



Date: October 13, 2021

To: Members, Legal Services Trust Fund Commission (LSTFC) Rules Committee

From: Christian Schreiber, Co-Vice Chair, LSTFC
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Subject: Proposed Changes to Rules of the State Bar to Define and Demonstrate Indigency (Update)

EXECUTIVE SUMMARY

At its meeting on October 16, 2020, the Rules Committee of the Legal Services Trust Fund Commission (LSTFC) first considered proposed changes to the Rules of the State Bar and Legal Services Trust Fund Program Eligibility Guidelines regarding the definition of indigency and ways for qualified legal services projects (QLSPs) to demonstrate their clients' indigency in grant applications and reporting. After feedback from the civil legal aid community, the committee voted to recommend amending Business and Professions Code section 6213(d) to increase the client income eligibility threshold from 125 percent of the federal poverty level to 200 percent. The committee also discussed other points of clarification or improvement in the rules and guidelines, but no further action was taken pending the recommended statutory change to the income eligibility threshold.

The proposed statutory change has been approved by the Legislature and, as of the posting date of this memorandum, is awaiting the governor's signature. In light of these developments, this memorandum summarizes the main points of discussion from the last meeting on the topic of indigency and possible options for the committee's consideration. The working group previously recommended creating a State Bar Rule defining "income" while providing flexibility to grantees to determine exceptions to income under extenuating circumstances. There was also a general recommendation to modify the Rules of the State Bar and/or Eligibility Guidelines to assist organizations engaging in impact litigation and advocacy work (ILAW) to demonstrate the indigency of the populations they are serving.

BACKGROUND

CODIFICATION PROCESS

In 2019, at the recommendation of the Board of Trustees, State Bar staff and the LSTFC agreed to engage in a multi-phase process of revising and/or codifying all decision points employed in the grant-making process for IOLTA and Equal Access Fund (EAF) grants. The intent was to provide more transparency about the process and to ensure consistency in administering the grants.

LSTFC members have formed working groups to investigate the questions raised in the Rules Committee's work plan and develop preliminary recommendations. The working groups develop preliminary recommendations, which are circulated by the committee to the legal aid community through the Legal Aid Association of California (LAAC) to obtain feedback. The committee considers the feedback and discusses before making a final recommendation to the LSTFC, and in turn, the Board of Trustees.

As part of the codification process, this memorandum seeks to clarify the definition of "indigent person" under Business and Professions Code section 6213(d) for Income on Lawyers' Trust Account (IOLTA) grant recipients. It will also provide options under consideration for QLSPs to demonstrate that they are providing services to indigent persons when working on behalf of a group or class of persons. This relates to the work reported in QLSP ILAW reports.

This topic has already gone through one round of community feedback and committee discussion. This memorandum presents a restatement of prior identified issues that remain unresolved, as well as any new or additional information obtained in the interim.

GOVERNING AUTHORITIES¹

IOLTA and EAF grants are awarded to approximately 100 nonprofit legal services organizations each year to provide free civil legal aid in California to indigent persons, or legal training, legal technical assistance, or advocacy support without charge to the organizations providing services to indigent persons. Grantees must comply with criteria set forth in Business and Professions Code sections 6210-6228 (otherwise known as the "IOLTA Statute"), State Bar Rules and Appendices, and Legal Services Trust Fund Program Eligibility Guidelines (for Legal Services Projects or Support Centers, as applicable).²

¹ Prior review of the legislative history for any information or references relevant to the interpretation of these governing authorities yielded no additional guidance.

² Additional governing authorities include the Legal Services Trust Fund General Grant Provisions, and Standards for Financial Management Systems and Audits. However, they are not pertinent to the issues raised in this discussion.

State Bar Staff (staff) and the indigency working group reviewed these governing authorities for direction regarding the definition of “indigent person” and methods for demonstrating indigency when working on behalf of a group. Specifically, Business and Professions Code section 6213(d), which provides definitions of “indigent person,” and Guideline 2.3.4. of the Eligibility Guidelines for Legal Services Projects, which describes the methods for demonstrating indigency when performing work on behalf of a group, are relevant to the issues raised in this memorandum.

DISCUSSION

DEFINING INDIGENCY

Under Business and Professions Code section 6213(d), an individual may qualify for services offered by QLSPs as an “indigent person” in a variety of ways, some means tested, some not. A new recommended State Bar Rule would not change the underlying categories identified in the Business and Professions Code, but rather provide further information to ensure the definitions are applied consistently across all QLSPs.³

1. Definition of “indigent person” based on income

The IOLTA statute does not provide a definition of “income.”⁴ To guide the analysis of how to determine if an individual’s “income” is less than 125 percent FPL, additional relevant sources of information were reviewed. This included the definition of gross income from the Internal Revenue Service, the poverty guidelines mentioned in the IOLTA statute,⁵ Legal Services Corporation (LSC) regulations, and the fee waiver forms used by California courts.

The poverty guidelines themselves provide little insight. They explicitly state that there is no universal definition of “income” under the guidelines; each program that uses the guidelines will apply them based on its own definition of income.⁶ The Internal Revenue Code identifies 14 different categories of gross income (i.e. pretax income). The LSC regulations are the most

³ Support Centers generally provide services to QLSPs rather than to direct service clients, unless co-counseling or taking a case at a QLSP’s request, so the focus of this discussion is QLSP income-screening practices.

