



Date: June 25, 2021

To: Members, Legal Services Trust Fund Commission

From: Erica Carroll, Senior Program Analyst

Subject: Treatment of Expungement, Infractions, and Similar Legal Services in 2022 IOLTA/EAF Applications

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### EXECUTIVE SUMMARY

Several current IOLTA/EAF grant recipients and recent applicants have reported that a portion of their legal services are devoted to expungement, infractions, and other potentially non-civil legal services. Historically, expungement and similar activities have been considered qualifying activities for determining an organization's primary purpose, and recipients have also been allowed to use IOLTA/EAF funds for this work. However, in response to inquiries about the proper characterization of such work, the State Bar has conducted further research and concluded that these activities are more properly characterized as criminal, not civil, legal services.

Notwithstanding this conclusion, staff believes that the IOLTA statute (Business & Professions Code sections 6210-6228) permits such services to count towards the grant recipients' primary purpose determination and qualified expenditures (QE) amounts. Although the Eligibility Guidelines promulgated by the LSTFC suggest otherwise, the statute is controlling. The statute is clear, though, that IOLTA/EAF funds may not be used "with respect to any criminal proceeding." Business & Professions Code section 6223.

The staff recommendation for the 2022 IOLTA/EAF application cycle, therefore, is to allow applicants to continue to include their expenditures for such work as part of the primary purpose and QE determinations but not permit use of IOLTA/EAF funds towards these services. Staff further recommends that the LSTFC prioritize this topic for the Rules Committee as part of the ongoing codification process.

## BACKGROUND

Interest on Lawyers' Trust Account (IOLTA) and Equal Access Fund (EAF) grants are administered on a yearly basis. The intent of the IOLTA statute is to expand civil legal services for the indigent. Business & Professions Code section 6210. (See **Attachment A** for the full text of the IOLTA statute.)

To qualify for a grant award, applicants for IOLTA and EAF funding must demonstrate that they either have a "primary purpose and function [of providing] legal services without charge to indigent persons" (qualified legal services projects or QLSPs) or a "primary purpose and function [of providing] legal training, legal technical assistance, or advocacy support without charge" (qualified support centers or SCs). Business & Professions Code sections 6213(a) and (b). An organization's primary purpose is established by calculating the percentage of an applicant's services that are devoted to the activities described in Business and Professions Code section 6213. State Bar Rule 3.671.

If at least 75 percent of the applicant's expenditures (also called its "qualified expenditures" or QEs) are for legal services to the indigent or legal training, technical assistance and/or advocacy support, the organization is presumed eligible for funding. QEs falling below that percentage require review by the LSTFC.<sup>1</sup> The Eligibility Guidelines for Legal Services Projects, and the corresponding document for Support Centers, add the limitation that the primary purpose determination only utilizes "civil" legal services in the QE calculation. (See Eligibility Guidelines 2.3-2.3.5. for Legal Services Projects and Commentary to Eligibility Guideline 2.3. for Support Centers.)

The IOLTA statute (Business & Professions Code section 6223) goes on to state that:

**No funds allocated by the State Bar pursuant to this article shall be used for any of the following purposes:**

(a) The provision of legal assistance with respect to any fee generating case, except in accordance with guidelines which shall be promulgated by the State Bar.

**(b) The provision of legal assistance with respect to any criminal proceeding.**

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<sup>1</sup> QEs are also relevant to funding amounts for QLSPs, as an organization's yearly award is calculated based on QEs, rather than its total corporate expenditures. (Because SCs offer services statewide, they all receive the same allocation, and their QEs are mostly relevant to the primary purpose determination.)

(c) The provision of legal assistance, except to indigent persons or except to provide support services to qualified legal services projects as defined by this article. (Emphasis added.)

Thus, if an organization provides any services related to criminal proceedings, the statute is clear that IOLTA (and EAF) funds may not be used for providing such services.

## **DISCUSSION**

### **Historical Practice and Context**

Until recently, expenditures for work related to expungements, infractions, and other similar legal services (or support services related to such activities) were considered allowable as qualified expenditures and were included in the determination of whether a program satisfied the primary purpose test. Programs were also permitted to use IOLTA/EAF funds for this work. The question of whether expungement or similar services were civil or criminal legal services had not been squarely addressed, but there was significant overlap with, and applicability to civil legal issues.<sup>2</sup> Moreover, the Legal Service Corporation—the agency that provides civil legal aid funding at the federal level, and which funds some current IOLTA/EAF grant recipients—allows use of its grants toward such services.

During the application cycle for 2021 Partnerships Grants,<sup>3</sup> the issue of whether IOLTA/EAF funds could be used to support expungement work was directly implicated. This inquiry offered the State Bar the opportunity to revisit its interpretation of the governing authorities and its historical practice.

Based on the initial research, the Office of Access & Inclusion informed organizations they could not allocate IOLTA/EAF funds towards these services for 2021 grants, with additional guidance on the issue to be provided in the future.

### **Recent Developments and Research**

Further investigation into the correct classification of expungement and related services ultimately yielded the conclusion that these services are more properly characterized as criminal, rather than civil, legal services. However, it also revealed that the LSTFC's Eligibility

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<sup>2</sup> It is common for civil legal services organizations to offer assistance with expungements and infractions as a complement to the other services provided; for example, a criminal record can prove to be an obstacle, or lead to discrimination, when attempting to obtain employment or housing.

<sup>3</sup> Partnership Grants are funded from a portion of the EAF funds each year, and, though discretionary in nature, are governed by the same IOLTA statute and State Bar Rules.

Guidelines might be overly restrictive in what legal services are allowed to count as QEs for the organizations' allocations and primary purpose determination.

