

**Meeting of the Rules Committee  
of the Legal Services Trust Fund Commission**

**Meeting Summary and Action Items**

**Friday, October 16, 2020**

**10:00 a.m. – 2:00 p.m.**

**Zoom Conference**

**OPEN SESSION**

Chair Amin Al-Sarraf called the meeting to order at 10:04 a.m.

**I. ROLL CALL**

Roll was called; all members participated on Zoom.

**Committee Members**

Amin Al-Sarraf (Chair)  
Zahirah Mann  
James Meeker  
Kim Savage

**Commission Members**

Richard Reinis

**Advisors**

Judge Brad Seligman

**State Bar Staff**

Vicky Avila  
Christal Bundang  
Erica Carroll  
Brady Dewar  
Elizabeth Hom  
Doan Nguyen  
Dan Passamaneck

**Liaisons**

Salena Copeland (Legal Aid Association of California) (LAAC)

**Public**

John Affelt (Public Advocates)  
Tzung-lin Fu (Bet Tzedek)  
Zach Newman (LAAC)  
Lorin Kline (LAAC)  
Dana M. Richardson (OneJustice)  
Claire Solot (Legal Services Funders Network; Bigglesworth Family Foundation)  
John Affeldt (Public Advocates)

Quorum was confirmed. Chair Al-Sarraf led the meeting.

## **II. CALL FOR PUBLIC COMMENT**

Chair Al-Sarraf invited any member of the public to address the Committee. Tzung-lin Fu, Vice President of Legal Services at Bet Tzedek, offered comments as follows: Bet Tzedek believes that using the Average Median Income (AMI) standard to define indigency would be more responsive to local differences in costs of living, than a blanket statewide standard. Bet Tzedek further believes that adoption of the Legal Services Corporation's income-exclusion rules would be administratively burdensome for non-LSC organizations, and poses a risk of excluding eligible clients. Bet Tzedek also suggests that any changes to income eligibility thresholds should retain a higher threshold for pro bono programs, or otherwise find a way to enhance funding for such organizations, in recognition of the additional costs associated with pro bono administration.

No other public comments were offered at this time.

## **III. CONSENT**

### **A. Approval of Meeting Summary and Action Items from March 6, 2020 Meeting**

The Committee made a motion to approve the meeting summary. The motion was approved by roll call vote (Al Sarraf moved; Mann seconded; Savage abstained).

## **IV. DISCUSSION AND ACTION ITEMS**

### **A. Discuss and Approve Recommendations to Board of Trustees on the Definition of Indigency and Methods to Demonstrate that Services Benefit Indigent Clients**

Staff presented background on the definition of indigency under sections 6210 et seq. of the Business & Professions Code ("IOLTA Statute") and the QLSP Eligibility Guidelines. For most QLSPs, indigency is defined at section 6213(d) of the IOLTA Statute as 125% of the federal poverty level (FPL), though organizations that receive the pro bono allocation may use a different definition with a higher income threshold. Federal regulations for the Legal Services Corporation (LSC) exclude certain kinds of income or expenditures when determining a client's income level, to improve equity among people seeking legal services. Staff's initial recommendation was to follow the LSC model for identifying income exclusions to be considered when determining client indigency.

Salena Copeland, Executive Director of LAAC, reported that that grantee organizations believe that the current income eligibility standard of 125% of the FPL is too low, and that the community is united in moving to an as-yet-undetermined higher value such as 200% of federal poverty, or perhaps to the Area Median Income (AMI) standard. Feedback is still being gathered regarding the various options.

Commission Member Meeker noted that a higher income eligibility threshold would increase the number of potentially eligible organizations, and that reliance on the AMI would shift funding to urban areas. He asked whether income would be determined on an individual or household basis, and whether local median income would be determined on the county level, census tract level or otherwise. He additionally inquired whether changes in income eligibility would be applied to the allocation formula as well. Staff indicated that a single client indigency level would likely be set for each county, because multiple standards within a single county would be too complicated to administer. Salena Copeland suggested that a shift to AMI for purposes of allocations, would shift significant funding out of rural areas and into urban areas.

Salena Copeland shared a question from a support center, about whether they had to conduct independent income screening for clients referred by a QLSP, and whether an organization can use the higher pro bono income eligibility levels for specific organizational “projects” that primarily rely on volunteers to deliver services. Staff clarified that support centers do not currently need to income screen clients referred from a QLSP, though this issue will be revisited during codification; the Office of General Counsel has been asked for advice regarding the definition of the word “project” as it appears at Business & Professions Code section 6213(d).

