, one of whom must be an appellate justice. Two members must be or have been within five years of appointment indigent persons as defined by the Business & Professions Code section 6213(d).² The Board of Trustees appoints officers of the Commission. Typically, Board-appointed members of the Commission serve for a term of 3 years, with the possibility of renewing for a second 3-year term. In addition, membership can be extended to serve as an officer.³

The Commission meets 4-6 times per year, in person in Los Angeles and San Francisco, connected by videoconferencing. Typically, one or two of the subcommittees of the Commission meet on the same day but prior to the full Commission meeting, and as needed in stand-alone meetings, usually 1-2 times per year.

¹ Votes were taken regarding these recommendations at the Working Group's January 9, 2019, meeting. Of Working Group members who attended that meeting, there were 3 no votes, 1 abstention and 1 not present for recommendation 4; 3 abstentions and 1 not present for recommendation 5; and 1 no vote and 1 not present for recommendation 6. All other recommendations received consensus support. At its January 22, 2019, meeting, a majority of the Working Group voted to submit the January 9 recommendations as the totality of its report; in order to so effectuate, a review of each line of the functional matrix was undertaken to identify consensus entries. One Working Group member who abstained from certain votes on January 9 called for a separate vote regarding the submission of consensus matrix items at the January 22 meeting, allowing those who had abstained from selected votes to express support for inclusion of the matrix.

² Business & Professions Code, Section 6213(d).

³ Board Book, Article 7, Guidelines for Appointment to Legal Services Trust Fund Commission.

The IOLTA distribution formula is defined in Business & Professions Code section 6210 et seq. (hereafter the IOLTA statute). In addition to IOLTA funding, Equal Access Fund appropriations and opt-out/opt-in licensing fee donations are allocated pursuant to the IOLTA formula. As a result, the LSTFC has related administrative responsibilities for these revenue streams. The LSTFC exercises significant discretion in its effectuation of these responsibilities, including decisions defining a “qualified legal services provider” or “support center” and, related, “qualified expenditures” used to determine “primary purpose.” The policies underlying these decisions, some of which are codified in publicly available guidelines and some of which are not, are not reviewed or approved by the Board. The LSTFC does however seek Board approval for the aggregate level of grant funding to be made available annually. That is, it proposes to the Board the total amount of funds to be used for grants, after accounting for program administration costs and required reserves.

In 2015 and 2016 the State Bar received funds from U.S. Department of Justice settlements with Bank of America and Citi; although not required by the terms of the settlement agreement or formally approved by the Board, the LSTFC has assumed responsibility for the administration of these funds.

WORK OF THE LEGAL SERVICES TRUST FUND PROGRAM

The work performed by the Legal Services Trust Fund program was documented for the first time as part of the LSTFC Stakeholder Working Group process. A detailed list of tasks is provided in a functional matrix included as Appendix A to the LSTFC Stakeholder Working Group report. These tasks are identified by funding source and outline staff, LSTFC, and Board roles.

With respect to the LSTFC, the Commission is organized into five standing committees:

- Executive Committee;
- Eligibility and Budget Committee;
- Partnership Grants Committee;
- Bank Community Stabilization and Reinvestment Committee; and
- Nominations Committee.

The work of the Commission’s three principal working committees is described briefly below.

Eligibility and Review Committee

This Committee evaluates applicants and application materials for eligibility for grants allocated on the IOLTA formula (IOLTA, EAF, Justice Gap, Licensee Fee Statement revenue sources). The functions associated with the activity of this Committee are outlined under *IOLTA/EAF/Justice Gap/Licensee Fee Statement* in Appendix A to the Working Group report.

Partnership Grants Committee

The Partnership Grants Committee administers grants funded by a portion of the EAF; by statute, ten percent of the Equal Access Fund must be allocated to partnerships between qualified legal services providers and the courts for services to self-represented litigants through projects located at or near the court.

Associated functions are outlined under *Partnership Grants* in Appendix A to the Working Group report.

Bank Community Stabilization and Reinvestment Committee

The Bank Community Stabilization and Reinvestment Committee is responsible for administering funds arising from U.S. Department of Justice settlements with Bank of America and Citi.

Associated functions are outlined under *Bank Grants* in Appendix A to the Working Group report.

OPPORTUNITIES FOR IMPROVING GOVERNANCE AND SERVICE DELIVERY

A number of governance issues were identified during the 2018 Appendix I review process, most significantly the lack of Board involvement in significant policy decisions being made by the LSTFC, impacting virtually every aspect of grant award and allocation determinations. The LSTFC's establishment of an off-shoot committee, the Reboot Committee, which was not Board authorized or operated in compliance with Bagley-Keene, also raised concerns⁴.

