



The State Bar *of California*

DATE: April 17, 2019

TO: Members, LSTFC Eligibility and Budget Review Committee

FROM: Office of Access & Inclusion

SUBJECT: Impact Litigation & Advocacy Work (ILAW) Report

EXECUTIVE SUMMARY

The Trust Fund Statute distributes IOLTA funds to qualified legal services organizations based on a formula centered in part on the organization's expenditures on "qualified legal activities" that benefit indigent persons under Business and Professions Code §6216. EAF funds are also distributed according to the IOLTA formula. The Legal Services Trust Fund Commission Eligibility and Budget Review Committee (Committee) will meet on April 23, 2019 to review potentially non-qualifying impact litigation and advocacy activities, as reported by both qualified legal services projects (QLSPs) and support centers (SCs) in the Impact Litigation and Advocacy Work (ILAW) report. Activities found to be non-qualifying would need to be deducted in the organizations' 2020 IOLTA and EAF grant application. A reduction in the amount of qualifying expenditures could result in reducing the allocation of funds to an organization.

For QLSPs, non-legal activities and any legal services not provided to indigent persons, as defined in Business and Professions Code §6213, State Bar Rule 3.672(a), and Commentary to 2.3.4 of the Legal Services Projects Eligibility Guidelines, are non-qualifying for purposes of determining IOLTA and EAF grant awards. For SCs, non-support services and direct legal assistance, including impact litigation, are non-qualifying unless the direct assistance falls into one of the exceptions enumerated in State Bar Rule 3.672(b) and 2.3(c) of the Support Center Eligibility Guidelines.

In previous years, potentially non-qualifying impact cases and advocacy activities had been reviewed as part of the IOLTA and EAF application review process. This year, these activities reported in ILAW are being reviewed prior to the 2020 IOLTA and EAF application to streamline the review process for Commissioners and staff.

Staff conducted an initial review of the ILAW reports to assess the qualifying nature of activities according to the requirements for QLSPs and SCs. Where the activity initially appeared to be non-qualifying, staff is elevating said activity to the Committee for further review. Of the 390 impact cases and 437 advocacy activities reported, staff is seeking the Committee's

determination for the 2020 IOLTA and EAF grant application on 12 impact cases and 23 advocacy activities. See Attachment B and C.

Lastly, staff identified four categories for which organizations were not able to provide clear data to demonstrate that the activities primarily impact indigent persons, although the sheer number of indigent persons who benefitted may have been large and the substantial impact on indigent persons was clear. In the absence of existing policy to provide further guidance, staff proposes that the Committee approve impact litigation and advocacy activities this year in four categories as meeting the indigency requirement: affordable housing, low-income immigrants, public benefits, and education equity where free or reduced lunch statistics were used as a proxy for indigent persons.

BACKGROUND

A. Governing Authorities

The Trust Fund Statute provides for distribution of IOLTA funds to qualified legal services organizations based on a formula centered in part on the organization's expenditures on "qualified legal activities" that benefit indigent persons (Business and Professions Code §6216). In other words (for QLSPs), generally the more expenditures an organization spends on qualified legal activities, the larger their IOLTA and EAF allocation award. QLSPs and SCs have different requirements for what is considered a qualifying activity. According to Business and Professions Code §6213(a), a QLSP's primary purpose is to provide legal services to indigent persons without charge. As such, to be considered qualifying, the activities in a QLSP's ILAW report must be legal services and primarily impact indigent individuals. Business and Professions Code §6213(d) defines indigent person as someone whose income is 125% or less of the federal poverty threshold, a senior, a person with a developmental disability, or a person who is eligible for Supplemental Security Income. QLSPs that receive a pro bono allocation may use the higher HUD income thresholds to determine indigency (Business and Professions Code §6213(d)). In addition, State Bar Rule 3.672 defines legal services (as distinct from legal support services) to "include all professional services provided by a member of the State Bar and similar or complementary services of a law student or paralegal under the supervision and control of a member of the State Bar."

Unlike QLSPs, SCs are not required to provide services that would directly impact indigent persons. According to Business and Professions Code §6213(b), a SC's primary purpose is the provision of legal training, technical assistance, or advocacy support without charge and which provides a significant level of support services without charge to QLSPs on a statewide basis. State Bar Rules and Support Center Eligibility Guidelines refined this definition, providing that direct representation to clients, including in impact litigation, is not considered a qualifying support service unless the case is:

- co-counseled with a QLSP (State Bar Rule 3.672(b));

- co-counseled at the request of a private attorney representing indigent clients without charge (Support Center Eligibility Guidelines 2.3(c)); or
- undertaken at the request of a QLSP that is unable to assist the client (State Bar Rule 3.672(b)).

The governing authorities do not provide a clear definition of advocacy work for either QLSPs or SCs.

B. Staff Review Process

The ILAW reports required each grantee to submit its top 15 impact litigation cases and top 10 advocacy activities, based on the highest number of staff hours. If its total number of cases and activities exceeded this requirement, the organization was asked to provide a brief description of the nature of those additional activities. Staff reviewed ILAW reports to assess which activities were qualifying or non-qualifying based on governing authorities, and which activities needed to be elevated to the Committee for further review.

1. Qualified Legal Services Projects

For QLSPs, staff determined an impact litigation or advocacy activity was qualifying if it primarily impacted indigent persons as defined by Business and Professions Code §6213(d) and Commentary to 2.3.4 of the Legal Services Projects Eligibility Guidelines. Historical practice has been to interpret “primarily” as more than 50% of persons who would benefit from the activity. As such, staff considered an impact case qualifying if:

- the named plaintiff was indigent;
- more than 50% of the named class was indigent; and/or
- sufficient support was provided to demonstrate that more than 50% of those impacted were indigent.

