

Memo on Homeless Prevention Grants

December 15, 2020

To: Members, Legal Services Trust
Fund Commission

From: William Boschelli, Member,
LSTFC

Subject: National Mortgage Special
Deposit Fund Grants

My fellow Legal Services Trust Fund
Commission members,

I write to you today out of a sense of
shared purpose.

It has been my experience over the
past year on this Commission that
the members are fully committed to
improving the access to legal services
for the residents of California, as is
our charge, within the boundaries of
the California Bar Rules and state
law. It's been an incredible learning
experience.

I wish to meet the same standard of
excellence I've seen set by tireless
hours of staff and member work. As I
have come to a deeper understanding
of our common mission I feel
confident that I can contribute
meaningfully.

I have, however, failed to find an
appropriate and effective way of
raising concerns on certain matters
in a manner that allows other
members to vet such concerns and
either (a) correct my less

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Now then, I ask myself, can I fulfill our common purpose on this Commission while being respectful of other members' time? Written remarks seem obvious but I confess it didn't occur to me until it was suggested.

So in that spirit, I put forth this record of my concerns and thoughts on our administration of the AB-83 Housing Grants for the consideration of other members. I will endeavour to be concise but can make no promises as a mere mortal.

Caveats

Unlearned Hand

As many of you know, I am not an attorney so I risk embarrassment in expressing any sort of legal viewpoint but I was appointed with the full knowledge of that deficiency. So I can only assume that tolerance and patience for ignorance and misinterpretation is included as part of the requirements.

I shall lean heavily upon the patience of those with more experience and understanding to help guide me here.

Last Year's Implementation

It is my understanding that last year this Commission administered a similar housing grant. I was not that I was not a member of the Commission during that time and have minimal knowledge about the reasoning for that implementation.

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Some may also read these concerns as coming too late in the process. That is understandable and I would not contest such an assertion when it comes to changing course.

However, I would note a few points. I did raise concerns at our past two full Commission meetings and I've had some discussions with staff but I've been unable to engage in a full discussion and debate. My inability to understand the best procedural path should not preclude some consideration and the opportunity to learn.

After all, some might say, "better late than never." I understand the Commission will not be in a position to discuss or otherwise address my concerns in our present meeting, there may still be value in members considering the matter for future work.

In that same vein, I welcome guidance and suggestions on how best to have effective discussions on the substantive differences in implementation or interpretation in the future while being mindful of staff time constraints and the limitations of our meetings. Unfortunately full agendas tend to make it impractical to engage in a full and robust discussion.

Overview

The concerns I will be addressing relate to our Commission's implementation of AB 83, signed by the Governor on June 29, 2020. Chaptered as Government Code §12531(e)(1)(B) that sets forth the

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The legislature directed that \$31,000,000 be allocated "to the Judicial Council for distribution through the State Bar [...] to provide eviction defense or other tenant defense assistance in landlord-tenant disputes..." (Gov. Code §12531(e)(1)(B)).

It is my understanding that \$1,550,000 (5%) has been allocated to grant administration by the CalBar staff, leaving \$29,450,000 for distribution.

The statute provides that 75% (\$22,087,500) should be distributed using a formula based on an eligible program's 2020 IOLTA allocation with a minimum \$50,000 guarantee unless waived by the project.

The remaining 25% (\$7,362,500) to be "allocated through a competitive grant process developed by the Legal Services Trust Fund Commission[...]" (§12531(e)(1)(B)(ii)). The legislature directly entrusting this Commission with a high level of discretion, I presume in hopes of seeing innovative programs and/or filling in gaps where service lacking.

Timeline

Commission members received an email from staff on July 2, 2020 informing us of AB 83's passage. By the time of our next meeting on August 14, 2020 it seems some substantive decisions about the process had been made about how the Commission and the Homelessness Prevent Committee would proceed.

While speed is of great importance in an emergency it's unclear to me how

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but again, due to the limits on the nature of time, could not go in depth on my myriad concerns.