⁴ This discussion relates to “income” as it pertains to eligibility determinations under section 6213(d). Business and Professions Code section 6216(b) also mentions “income” in relation to the IOLTA funding formula, but that code section provides a specific source for the income data (United States Department of Commerce, Bureau of the Census), thus eliminating the need for further interpretation or definition of “income” in that code section.

⁵ These are now produced by the Department of Health and Human Services, not the Office of Management and Budget.

⁶ Frequently Asked Questions Related to the Poverty Guidelines and Poverty, Department of Health and Human Services, <https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty#before> (last accessed September 29, 2021).

specific and easily understood; capture many of the IRS categories in colloquial terms; and clarify that “income” includes that of “resident members [who] contribute to the support [of] the household” while allowing organizations to determine who else is a member of the “household” beyond that.⁷

LSC is often consulted and referenced as a leader in civil legal aid funding. All LSC-funded programs in California also receive IOLTA funding, and they typically represent the larger legal aid organizations in the state. The LSC definition of income is similar to the categories of income listed on California fee waiver forms (FW-001) produced by the Judicial Council and used by California courts. The working group’s preliminary recommendation was to adopt the LSC income definitions under Title 45, section 1611.2(i) of the Code of Federal Regulations (CFR). (Attachment B.)

Application of income exceptions

The original memorandum on this topic acknowledged that there are situations in which exceptions to household income would be appropriate, without prescribing those exceptions. The suggestion from LAAC was to consider the LSC’s income exceptions under Title 45, section 1611.5 of the CFR. (Attachment C.) The effect of such an approach would be that an individual’s gross income may exceed the income eligibility threshold under Business and Professions Code section 6213(d), but the person’s net income would qualify after appropriate deductions or exceptions are made.

Additionally, the Office of Access & Inclusion (OA&I) received inquiries specifically related to determining income for youth. Where the client is a minor and not working, the client’s income is often considered to be zero, and organizations wanted to know if this was an appropriate determination. Given that many instances in which a legal aid organization may provide direct services to a minor involve a lack of, or disruption to, family support (e.g. immigration services to unaccompanied minors or representing youth in juvenile dependency or probate guardianship proceedings), it seems appropriate to look only to the youth’s income, if any, in certain circumstances. At least in the case of probate guardianship, the California Government Code supports this interpretation for fee waivers.⁸

Providing more explicit instructions for income exceptions could support the Rules Committee’s effort to promote uniform application of the income requirements across IOLTA/EAF grantees.

⁷ Title 45 Code of Federal Regulations, section 1611.2(i), <https://ecfr.federalregister.gov/current/title-45/subtitle-B/chapter-XVI/part-1611> (last accessed September 29, 2021).

⁸ California Government Code section 68632

However, some organizations previously expressed concern about the potential administrative burden of imposing specific income exception requirements.⁹ In order to provide requested guidance—as many organizations communicated a desire to obtain more specific information regarding eligibility for services—while balancing these concerns, the working group previously recommended adopting the LSC definition of income while allowing grant recipients to develop their own guidelines for allowing income exceptions under extenuating circumstances, subject to LSTFC review.

Working group recommendation regarding definition of “indigent person” based on income, and income exceptions

The working group previously recommended adopting the same definition for “income” as LSC under 45 CFR section 1611.2(i), while allowing grantees to make exceptions to their income eligibility guidelines under appropriate circumstances, such as recent separation from an abusive partner. The Legal Services Trust Fund Commission would have authority to review eligibility guidelines for compliance with the governing authorities.

See Attachment A for the proposed rule as it was presented to the legal aid community, along with some updates based on the pending statutory change and discussion at the last committee meeting. Those updates are highlighted through track changes. This is not the final recommended rule but rather a reference point for discussing specific modifications.

2. Definition of “indigent person” based on other qualifying characteristics

In addition to qualifying for services based on income, Business and Professions Code section 6213(d) indicates that persons eligible for Supplemental Security Income (SSI), or for free services under the Older Americans Act (OAA) or Developmentally Disabled Assistance Act (DDAA) may also be considered “indigent persons” within the meaning of the statute.¹⁰

Receipt of SSI benefits is a straightforward way to satisfy the SSI requirement. Programs that receive OAA funding typically consider anyone over 60 eligible for services, but they are also encouraged to target services to those most in greatest economic and/or social need.¹¹

⁹ This was staff’s understanding of the concern expressed during public comment at the meeting in October 2020, that the objection pertained to specifying income exceptions, and that there was less or no concern about defining categories of income.

¹⁰ Office practice has held that recipients of SSI, adults over 60 years of age, and individuals with developmental disabilities could be considered eligible for services as “indigent persons.” OA&I has received feedback that these categories might be interpreted as requiring means testing. However, OA&I has never required grant recipients to income screen for individuals meeting the criteria listed above, and the proposed rule would endorse this approach.

¹¹ California Department of Aging, Poverty Guidelines for Older Americans Act and Older Californians Act Programs, <https://www.aging.ca.gov/download.ashx?lE0rcNUV0zaJuR9bwB4Pmw%3d%3d> (Updated March 2020).

Similarly, organizations often receive specific funding for services provided to persons with developmental disabilities under the DDAA, and such funding may have its own eligibility requirements.