As noted above, although the Eligibility Guidelines specify that primary purpose and QEs are calculated based on expenditures for civil legal services, the IOLTA statute and State Bar Rules do not include the reference to "civil." As a result, even with the clarification that expungement and related services are more properly classified as criminal, the statute and rules would permit them to be used for primary purpose and QE determinations.

On April 23, 2021, in response to inquiries received during the 2022 IOLTA/EAF application period, the Office of Access & Inclusion sent an email to current grant recipients further detailing its conclusion that expungement and infractions are criminal, rather than civil, legal services. (Attachment B.) In recognition of the fact that this was a change in the State Bar's position, OA&I advised applicants to include these services in the calculation of their QEs but to be prepared to deduct them later, if necessary.

The Office of Access & Inclusion is in the process of convening a working group devoted to this topic as part of the LSTFC's codification process led by the Rules Committee.

### **Recommended Approach for 2022 IOLTA/EAF Application Cycle**

Consistent with the dictates of the IOLTA statute and the Rules of the State Bar, staff recommends that expenditures related to non-civil legal services—such as expungement and infractions—continue to count for purposes of determining an applicant's primary purpose and QEs for the 2022 IOLTA/EAF application cycle. However, also consistent with the statute, IOLTA/EAF funds may not be used for activities that are not considered civil legal services.

### **ATTACHMENTS**

- A. Governing Authorities: [IOLTA statute](#) (Business & Professions Code section 6210-6228); [State Bar Rules](#); Eligibility Guidelines for [Legal Services Projects](#) and [Support Centers](#)
- B. Email Dated April 23, 2021 from the Office of Access & Inclusion to Current Grant Recipients

**From:** [calbar@smartsimple.com](mailto:calbar@smartsimple.com) on behalf of [Trust Fund Program](#)  
**To:** [Carroll, Erica](#)  
**Subject:** Important Message Regarding Expungement and Infraction Work in IOLTA/EAF Application  
**Date:** Friday, April 23, 2021 1:13:44 PM

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Dear Program Directors and Advocates:

We have received inquiries from several programs regarding treatment of expungement and infraction work in the 2022 IOLTA/EAF application process. The State Bar's Office of General Counsel (OGC) has conducted research and concluded that **expungements and infractions** are most likely criminal, rather than civil, legal services, although countervailing arguments exist.

Pursuant to the regulations set forth in the Eligibility Guidelines for Legal Services Projects, to establish eligibility as a Qualified Legal Services Project, an applicant must demonstrate, among other things, that it "provides civil legal services" as its primary purpose and function. (Eligibility Guideline 2.3.1.) Similarly, an applicant's qualified expenditures for purposes of calculating its grant allocation is limited to expenditures on free civil legal services for the indigent. (See Eligibility Guideline 2.7.2, Commentary.)

OGC has opined that the best interpretation of the current guidelines is that they do not permit work related to expungements and infractions to be counted as qualified expenditures in the IOLTA/EAF application. However, the Legal Services Trust Fund Commission (LSTFC) has some leeway to interpret its Guidelines differently, and its Rules Committee will be examining the relevant regulations over the next few months and may recommend changes or clarifications to the relevant regulations. In addition, we know that many existing grant recipients have engaged in work related to expungements and/or infractions, and we do not want to cause undue hardship to those organizations that have been permitted to include these activities as part of their qualifying expenditures in years past.

Consequently—for this application cycle only—State Bar staff is recommending applicants be permitted to include this work as part of their qualified expenditures in the 2022 IOLTA/EAF application. This recommendation is subject to approval by the LSTFC. If the LSTFC agrees with this recommendation, as long as these services meet other statutory requirements (e.g. provided free of charge to indigent persons as defined by statute), you will not need to deduct this work from qualifying expenditures. If the LSTFC does not agree, expenditures related to this work would need to be deducted on Form VIII of the application.

The LSTFC's next meeting is not scheduled until June 25, after the 2022 IOLTA/EAF application deadline. For this reason, and **until further notification, you may count expungement and infraction work as qualified expenditures in the 2022 IOLTA/EAF application.** However, we strongly recommend that you calculate expenditures related to expungements and infractions separately, to ease your ability to segregate those funds and deduct them from qualifying expenditures in the application, if required.

Regardless of the LSTFC's decision regarding qualified expenditures, if your organization is found eligible for 2022 IOLTA/EAF funding, you will be prohibited from using IOLTA and

EAF funds to support expungement and infractions work; those services must be funded through other sources. Allocating IOLTA/EAF funds to activities that constitute criminal legal services would likely result in a violation of California Business & Professions Code section 6223(b)'s prohibition of using IOLTA funds for "[t]he provision of legal assistance with respect to **any criminal proceeding.**"

In order to bring finality to some of these questions and provide as much notice as possible to applicants about how these activities will be treated in future funding cycles, the LSTFC's Rules Committee will expedite review of expungements, infractions, and certain other non-civil areas of law, and recommend a resolution to the LSTFC and Board of Trustees and in advance of the 2023 IOLTA/EAF application cycle. We hope to have a clearer answer for the community in the coming months to ensure that the IOLTA statute, State Bar Rules, and Eligibility Guidelines are consistent in the directions provided to grantees concerning this work in the future. We will keep you apprised when the Rules Committee and LSTFC will meet to discuss this topic. A memo with staff's recommendation will be circulated in advance of the meetings.

If you have any questions, please contact Elizabeth Hom at [elizabeth.hom@calbar.ca.gov](mailto:elizabeth.hom@calbar.ca.gov) or Doan Nguyen at [doan.nguyen@calbar.ca.gov](mailto:doan.nguyen@calbar.ca.gov).

Regards,

Office of Access & Inclusion

Office of Access & Inclusion

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