On September 16, 2020 a convening session was hosted by the Homelessness Prevention Committee to "come together to brainstorm innovative and creative strategies to effectuate positive 'big picture' changes to tackle the impending eviction crisis and coordinate efforts to best serve low-income Californians at risk of homelessness." ("State Bar Homelessness Prevention Funding Convening" email).

The Homelessness Prevention Committee and staff then worked incredibly hard to complete the RFP, review grant applications and make recommendations. I cannot pretend to fully appreciate the amount of work that would have went into completing that process prior to this December 15 meeting but I imagine it was intense.

Presently we have been asked to approve the formula and competitive grants allocated by AB-83 (Item IV, LSTFC Agenda, Dec 15, 2020).

Current State of Affairs

We are currently in the midst of a public health emergency caused by the outbreak of COVID-19. It is difficult to overstate the impact of this pandemic. Hundreds of thousands of Americans dead, many more infected with a disease that can have serious disparate impacts.

The economic damage being done by this pandemic is likely to negatively

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that would ignore the very real dangers of this disease and the reality that failure to take reasonable precautions to limit spread would result in panic as hospitals became overwhelmed.

Nevertheless, those issues are beyond the scope of our work but they do inform it. Those who lack the means to access the best healthcare, those who lack stable housing and those who have historically had difficulty accessing legal protections.

We are but a small piece of the response to this problem but we can have an outsize impact by helping empower the legal aid organizations of this state to meet the need as best as humanly possible given the constraints.

In short, we are in an emergency and housing is a critical source of safety and security. Losing your home and facing the prospect of homelessness can have severe knock-on effects that mean eviction prevention, where appropriate and supported by law, can have an outsize positive impact on society as a whole.

Sustainability vs. Emergency Response

This Commission is well aware of the reality we face should the federal or state government not implement extended or more direct protections for housing. I highlight it here to establish clearly that our response must be commensurate with the emergency we face.

Even the onerous provisions of
Roxley-Keene give way to "crimping

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health emergencies and waiving 10-day notice requirements).

This context is helpful for understanding why I favor strong emergency response as opposed to during normal operations where the program sustainability would be an important consideration.

When facing an emergency it is important to have flexibility, adaptability and bring as many resources to bear as possible for an effective response. Time is the enemy in so many emergency situations. I think it is best, where feasible, to err on the side of over-responding, committing the most amount of resources possible to enable our legal non-profit partners to respond quickly.

Legislative Intent

One brief diversion before diving into the substance of my concerns.

While expressing some views contrary to the planned process I was rebutted with statements along the lines that staff had been in contact with members of the State Legislature and they had no problems with our plans in relation to the housing grants.

This is undoubtedly reassuring. It is totally reasonable to keep those lines of communication open to help facilitate the appropriate implementation of laws.

However, it is my understanding that legislative bodies express their will through passing resolutions or bills to be signed by the Governor. As such bills should take precedence

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in short, backchannel communication does not absolve us from the responsibility to implement policy based upon that primary source even as we can (wisely, I believe) accept informal interpretations and analysis where there is ambiguity in a statute.

While I do not believe those remarks were made in order to dismiss the need for our own due diligence in assessing whether our policies and procedures comport with the law, on the off chance there was confusion, I respectfully disagree.

Some Considered Concerns

Formula Grant Distribution

The current proposal before us calls for the distribution of formula grants on a quarterly basis for a 3-year period starting in 2021. So a grantee who receives a total allocation for \$50,001 would receive an annual allocation of \$16,667 over 2021-2023 years or \$4,166.75 per quarter.

I disagree with this method of distribution. I would advocate for an immediate lump-sum distribution as soon the funds were available with a 3-year spend down requirement to allow for appropriate oversight.

I am guided to this position for the following reasons:

1. As mentioned above, we face an emergency and it is important we recognize and respond with urgency and in proportion to the scope of the

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lump sum would provide the maximum flexibility for an organization to respond to the housing crisis. e.g. \$50,000 in January of 2021 may not be significantly more than \$4,000 in providing legal housing services but it seems possible that these organizations could, with money in hand, would be in the best position to determine whether they wish to allocate it over the full 3 years or use it all immediately.