Working group recommendation regarding the definition of “indigent person” based on other qualifying characteristics

The working group previously recommended that recipients of SSI,¹² and persons over 60, or who have a developmental disability, be considered “indigent” without requiring means testing once they establish meeting any of these criteria. (Grant recipients, of course, may choose to means-test these clients or be required to do so by other funders.) No specific comments were previously received from the legal aid community in response to this recommendation.

At the last meeting on this topic, committee members expressed concern about the limitation of these eligibility categories to individuals with developmental disabilities (rather than adopting a broader definition of disability). However, the statute is clear on the definition of this qualifying characteristic. Further, Business and Professions Code section 6213(d) recognizes that others with disabilities are to be means-tested, providing that income for persons with disabilities should be calculated after deducting “medical and disability-related special expenses.”¹³ The working group’s recommendation conformed to these requirements, and the legal aid community voiced no objection to this recommendation.

3. Definition of “indigent person” for pro bono programs

Grant recipients that meet certain criteria may receive additional funding (a “pro bono allocation”) and use higher income thresholds when their principal means of service delivery is through pro bono attorneys. Eligibility for the pro bono allocation is determined on a yearly basis through the IOLTA/EAF application process. If a program receives this allocation, it may use the higher income threshold cited in Business and Professions Code section 6213(d) (“75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code”).

¹² Organizations that can make an affirmative showing that clients who are not receiving SSI benefits are nonetheless eligible to receive SSI benefits may treat those clients as indigent.

¹³ After the statutory change to the income threshold was taken up in the Legislature, the Legislature added a provision that disability compensation for veterans would also not be counted towards income eligibility determinations, further reducing an economic barrier to qualifying for this population. This will be part of the final statute once signed and has been added to the proposed rule in Attachment A.

Response from legal aid community and relevant considerations regarding the definition of “indigent person” for pro bono programs

Three main points emerged from LAAC’s feedback:

1. Some member organizations felt it was unfair that two organizations may be doing the same type of work, but one would have to deduct an activity from its qualifying expenditures if the client’s income exceeds 125 percent FPL, while the other could count it as a qualifying expenditure if it receives a pro bono allocation (regardless of whether a pro bono attorney is working on the actual matter) because of the higher income threshold;¹⁴
2. Because an organization’s eligibility for the pro bono allocation may change from year to year, support centers and fellow QLSPs can have difficulty tracking qualifying expenditures when agreeing to partner with, or support, different organizations in their activities; and
3. Some LAAC member organizations also asked that the LSTFC reconsider the interpretation of the phrase “a project that provides free services of attorneys in private practice without compensation” under Business and Professions Code section 6213(d), which historically has been interpreted to mean only organizations that receive the pro bono allocation but which some members believe is too restrictive. (This ties to the first point above.)

The first point made about qualifying expenditures may very well be true. However, the higher income threshold is permitted by statute. Regarding the second point, support centers are not currently required to independently screen clients for income eligibility if they are co-counseling with a QLSP, for example. Both support centers and QLSPs that want to improve tracking of qualified expenditures might consider adding to their screening process a question about the client’s eligibility for services from the referring organization under the IOLTA/EAF income eligibility guidelines.

Concerning the third point, the LSTFC and staff are aware that several grant recipients have pro bono programs or units, but do not qualify for a pro bono allocation. Prior analysis supported the current interpretation of the higher threshold applying only to QLSPs receiving a pro bono allocation. An alternate interpretation would allow any QLSP that provided even a de minimis amount of pro bono services to use the higher threshold, which is arguably an absurd result.

While some grantees have suggested that they should be able to use the higher threshold for just their pro bono activities (while using the regular threshold for non-pro-bono work), the

¹⁴ After learning of the recommendation to increase the income threshold to 200 percent FPL, at least one pro bono organization countered that the LSTFC should ensure that a higher income threshold is retained for pro bono programs, asserting that those programs have higher costs. The income threshold for pro bono programs is set by statute, and in many counties (though not all), will still be higher than the proposed 200 percent FPL threshold.

statute does not permit this interpretation. Further, this interpretation would exacerbate the concerns raised by the second point of feedback. As discussed at the last meeting, expanding the income eligibility definition to only certain programs within an organization would likely only further complicate the determination and tracking of qualified expenditures.

Working Group Recommendation regarding the definition of “indigent person” for pro bono programs

The working group recommended using the same definition of income as that described in the “Definition of ‘indigent person’ based on income” section when determining income for persons receiving services from pro bono programs. The working group did not recommend any changes to the current interpretation or application of the higher income threshold for pro bono programs, though the committee may wish to discuss whether creating a rule would be helpful.

DEMONSTRATING INDIGENCY

Business and Professions Code section 6213(d) provides guidance on identifying individual clients who are eligible for services as “indigent persons,” but that statute and the State Bar Rules are silent regarding services provided for the benefit of indigent persons generally, or as a group. The impact litigation and advocacy work (ILAW) process is intended to allow grant recipients to engage in broad, impactful work while ensuring that these services primarily benefit indigent persons.¹⁵ QLSPs must have a primary purpose and function of providing free legal services to indigent persons;¹⁶ the ILAW activities are reviewed to determine whether expenditures on such activities should be considered qualifying—and thus count towards the organization’s primary purpose—in its annual IOLTA/EAF application.