Commission Member Mann noted that urban needs must be balanced against those of rural communities that lack the access to private funding enjoyed by urban organizations. Staff presented a chart contrasting different income standards at the statewide and county levels. Commission Member Meeker requested that the chart be revised to include a rural county such as Imperial, population figures for each county, and (later in the meeting) counties in the center and north of the state, which was a request echoed by other members of the Commission. Commissioner Meeker agreed to assist with the update of this chart, for further review at the committee’s next meeting.

Advisor Seligman asked whether client eligibility standards and the funding allocation formula must both use the same basis for determining indigency, and raised the option of using the AMI for determining client eligibility, but using a different standard such as one based on federal poverty levels for purposes of determining grant allocations, to keep funds from being siphoned out of rural areas. This option will be considered further by this committee at a future date.

Discussion then turned to the non-income-based criteria for determining indigency cited at section 6213(d) of the Statute: eligibility for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. These did not elicit significant community comment, but Commission Member Savage noted that the restriction to developmental disability, as opposed to disability in general, is very limiting, and suggested relying instead on eligibility for MediCal. Salena Copeland reported a lack of community consensus on this suggestion but considers it worth consideration because MediCal eligibility can cover a wide range of individuals and conditions.

Staff recommended, in view of community feedback, that the State Bar:

- Pursue a statutory change to increase income eligibility levels, after first surveying the community to determine which level to select;
- Establish a State Bar Rule further clarifying the definition of “income” in Business and Professions Code section 6213(d) by adopting the LSC definition of “income” and confirming the deductibility of disability-related costs;
- Explore other income exclusion exceptions that might be incorporated into the Rules.

Staff’s recommendation currently leans toward increasing the income eligibility threshold to 200% of the Federal Poverty Level, but research is ongoing into the potential impacts of different kinds of changes.

The Office of Access & Inclusion would survey the community for input regarding any changes sought to the income eligibility level, bringing any recommendations directly back to the full Commission for discussion and approval. Approved recommendations would be submitted for Board of Trustees approval at its January 2021 meeting.

Staff then reported on discussions concerning the criteria used to demonstrate that “impact” work primarily benefits indigent people, for purposes of the Impact Litigation and Advocacy Work (ILAW) report. Currently that report requests information on several criteria to determine whether a case primarily benefits indigent persons. Among these, only one has elicited community feedback: Organizations have requested that the ILAW report no longer request that they identify the number of indigent people who will benefit from the activity, due to the cost and technical difficulty of producing a numerical answer.

Staff reported that the Working Group considered the following recommendations:

- To limit ILAW reporting to organizations that engage in impact litigation or advocacy for the lesser of 100 hours annually, or 10% of their total time annually; **and**
- To allow the use of internal data if other data is not available, **[and or and/or]** other ways of demonstrating disproportionate impact on indigent individuals.

Community feedback tended to recommend that the reporting threshold be changed to be the greater of 10% or 100 hours, not the lesser, and to support the use of internal data; Salena Copeland noted that organizations have reported that the ILAW report can require significant time and expense to complete.

John Affeldt, Managing Attorney at Public Advocates, commented that Public Advocates is supportive of the options under consideration and hopes that the option regarding the types of data that may be used, remains “and/or”. He requested that the Committee adopt these modifications to the ILAW reporting requirements regardless of any changes being considered to the income eligibility level.

Staff now recommends that more research be conducted on recommendations from the community as to the definition of indigency. These will be brought back to the Committee, with a final recommendation, for development of a new rule with formal public comment.

Commission Member Mann requested that staff review whether the Justice Gap Study could be cited as a basis for claiming impact on an indigent constituency. Staff will review the Study and will report at the next Committee meeting whether that document would appropriately be cited as a basis on which to claim work as eligible.

The Committee made a motion to for staff to survey the community and get more data points for a further report on potential changes to the statutory definition of indigency. The motion was approved by unanimous roll call vote (Meeker moved, Mann seconded).

Advisor Seligman encouraged the Committee to continue with regulatory review pending any statutory changes. Commission member Reinis asked if any changes could be implemented on a trial basis pending formal amendment of the statute. Staff identified income exclusions as one potential area for trial implementation, and will explore this option further.

#### **B. Discuss and Approve Recommendations to Board of Trustees on the Primary Purpose Requirement for Qualified Legal Services Projects**

The “primary purpose” requirement is found at Business & Professions Code § 6213, which establishes this standard for Qualified Legal Services Projects (QLSPs) Law School Clinical Programs, and Qualified Support Centers at subparts (a)(1), (a)(2), and (b), respectively. The Working Group focused on the primary purpose for QLSPs: “A nonprofit project incorporated and operated exclusively in California that provides as its primary purpose and function legal services without charge to indigent persons”.