Staff's original Appendix I recommendation was to eliminate the LSTFC, ensuring that the appropriate structure was in place for the Board to make critical policy decisions around this most significant aspect of the Bar's work. That recommendation was quickly abandoned however; the Legal Services Trust Fund Stakeholder Working Group process was established to ensure that any recommendations ultimately brought forward to the Board regarding the LSTFC be appropriately vetted by Commission members and stakeholders.

As noted above, the LSTFC SPWG recommendations are posted to this agenda item as a separate document. A brief overview of some of the issues not addressed by those recommendations is provided below.

IOLTA Statute

The IOLTA formula has not been updated since adopted in 1982. Of approximately 100 programs funded in 2018, 75 have been funded consistently for the last thirty years; these 75 programs have received 90 percent of available funding for at least the last 10 years. With that in mind, modification of the statutory formula to either reflect the reality of stable and predictable funding results *or* to encourage innovation, is likely warranted. Adjustments to the

⁴ Some members of the Working Group characterized the Reboot Committee as a staff initiated body.

poverty threshold, non-income based eligibility criteria⁵, and the shared distribution of support center funding⁶ are also likely overdue. More significantly, there is little strategy reflected in the funding – all programs meeting eligibility requirements are funded. Future reform efforts might focus on ensuring allocated funds are used more intentionally to ensure that a core set of legal services is available for poor and low-income people in each California county.

Additional Data Collection and Analysis

There was some evidence presented to the Working Group by State Bar staff that certain racial and ethnic populations may be under-served by the current distribution of funds. With that in mind, the Board may wish to consider asking the LSTFC and staff to identify strategies for modifying data collection and analysis in order to determine if any populations are in fact underserved. It should be noted however that the LSTFC Stakeholder Working Group strongly disputed that any evidence was presented indicating that there may be service disparities based on significant methodological concerns with the work of Bar staff; accordingly, there was significant opposition to any related recommendation regarding additional data collection or analysis needs.⁷

Staff Recommendation

LSTFC Stakeholder Working Group recommendations reflect significant progress in some respects, most importantly by clearly placing responsibility for policy decisions as related to the Bar's legal services grant distribution and administration efforts squarely with the Board of Trustees. With these considerations in mind, staff recommends that the Board approve all Working Group recommendations with the exception of recommendations 3, 4, and 5:

- 3) Status quo division of responsibilities between staff and the Commission except as reflected in consensus changes to the matrix.
- 4) No recommended changes to the size of the LSTFC.
- 5) LSTFC vacancies must be filled immediately.

With respect to recommendation 3, staff recommends that the Board approve the matrix as reflected in Appendix A of the Working Group report **and** direct staff and the LSTFC to work together to finalize proposed roles of staff, the LSTFC, and the Board with respect to those functional areas of the matrix for which consensus was not reached.

With respect to recommendations 4 and 5, there are currently 7 vacancies on the LSTFC, all of which represent Board appointees. Staff is in the process of developing recommendations regarding LSTFC size for both the Commission and the Working Group to consider. A staff recommendation, as well LSTFC and Working Group feedback regarding that proposal, will be

⁵ Business & Professions Code, Section 6213(d).

⁶ Business & Professions Code, Section 6216(c).

⁷ State Bar staff originally prepared two equity analysis for Working Group consideration. One analyzed the geographic distribution of IOLTA/EAF funding; the other the ethnic and racial composition of grantee clients. An error in the methodology used by State Bar staff as related to the preparation of the geographic analysis was in fact made. Once corrected there was no discernable geographic variance in per poverty capita allocation levels.

brought forward to the Board at its March meeting. Staff does not recommend any Board action regarding LSTFC size or vacancies prior to that time.⁸

⁸ Although members of the Working Group and legal services grantee community expressed significant concerns regarding the number of LSTFC vacancies, a review of attendance records, Commission workflow, and the opinions of staff to the Commission, suggests that there is not in fact a business need to make appointments prior to March (staff timelines for LSTFC work indicate that the Bank Community Stabilization and Reinvestment Committee is only beginning its work in April, with other Committees' activities initiating later in the calendar year).

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LSTFC STAKEHOLDER PROCESS WORKING GROUP ROSTER]

ATTACHMENT A

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LSTFC STAKEHOLDER MEETING DATES:

 Monday, October 15 - Sacramento, State Capitol, Rm 4203, 4th Floor

Monday, November 19 – Los Angeles, State Bar, 845 South Figueroa Street

Monday, December 3 – San Francisco, State Bar, 180 Howard Street

Wednesday, December 19 – Los Angeles, State Bar, 845 South Figueroa Street

Monday January 9, 2019 – San Francisco, State Bar, 180 Howard Street

Tuesday, January 22 - Phone