The only guidance for demonstrating indigency in ILAW reports is provided by the Eligibility Guidelines for Legal Services Projects, Guideline 2.3.4. This includes consideration of the following factors: (1) forum, (2) whether named plaintiff is indigent, (3) the definition of the class if impact litigation, (4) a description of the group of individuals who would benefit, (5) whether a majority of those who would benefit are indigent, (6) relation of the issues raised in the matter to the legal needs of indigent persons, and (7) whether indigent persons are disproportionately affected by the legal issues raised. The Commentary to the Guideline goes on to state:

For each of the matters so identified in your application, describe who would benefit from the services, state whether the matter is primarily for the benefit of indigent persons and, if so, explain the reasons you reached that conclusion. For any such matter

¹⁵ Legal Services Trust Fund Program Eligibility Guidelines for Legal Services Projects, Guideline 2.3.4.

¹⁶ Business and Professions Code section 6213(a)

that is primarily for the benefit of indigent persons, your description should include the information listed as items (1) through (7) in the preceding paragraph; **you must quantify** the percentage of your clients who are indigent persons (or organizations qualifying under Commentary 2.3.3 above) and **the percentage of the persons who would benefit from the services who are indigent persons. Explain the basis of this information.** (Emphasis added.)

Several grant recipients reported difficulty demonstrating they satisfy all of the requirements that would define their services as “primarily for the benefit of indigent persons” under Guideline 2.3.4., even though their ILAW services are intended for the benefit of indigent persons. The biggest hurdle has been in quantifying whether a majority of those who would benefit from the work are indigent. Current office practice is to find an activity qualifying if over 50 percent of the population that would benefit is indigent, but reliable data is not always available to demonstrate that this is the case.

The ILAW reporting requirements can be onerous, both from a reporting and administrative perspective, with over 800 individual activities from 2020 reported and reviewed. Nonetheless, it is an important part of the annual application process; if these activities are found to be non-qualifying, the expenses would need to be deducted from an organization’s qualified expenditures in its IOLTA/EAF application. This could impact the organization’s eligibility and would impact its grant award.¹⁷

The commentary to Eligibility Guideline 2.3.4. states that if ten percent or more of an organization’s legal services are devoted to ILAW activities, the report must be completed. However, current office practice is to have all organizations complete the report with their top 15 impact litigations cases (based on number of staff hours devoted to the activity), top 10 advocacy activities, and a summary of any additional ILAW activities. This practice was adopted to ensure that significant non-qualifying expenditures are not overlooked, as that might result in a larger IOLTA/EAF grant award for an organization than is warranted.

The median number of grant recipient staff hours reported per impact litigation case in 2019 was 125, and the average number was 358 hours.¹⁸ However, some cases reported as few as one or two hours, and others amounted to thousands of hours. There is high variability among organizations as to how much of their services are comprised of these ILAW activities, yet the reporting requirement is currently the same for all.

With these issues in the mind, the working group recommended creating a State Bar Rule that is consistent with the intent of the IOLTA statute to ensure that funding is limited to those

¹⁷ Grant awards are calculated based on a formula that, in part, depends on an organization’s qualified expenditures (i.e. funds spent to provide free legal services to indigent persons).

¹⁸ Hours are not currently reported for advocacy activities.

providing services to indigent persons,¹⁹ while at the same time promoting efficient and accurate reporting.²⁰

The working group shared with the legal aid community the following options, which were under consideration:²¹

1. Only requiring completion of the ILAW report if the amount of time devoted to these activities exceeds the lesser of the following: 10 percent of the organization’s legal services in a given year, or 100 hours (cumulatively), as determined by the organization; and
2. Allowing the use of internal data to provide justification for the activity if independent data is not available.
 - One example would be for the organization to quantify the percentage of its indigent clients who experienced a particular problem in the past few years (as reported in its State Bar Case Summary Report) to demonstrate a nexus with the legal issue now being addressed through an impact litigation case or advocacy activity; and/or
3. Demonstrating disproportionate impact to indigent persons based on the nature of the activity and the specific anticipated outcomes for indigent persons if the activity succeeds.
 - While the intent behind the activity is certainly important, the working group believed that it needed to be anchored by relevant and current information regarding the needs of indigent persons in the community served by the activity, even if these activities are not conducive to quantifying the percentage served who are indigent.

The working group invited more feedback on this issue before articulating a change to the current guidelines and rules.

Response from the legal aid community and relevant considerations

Both LAAC and one of the IOLTA/EAF grantees, Public Advocates, provided separate comments on these questions. (Attachments E and F.) Their comments reiterated how difficult the

¹⁹ Business and Professions Code section 6210

²⁰ To the extent necessary, this will also include revisions to the existing Eligibility Guidelines.