If the named plaintiff was not indigent, or less than 50% of the class was indigent and no data or limited data exists to demonstrate that the case primarily impacted indigent persons, staff included the impact case in Attachment B and C for the Committee’s review.

An advocacy activity must both be a legal service and primarily impact indigent persons in order to be qualified. While the governing authorities does not explicitly state that advocacy activities are qualifying for QLSPs, historical practice has been to interpret legal services to include legal advocacy activities. Staff has therefore interpreted qualifying advocacy activities to include policy work such as drafting a bill, participating in a legislative campaign, or enforcing a law or regulation where the majority impacted were indigent persons. If a QLSP did not engage in clearly qualifying legal services advocacy work or did not provide sufficient support to demonstrate that more than 50% of those impacted by the advocacy work was indigent, staff included the advocacy activity in Attachment B and C for the Committee’s review.

2. Support Centers

Due to the nature of the work of SCs, the definition of a qualifying activity is different. As long as the impact case is: co-counseled with a QLSP; co-counseled at the request of a private attorney representing indigent clients without charge; or undertaken at the request of a QLSP that is unable to assist the client, the cases are qualifying under the current rules. See State Bar Rules 3.672(b) and 3.682 and Commentary to 2.2.1 of the Support Center Eligibility Guidelines.

Staff considered advocacy work qualifying if it generally supported QLSPs or legal services advocates who provided direct civil legal services to indigent persons. Under this analysis, no ILAW reports from SCs are being elevated to this Committee for further review.

C. Staff Proposal for Categories Meeting Indigency Requirement

Staff identified four categories for which organizations were not able to provide clear data to demonstrate that the activities primarily impact indigent persons, although the sheer number of indigent persons who benefitted may have been large and the substantial impact on indigent persons was clear. In the absence of existing policy to provide further guidance, staff proposes that the Committee approve impact litigation and advocacy activities this year in four categories as meeting the indigency requirement: affordable housing, low-income immigrants, public benefits, and education equity where free or reduced lunch statistics were used as a proxy for indigent persons.

1. Affordable Housing

Qualified Legal Services Projects reported 85 impact cases and advocacy activities related to affordable housing. Examples of affordable housing activities reported include challenging local rent ordinances; legislation to increase stock of affordable housing such as mobile homes; policy advocacy work to address rehabilitation or preservation of affordable housing in rural communities; enforcement of rent control policies; litigation to enforce the Surplus Land Act; and challenging exclusionary zoning ordinances.

The IOLTA income threshold does not generally adjust for cost of living, and affordable housing litigation and advocacy in high cost areas may not always align with IOLTA income guidelines. However, the lack of affordable housing disproportionately impacts seniors and low-income individuals and families, and the problem is exacerbated in high-cost areas such as San Francisco and Los Angeles.

Staff recommends that affordable housing impact cases and advocacy activities be approved as meeting the indigency requirement.

2. Low-Income Immigrants

Qualified Legal Services Projects reported 21 impact cases and advocacy activities related to low-income immigrants in California. Examples of reported activities benefitting low-income

immigrants include litigation and policy advocacy work related to immigrants in detention, unaccompanied minors, and the Deferred Action for Childhood Arrivals (DACA) program. Limited or no data exist that clearly demonstrates that more than 50% of those impacted are within the IOLTA definition of indigent. However, the activities reported describe how this constituency is generally low-income and likely indigent per the IOLTA income requirement.

Staff recommends that impact cases and advocacy activities aimed at primarily impacting low-income immigrants be approved as meeting the indigency requirement.

3. Public Benefits

Qualified Legal Services Projects reported 28 impact litigation and advocacy activities that address public benefits-related issues for low-income Californians. Limited or no data exist that clearly demonstrates that more than 50% of those impacted fall within the IOLTA definition of indigent. However, organizations have presented data that serves as a compelling proxy for measuring the number of indigent persons and that this work most likely impacted primarily indigent populations. For example, one organization cited that Medi-Cal eligibility for most adults, many of which are seniors, is limited to 138% and 128% of the federal poverty threshold. Given that public benefits programs are designed to meet the basic needs of low-income families and children, a lack of clear data should not prohibit organizations from claiming this work as qualified.

Staff recommends that impact cases and advocacy work related to public benefits – including but not limited to CalWorks, CalFresh, Medi-Cal, and Denti-Cal – be approved as meeting the indigency requirement.

4. Education Equity

Qualified Legal Services Projects reported 10 impact litigation and advocacy activities related to education equity for low-income students in California. Examples of reported activities are legislation to reduce the disproportionate use of suspensions and expulsions against students of color in predominately low-income school districts and litigation and policy advocacy to ensure that students with disabilities have access to the supports they need in school and that schools remain a safe and toxin free space for children to learn. Limited or no data exist that clearly demonstrates that more than 50% of those impacted fall within the IOLTA definition of indigent. However, the Committee has previously accepted the use of data demonstrating that the majority of students in a school are eligible for free or reduced lunch as a proxy for measuring the number of indigent persons and sufficient to support that activities primarily impact indigent students.

Staff recommends that impact cases and advocacy work related to education equity be approved as meeting the indigency requirement if data is provided to demonstrate that the majority of students in the school impacted are eligible for free or reduced lunch.

ATTACHMENT LIST

A. Governing Authorities

1. Business and Professions Code 6212-6216
2. State Bar Rules, Legal Services Trust Fund Program
3. Eligibility Guidelines for Qualified Legal Services Projects
4. Eligibility Guidelines for Support Centers

B. Spreadsheet summarizing all ILAW reports being elevated for Committee review

C. ILAW reports of all cases and advocacy activities being elevated for Committee review