While primary purpose is not statutorily defined, the State Bar Rules (at Rule 3.671(A)) and Eligibility Guidelines (at QLSP Guideline 2.3.4) adopt a quantitative method for establishing primary purpose. The Working Group considered three issues:

- State Bar Rule 3.671 requires an organization's proposed budget for the coming grant year, as well as the organization's expenditures in its most recent fiscal year, to demonstrate a primary purpose of providing legal services to indigent Californians without charge. However, office practice does not include review of an applicant's prospective budget for this purpose. From the outset of the IOLTA program, this data was considered insufficiently accurate for use in this determination, particularly because prospective budgets could not accurately predict the amount of IOLTA funding to be allocated. The Working Group's preliminary recommendation was to codify existing practice by deleting reference to the budget for the year for which funding is requested, from Rule 3.671. Community feedback supported this recommendation.
- State Bar Rule 3.671(A) establishes a presumption of primary purpose if no less than 75 percent of an applicant's expenditures are for the provision of legal services without charge to indigent persons ("qualified expenditures"). QLSPs that do not pass the 75 percent test are instructed to provide additional information in a narrative form to demonstrate that they satisfy primary purpose and function by other means. The Commission has historically found QLSPs with qualified expenditures between 50 and 75 percent of qualified expenditures as satisfying purposes for reasons such as the QLSP experienced an anomalous event resulting in a dip in a qualified expenditures or that the QLSP offers an integrated service delivery model, and falls below the presumption threshold because it has deducted for work and/or staff positions not currently under the definition of legal services. The Working Group's preliminary recommendation was to codify Commission practice by lowering the primary purpose threshold, tentatively proposed in the range of 51-60 percent. Community feedback supported the overall recommendation to lower the presumption percentage but thought 51 percent would be too low. The community also raised concerns that this issue overlaps with both the definition of civil legal services and ongoing discussions regarding utilizing paraprofessionals to increase access to justice. Community feedback also indicated that an expanded definition of "legal services" at State Bar Rule 3.672(A) might allow some organizations to "count" certain expenditures that they must currently deduct, potentially raising their qualified expenditure percentage. Further research is needed to understand how different changes to the eligibility presumption cut-off, might impact the pool of presumptively eligible grantees and the number of grantees overall.
- State Bar Rule 3.671(A), Rule 3.671(C) and Eligibility Guideline 2.3.5 provides the Commission with discretion to consider "other means" for determining that an applicant

meets primary purpose. In prior grant years, “other means” has included providing historical expenditure information and having a demonstrated track record in meeting primary purpose in prior grant years. The working group considered whether discretion would still be needed if the presumption percentage was lowered. The Working Group’s preliminary recommendation was to retain Commission discretion regarding application of the “other means” test. Community feedback supported this recommendation.

Given community feedback, the Working Group’s tentative recommendations are as follows, pending further research and analysis:

- To codify office practice by deleting reference to calculating primary purpose based on budget information for the coming grant year from Rule 3.671;
- To codify Commission practice by lowering the primary purpose presumption threshold of Rule 3.671(A), to a level yet to be determined;
- To maintain the Commission’s discretion regarding the “Any Other Means” test under Rule 3.671(C) and QLSP Eligibility Guideline 2.3.5, and to provide further guidance in that regarding how and when this test would be used.

The report was informational; no vote was required.

### **C. Discuss Formation of Focus Groups on How to Define Civil Legal Services**

Staff reported that the Working Group considering the definition of “legal services” at State Bar Rule 3.672(A) is researching this issue by looking at current office practice, as well as ABA and LSC standards, that sometimes permit other kinds of professional services to be included as part of legal services. The Working Group will begin holding focus groups in November to discuss how HICAP, social work, and housing counseling services relate to civil legal aid. Focus group work might expand to other service areas in early 2021. The Working Group will use focus group input to develop a revised definition of legal services for committee consideration. This timeline is subject to change if circumstances require.

The report was informational; no vote was required.

### **D. Preliminary Discussion of Fiscal Grant Issues Including Pass-through Funds, Indirect Costs, Out of County Expenditures, Carryover and Budget Modifications, and How the IOLTA Formula is Calculated**

Staff offered a short preview of the workplan for addressing fiscal issues. In January 2021 the Committee will consider pass-through funds, exchanged funds, out-of-county determinations,

carryover and budget modification approval authority, and permissible ratios for indirect costs and personnel/non-personnel and program/administrative expenses. The Committee will consider the purchase of real and tangible property, revisions to the *Standards for Financial Management Systems and Audits*, and the IOLTA formula itself, later in 2021.

## **V. ADJOURN**

At the conclusion of the presentations and discussion, and there being no other business before the Committee, the meeting was adjourned at 12:40 p.m.