²¹ We received a request for clarification around the “and/or” language between these options. The first option regarding the number of hours or percentage of time spent on ILAW activities relates to the reporting process itself; it is intended to alleviate some of the burden of the current reporting requirements by setting a threshold. The second and third options relate to demonstrating indigency and are under consideration either as exclusive options (i.e. one would be chosen depending on which has more sound reasoning) or, more likely, as two alternatives (i.e. if quantitative data exists, provide it, and if not, articulate how the activity—though it might impact Californians at varying income levels—will disproportionately impact indigent persons).

reporting process can be, which may have the effect of impeding rather than enabling this type of work. Feedback was provided on each option presented:

1. Reporting only when activities exceed 10 percent of the organization's legal services in a given year, or 100 hours (cumulatively), whichever is lower.
 - LAAC noted that smaller organizations felt this would be a more burdensome requirement for them than it would be for larger organizations and suggested using the alternatives above but requiring reporting when activities exceed the "greater" of the two options, rather than the "lesser." There is also confusion among the legal aid community about how to report activities when participating as a member of a coalition.
 - As noted above, the median number hours reported per activity in 2019 was 125. It would be unlikely that smaller organizations will have to report more than larger organizations, because the reporting is based on cumulative hours rather than individual activities. Changing the language to the "greater" of the two would mean, in the case of larger organizations, that reaching 10 percent of their expenditures could amount to hundreds of thousands of dollars spent before requiring reporting. The intent of the proposed change was not only to ease the burden on programs but to make it a more equitable process regardless of organizational size. If that is not the case, or it is not perceived as helpful, further discussion will be required to achieve that balance.
2. Allowing the use of internal data to provide justification for the activity if independent data is not available.
 - LAAC agreed with this and noted that some organizations may already be following this practice but that it should be a clear option to all grant recipients completing ILAW reports. Public Advocates suggested expanding this to allow use of data from community-based organizations in the areas where the organization operates or other direct legal services organizations.
 - As long as there is a reasonable basis for relying on the data and a connection to the activity in which the organization is engaged, Public Advocates' suggestion seems like a reasonable expansion.
3. Demonstrating disproportionate impact to indigent persons based on the nature of the activity and the specific anticipated outcomes for indigent persons if the activity succeeds.
 - Both LAAC and Public Advocates supported this option. LAAC stated that some grant recipients would like a revision to include homelessness prevention and domestic violence prevention and intervention activities as presumptively qualifying.
 - The examples provided by both LAAC and Public Advocates were helpful in highlighting how such activities may be presented and measured without quantifying the exact percentage of indigent persons who would benefit.

Whether to consider specific categories as qualifying, rather than looking at activities individually, will require discussion.

- During the previous discussion on this topic, some committee members suggested also looking to external data that may be generally applicable to the work being performed/identifying areas of need for indigent persons. One member inquired about using the State Bar’s Justice Gap Study to demonstrate the needs of indigent persons in relation to specific issues or areas of law. Staff revisited the Justice Gap Study findings and agrees that this could be a good source of information, particularly if looking at the Justice Gap Study technical report. However, the information captured a point in time prior to the COVID-19 pandemic and may eventually require updating. For that reason, staff believes it would be helpful to remind grantees about resources such as the Justice Gap Study when analyzing, and providing support for, the anticipated benefit of their activities to indigent persons but would not recommend restricting grantees to a specific source of data.

Working group recommendation regarding demonstrating indigency

The working group believed that the research and initial round of feedback showed that some changes are appropriate, rather than leaving the current guidelines as-is. The group recommended obtaining specific feedback from the committee and circulating a proposal with finalized language before confirming any revisions.

RECOMMENDATIONS

Summary of the recommendations for defining indigency:

1. Adopt a State Bar Rule that provides a definition of “income” that: mirrors the categories used by the Legal Services Corporation; clarifies other qualifying characteristics for service eligibility; and provides organizations flexibility in making income exceptions, subject to review by the LSTFC (using Attachment A as a starting point);
2. Do not make any changes to the interpretation of the income threshold for pro bono programs (i.e. only QLSPs that receive the pro bono allocation will be permitted to use a higher income threshold).

Summary of recommendations for demonstrating indigency:

1. Determine viable options to ease reporting requirements and prove benefit to indigent persons, using the list presented in the memorandum as a starting point, before crafting a new State Bar Rule (and possible attendant revision to the Eligibility Guidelines). Once

more definitive guidance is forthcoming, circulate the specific proposal to the legal aid community for feedback.

ATTACHMENTS

- A.** Proposed State Bar Rule Clarifying the Definition of “Indigent Person” (updated with track changes since October 2020 meeting)
- B.** Text of Title 45, Code of Federal Regulations, section 1611.2(i) (LSC definition of “income”)
- C.** Text of Title 45, Code of Federal Regulations, section 1611.5 (LSC exceptions to income)
- D.** Other Governing Authorities
 - a. Business and Professions Code sections 6210-6228
 - b. Eligibility Guidelines for Legal Services Projects, Guideline 2.3.4.
- E.** Prior Comments from Legal Aid Association of California
- F.** Prior Comments from Public Advocates

Proposed State Bar Rule

Rule 3.XX Income classifications and exceptions

For purposes of Business and Professions Code section 6213(d),

(A) “Income” means income as defined in section 1611.2(i) of Title 45 of the Code of Federal Regulations. If an applicant for services identifies as having a disability, income eligibility is calculated only after deducting the costs of medical and other disability-related special expenses, and in the case of veterans with a service-related disability, any disability compensation from the United States Veterans Administration;

(B) Any of the following are considered “indigent persons”:

- (1) Persons ~~receiving~~ eligible for Supplemental Security Income;
- (2) Persons who are 60 years or older; or
- (3) Persons who identify as having a developmental disability as defined in section 15002 of Title 42 of the United States Code;

(C) Pursuant to Business and Professions Code section 6218, qualified legal services projects shall establish financial eligibility guidelines consistent with this Rule and other applicable law and ~~regulations~~. Such guidelines may include provisions allowing qualified legal services projects to disregard income ~~—or make income exceptions—~~ in certain extenuating circumstances, including, but not limited to, the income of resident household members where intimate partner violence has occurred. The Legal Services Trust Fund Commission may reject such eligibility guidelines if it determines they are inconsistent with Business and Professions Code sections 6218(a) or 6213(d).