3. As all grant recipients are IOLTA recipients who have met the strenuous eligibility requirements they may be afforded a level of trust that might not be appropriate for non-IOLTA recipients with less of a track record.

4. To my knowledge, this Commission has not sufficiently justified a rationale for choosing a 3-year quarterly distribution. It appears arbitrary. Why not 4 or 5 years?

5. The legislature intended these funds to be distributed quickly, per their directive that "[t]hese funds shall be distributed as soon as practicable and shall not supplant existing resources." (§12531(e)(1)(B)(i))^[1]

6. Under my limited ability to research case law (the Los Angeles Law Library is understandably closed and WestLaw wants \$196), it appears that our ability to implement regulations related to the formula grants ought to be significantly limited because of the property interest^[2] of eligible grant

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within the definition of "eviction defense or other tenant defense assistance in landlord-tenant disputes" (*id.*)

7. Finally, though I believe this argument is the weakest, it is unclear to me where this Commission derives the authority to administer the formula grants and implement anything but a basic of oversight provision based on the statutory construction: "Thirty-one million dollars (\$31,000,000) to the Judicial Council for distribution through the State Bar[...]" (*id.*). It seems obvious that the LSTFC is the natural fit to administer these grants and it is my understanding that contracts between the Judicial Council and State Bar establish this responsibility by the Commission. Though I am not privy to those agreements and absent explicit authorization from the Judicial Council or the Board of Trustees I would hesitate to deviate from the bounds of the statute.

I readily accept that my concerns here may have perfectly reasonable rebuttals but I am not yet aware of them and feel obligated to proceed cautiously.

Staff Workload

I briefly want to touch upon how the decision to pursue both the competitive grants and formula grants may put an undue burden on our staff members.

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admirable and they deserve our respect.

I was rightfully reminded of this point recently. The CalBar staff assigned to this Commission bear the brunt of the administrative workload. This presents a moral hazard as members like myself can put forth ideas, questions, suggestions and other requests during relatively rare commission and committee meetings that end up occupying a significant portion of staff time without commission members ever being aware of full burden.

We do not have adequate transparency into that area and how specific choices can cause an unfair expectation to be placed upon them. Many of my fellow members seem far more cognizant of this issue than myself, as the new guy, and yet it still feels the current structure could use improvements in this regard.

I am hopeful that with a new Director for the Office of Access and Inclusion we can better balance the needs of our Commission and maintain an appropriately balanced workload.

To that end, I think this Commission erred in (a) beginning work on the competitive grants before substantially completing the formula grant process and (b) setting a start-of-2021 goal for the competitive grant allocations.

I encouraged a quick pace related to the formula grants but I do not believe I sufficiently advocated for a slower pace to allow a more deliberate and considered approach for the competitive grants.

Out of respect for the staff and a

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Competitive Grant Process

As we enjoy broad discretion in the award allocations for competitive grants I have less concern but I am confused by some of the recommendations.

For example, the agency receiving the highest amount of funding from the competitive grant process is a recipient of grants from LSC which prohibits directly serving clients without legal status except under a few narrow circumstances.

This seems out of alignment with the requirement that award preference be given to agencies that “serve clients regardless of immigration or citizenship status.”

It seems possible the rubric used was not in full alignment with the statute’s requirements. Especially the unusual provision for eligibility to receive funding that, “funds received will be not used to supplant existing resources and will be used to provide services to tenants not otherwise served by that qualified legal service project or support center.”
(*id. Emphasis added*).

I recognize that members and staff worked hard to complete this process prior to January 2021 and I hesitate to criticize as I was not privy to the entire process and the breadth of discussion and considerations.