§ 1611.2 Definitions.

[Previous sections omitted.]

(i) "Income" means actual current annual total cash receipts before taxes of all persons who are resident members and contribute to the support of an applicant's household, as that term is defined by the recipient. Total cash receipts include, but are not limited to, wages and salaries before any deduction; income from self-employment after deductions for business or farm expenses; regular payments from governmental programs for low income persons or persons with disabilities; social security payments; unemployment and worker's compensation payments; strike benefits from union funds; veterans benefits; training stipends; alimony; child support payments; military family allotments; public or private employee pension benefits; regular insurance or annuity payments; income from dividends, interest, rents, royalties or from estates and trusts; and other regular or recurring sources of financial support that are currently and actually available to the applicant. Total cash receipts do not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to \$2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute.

§ 1611.5 Authorized exceptions to the annual income ceiling.

(a) Consistent with the recipient's policies and this part, a recipient may determine an applicant whose income exceeds the recipient's applicable annual income ceiling to be financially eligible if the applicant's assets do not exceed the recipient's applicable asset ceiling established pursuant to § 1611.3(d), or the asset ceiling has been waived pursuant to § 1611.3(d)(2), and:

(1) The applicant is seeking legal assistance to maintain benefits provided by a governmental program for low income individuals or families; or

(2) The Executive Director of the recipient, or his/her designee, has determined on the basis of documentation received by the recipient, that the applicant's income is primarily committed to medical or nursing home expenses and that, excluding such portion of the applicant's income which is committed to medical or nursing home expenses, the applicant would otherwise be financially eligible for service; or

(3) The applicant's income does not exceed 200% of the applicable Federal Poverty Guidelines amount and:

(i) The applicant is seeking legal assistance to obtain governmental benefits for low income individuals and families; or

(ii) The applicant is seeking legal assistance to obtain or maintain governmental benefits for persons with disabilities; or

(4) The applicant's income does not exceed 200% of the applicable Federal Poverty Guidelines amount and the recipient has determined that the applicant should be considered financially eligible based on consideration of one or more of the following factors as applicable to the applicant or members of the applicant's household:

(i) Current income prospects, taking into account seasonal variations in income;

(ii) Unreimbursed medical expenses and medical insurance premiums;

(iii) Fixed debts and obligations;

(iv) Expenses such as dependent care, transportation, clothing and equipment expenses necessary for employment, job training, or educational activities in preparation for employment;

(v) Non-medical expenses associated with age or disability;

(vi) Current taxes; or

(vii) Other significant factors that the recipient has determined affect the applicant's ability to afford legal assistance.

(b) In the event that a recipient determines that an applicant is financially eligible pursuant to this section and is provided legal assistance, the recipient shall document the basis for the financial eligibility determination. The recipient shall keep such records as may be necessary to inform the Corporation of the specific facts and factors relied on to make such determination.

Business and Professions Code Section 6210-6228 (IOLTA Statute)

6210. The Legislature finds that, due to insufficient funding, existing programs providing free legal services in civil matters to indigent persons, especially underserved client groups, such as the elderly, the disabled, juveniles, and non-English-speaking persons, do not adequately meet the needs of these persons. It is the purpose of this article to expand the availability and improve the quality of existing free legal services in civil matters to indigent persons, and to initiate new programs that will provide services to them. The Legislature finds that the use of funds collected by the State Bar pursuant to this article for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes in the judicial branch of government. The Legislature further finds that the expansion, improvement, and initiation of legal services to indigent persons will aid in the advancement of the science of jurisprudence and the improvement of the administration of justice.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

6211. (a) An attorney or law firm that, in the course of the practice of law, receives or disburses trust funds shall establish and maintain an IOLTA account in which the attorney or law firm shall deposit or invest all client deposits or funds that are nominal in amount or are on deposit or invested for a short period of time. All such client funds may be deposited or invested in a single unsegregated account. The interest and dividends earned on all those accounts shall be paid to the State Bar of California to be used for the purposes set forth in this article.

(b) Nothing in this article shall be construed to prohibit an attorney or law firm from establishing one or more interest bearing bank trust deposit accounts or dividend-paying trust investment accounts as may be permitted by the Supreme Court, with the interest or dividends earned on the accounts payable to clients for trust funds not deposited or invested in accordance with subdivision (a).

(c) With the approval of the Supreme Court, the State Bar may formulate and enforce rules of professional conduct pertaining to the use by attorneys or law firms of an IOLTA account for unsegregated client funds pursuant to this article.

(d) Nothing in this article shall be construed as affecting or impairing the disciplinary powers and authority of the Supreme Court or of the State Bar or as modifying the statutes and rules governing the conduct of licensees of the State Bar.

(Amended by Stats. 2018, Ch. 659, Sec. 140. (AB 3249) Effective January 1, 2019.)

6212. An attorney who, or a law firm that, establishes an IOLTA account pursuant to subdivision (a) of Section 6211 shall comply with all of the following provisions:

(a) The IOLTA account shall be established and maintained with an eligible institution offering or making available an IOLTA account that meets the requirements of this article. The IOLTA account shall be established and maintained consistent with the attorney's or law firm's duties of professional responsibility. An eligible financial institution shall have no responsibility for selecting the deposit or investment product chosen for the IOLTA account.

(b) Except as provided in subdivision (f), the rate of interest or dividends payable on any IOLTA account shall not be less than the interest rate or dividends generally paid by the eligible institution to nonattorney customers on accounts of the same type meeting the same minimum balance and other eligibility requirements as the IOLTA account. In determining the interest rate or dividend payable on any IOLTA account, an eligible institution may consider, in addition to the balance in the IOLTA account, risk or other factors customarily considered by the eligible institution when setting the interest rate or dividends for its non-IOLTA accounts, provided that the factors do not discriminate between IOLTA customers and non-IOLTA customers and that these factors do not include the fact that the account is an IOLTA account. The eligible institution shall calculate interest and dividends in accordance with its standard practice for non-IOLTA customers. Nothing in this article shall preclude an eligible institution from paying a higher interest rate or dividend on an IOLTA account or from electing to waive any fees and service charges on an IOLTA account.

(c) Reasonable fees may be deducted from the interest or dividends remitted on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No other fees or service charges may be deducted from the interest or dividends earned on an IOLTA account. Unless and until the State Bar enacts regulations exempting from compliance with subdivision (a) of Section 6211 those accounts for which maintenance fees exceed the interest or dividends paid, an eligible institution may deduct the fees and service charges in excess of the interest or dividends paid on an IOLTA account from the aggregate interest and dividends remitted to the State Bar. Fees and service charges other than reasonable fees shall be the sole responsibility of, and may only be charged to, the attorney or law firm maintaining the IOLTA account. Fees and charges shall not be assessed against or deducted from the principal of any IOLTA account. It is the intent of the Legislature that the State Bar develop policies so that eligible institutions do not incur uncompensated administrative costs in adapting their systems to comply with the provisions of Chapter 422 of the Statutes of 2007 or in making investment products available to IOLTA members.

(d) The attorney or law firm shall report IOLTA account compliance and all other IOLTA account information required by the State Bar in the manner specified by the State Bar.

(e) The eligible institution shall be directed to do all of the following:

(1) To remit interest or dividends on the IOLTA account, less reasonable fees, to the State Bar, at least quarterly.

(2) To transmit to the State Bar with each remittance a statement showing the name of the attorney or law firm for which the remittance is sent, for each account the rate of interest applied or dividend paid, the amount and type of fees deducted, if any, and the average balance for each account for each month of the period for which the report is made.

(3) To transmit to the attorney or law firm customer at the same time a report showing the amount paid to the State Bar for that period, the rate of interest or dividend applied, the amount of fees and service charges deducted, if any, and the average daily account balance for each month of the period for which the report is made.

(f) An eligible institution has no affirmative duty to offer or make investment products available to IOLTA customers. However, if an eligible institution offers or makes investment products available to non-IOLTA customers, in order to remain an IOLTA-eligible institution, it shall make those products available to IOLTA customers or pay an interest rate on the IOLTA deposit account that is comparable to the rate of return or the dividends generally paid on that investment product for similar customers meeting the same minimum balance and other requirements applicable to the investment product. If the eligible institution elects to pay that higher interest rate, the eligible institution may subject the IOLTA deposit account to equivalent fees and charges assessable against the investment product.

(Amended by Stats. 2009, Ch. 129, Sec. 1. (AB 940) Effective January 1, 2010.)

6213. As used in this article:

(a) “Qualified legal services project” means either of the following:

(1) A nonprofit project incorporated and operated exclusively in California that provides as its primary purpose and function legal services without charge to indigent persons and that has quality control procedures approved by the State Bar of California.

(2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California that meets the requirements of subparagraphs (A) and (B).

(A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars (\$20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.

(B) The program shall have quality control procedures approved by the State Bar of California.

(b) “Qualified support center” means an incorporated nonprofit legal services center that has as its primary purpose and function the provision of legal training, legal technical assistance, or advocacy support without charge and which actually provides through an office in California a significant level of legal training, legal technical assistance, or advocacy support without charge to qualified legal services projects on a statewide basis in California.

(c) “Recipient” means a qualified legal services project or support center receiving financial assistance under this article.

(d) “Indigent person” means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project that provides free services of attorneys in private practice without compensation, “indigent person” also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.

(e) “Fee generating case” means a case or matter that, if undertaken on behalf of an indigent person by an attorney in private practice, reasonably may be expected to result in payment of a fee for legal services from an award to a client, from public funds, or from the opposing party. A case shall not be considered fee generating if adequate representation is unavailable and any of the following circumstances exist:

(1) The recipient has determined that free referral is not possible because of any of the following reasons:

(A) The case has been rejected by the local lawyer referral service, or if there is no such service, by two attorneys in private practice who have experience in the subject matter of the case.

(B) Neither the referral service nor any attorney will consider the case without payment of a consultation fee.

(C) The case is of the type that attorneys in private practice in the area ordinarily do not accept, or do not accept without prepayment of a fee.

(D) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with professional responsibility, referral will be attempted at a later time.

(2) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other nonpecuniary relief, or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims.

(3) A court has appointed a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

(4) The case involves the rights of a claimant under a publicly supported benefit program for which entitlement to benefit is based on need.