So on this matter I am simply left to wonder if there was a way we could have more accurately represented the statute in the rubric? It seems unlikely, though, that there would be any substantive change to the grant recipients given our discretion with

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I have been consistently impressed with the professionalism demonstrated by the California Bar staff and the expertise, thoughtfulness and the strong desire to improve access to legal aid demonstrated by my fellow members.

Every conversation I've had with other members on an individual basis (rare that it is given the Bagley-Keene restrictions coupled with the pandemic restrictions) has been illuminating and educational.

The time and energy put forth by the Homelessness Prevention Committee members was unquestionably substantial and impressive for that committee to be in a position to bring forth the recommendations at the December 15 meeting. I readily acknowledge and applaud that work even as I put forth concerns with our proposed course of action in hopes that I can learn or we can seize opportunities to improve.

And that may be the case. My concerns may be simple failure on my part to fully understand and appreciate all of the different pieces coming into play here. In such case, I welcome the chance to learn and contribute more productively.

Ultimately the goal here is to get the funds to the legal agencies so they can provide the housing services that protect people from unlawful evictions and improve the housing security of those who are most vulnerable to harm.

That's an outcome worth risking the possibility I'm totally wrong. Seeing people get to stay in their homes when faced with the profound

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consideration regarding these matters. Even if these remarks can only be used for post mortem analysis to improve responses in the future.

Submitted by William Boschelli
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December 15, 2020

Appendix A: Excerpt, Gov. Code 12531

(e) (1) The funds in the National Mortgage Special Deposit Fund shall be allocated as follows: (A) [...]

(B) Thirty-one million dollars (\$31,000,000) to the Judicial Council for distribution through the State Bar to qualified legal services projects and support centers to provide eviction defense or other tenant defense assistance in landlord-tenant disputes, including preeviction and eviction legal services, counseling, advice and consultation, mediation, training, renter education, and representation, and legal services to improve habitability, increase affordable housing, ensure receipt of eligible income or benefits to improve housing stability, and prevent homelessness. These funds shall be allocated as follows:

(i) Seventy-five percent shall be distributed to qualified legal services projects and support centers that currently provide eviction defense or other tenant defense assistance in landlord-tenant disputes as set forth in this subparagraph.

(I) To receive funds, a program shall be eligible for 2020 Interest

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allocation divided by the total 2020 IOLTA allocation for all legal services projects eligible for the funding.

(II) To ensure meaningful funding, a minimum amount of fifty thousand dollars (\$50,000) shall be allocated to an eligible program unless the program requests a lesser amount, in which case any funds that would have otherwise been allocated to the program shall be distributed proportionally to the other qualified legal services projects.

(III) These funds shall be distributed as soon as practicable and shall not supplant existing resources.

(ii) Twenty-five percent shall be allocated through a competitive grant process developed by the Legal Services Trust Fund Commission of the State Bar to award grants to qualified legal service projects and support centers.

(I) The grant process shall ensure that a qualified legal service project or support center to receive funding demonstrate that funds received will be not used to supplant existing resources and will be used to provide services to tenants not otherwise served by that qualified legal service project or support center.

(II) The commission shall determine grant awards, and preference shall be given to qualified legal aid agencies that serve rural or underserved communities which serve clients regardless of immigration or citizenship status.

(III) Any funds not allocated pursuant to this competitive grant process shall be distributed pursuant to clause (i).

(2) No more than 5 percent of the

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[1] It may be argued they are referring to the administrative work necessary to begin the initial distribution of funds but even if that is so it clearly establishes a sense of urgency and could reasonably be interpreted as directing the distribution of all funds.

[2] *Crawford v. Antonio B. Won Pat Int'l Airport Auth.*, 917 F3d 1081, 1090 (9th Cir. 2019) ("In the public benefits context, we have held that a protected property right exists when 'a statute authorizes those benefits and the implementing regulations greatly restrict the discretion of the people who administer those benefits.'")

[3] Any other discretion related to eligibility having already been exercised in determining 2020 IOLTA funding eligibility, leaving only a nibble of discretion for these the distribution of these funds.