(f) “Legal Services Corporation” means the Legal Services Corporation established under the Legal Services Corporation Act of 1974 (P.L. 93-355; 42 U.S.C. Sec. 2996 et seq.).

(g) “Older Americans Act” means the Older Americans Act of 1965, as amended (P.L. 89-73; 42 U.S.C. Sec. 3001 et seq.).

(h) “Developmentally Disabled Assistance Act” means the Developmentally Disabled Assistance and Bill of Rights Act, as amended (P.L. 94-103; 42 U.S.C. Sec. 6001 et seq.).

(i) “Supplemental security income recipient” means an individual receiving or eligible to receive payments under Title XVI of the federal Social Security Act, or payments under Chapter 3 (commencing with Section 12000) of Part 3 of Division 9 of the Welfare and Institutions Code.

(j) "IOLTA account" means an account or investment product established and maintained pursuant to subdivision (a) of Section 6211 that is any of the following:

- (1) An interest-bearing checking account.
- (2) An investment sweep product that is a daily (overnight) financial institution repurchase agreement or an open-end money market fund.
- (3) An investment product authorized by California Supreme Court rule or order.

A daily financial institution repurchase agreement shall be fully collateralized by United States Government Securities or other comparably conservative debt securities, and may be established only with any eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities or other comparably conservative debt securities, shall hold itself out as a "money market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.), and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars (\$250,000,000).

(k) "Eligible institution" means either of the following:

- (1) A bank, savings and loan, or other financial institution regulated by a federal or state agency that pays interest or dividends in the IOLTA account and carries deposit insurance from an agency of the federal government.
- (2) Any other type of financial institution authorized by the California Supreme Court.
(Amended by Stats. 2010, Ch. 328, Sec. 14. (SB 1330) Effective January 1, 2011.)

6214. (a) Projects meeting the requirements of subdivision (a) of Section 6213 which are funded either in whole or part by the Legal Services Corporation or with Older American Act funds shall be presumed qualified legal services projects for the purpose of this article.

(b) Projects meeting the requirements of subdivision (a) of Section 6213 but not qualifying under the presumption specified in subdivision (a) shall qualify for funds under this article if they meet all of the following additional criteria:

- (1) They receive cash funds from other sources in the amount of at least twenty thousand dollars (\$20,000) per year to support free legal representation to indigent persons.
- (2) They have demonstrated community support for the operation of a viable ongoing program.
- (3) They provide one or both of the following special services:

(A) The coordination of the recruitment of substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or to qualified legal services projects in California.

(B) The provision of legal representation, training, or technical assistance on matters concerning special client groups, including the elderly, the disabled, juveniles, and non-English-speaking groups, or on matters of specialized substantive law important to the special client groups.
(Added by Stats. 1981, Ch. 789, Sec. 1.)

6214.5. A law school program that meets the definition of a “qualified legal services project” as defined in paragraph (2) of subdivision (a) of Section 6213, and that applied to the State Bar for funding under this article not later than February 17, 1984, shall be deemed eligible for all distributions of funds made under Section 6216.

(Added by Stats. 1984, Ch. 784, Sec. 2.)

6215. (a) Support centers satisfying the qualifications specified in subdivision (b) of Section 6213 which were operating an office and providing services in California on December 31, 1980, shall be presumed to be qualified support centers for the purposes of this article.

(b) Support centers not qualifying under the presumption specified in subdivision (a) may qualify as a support center by meeting both of the following additional criteria:

(1) Meeting quality control standards established by the State Bar.

(2) Being deemed to be of special need by a majority of the qualified legal services projects.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

6216. The State Bar shall distribute all moneys received under the program established by this article for the provision of civil legal services to indigent persons. The funds first shall be distributed 18 months from the effective date of this article, or upon such a date, as shall be determined by the State Bar, that adequate funds are available to initiate the program. Thereafter, the funds shall be distributed on an annual basis. All distributions of funds shall be made in the following order and in the following manner:

(a) To pay the actual administrative costs of the program, including any costs incurred after the adoption of this article and a reasonable reserve therefor.

(b) Eighty-five percent of the funds remaining after payment of administrative costs allocated pursuant to this article shall be distributed to qualified legal services projects. Distribution shall be by a pro rata county-by-county formula based upon the number of persons whose income is 125 percent or less of the current poverty threshold per county. For the purposes of this section, the source of data identifying the number of persons per county shall be the latest available figures from the United States Department of Commerce, Bureau of the Census. Projects from more than one county may pool their funds to operate a joint, multicounty legal services project serving each of their respective counties.

(1) (A) In any county which is served by more than one qualified legal services project, the State Bar shall distribute funds for the county to those projects which apply on a pro rata basis, based upon the amount of their total budget expended in the prior year for legal services in that county as compared to the total expended in the prior year for legal services by all qualified legal services projects applying therefor in the county. In determining the amount of funds to be allocated to a qualified legal services project specified in paragraph (2) of subdivision (a) of Section 6213, the State Bar shall recognize only expenditures attributable to the representation of indigent persons as constituting the budget of the program.

(B) The State Bar shall reserve 10 percent of the funds allocated to the county for distribution to programs meeting the standards of subparagraph (A) of paragraph (3) and paragraphs (1) and (2) of subdivision (b) of Section 6214 and which perform the services described in subparagraph (A) of paragraph (3) of Section 6214 as their principal means of delivering legal services. The State Bar shall distribute the funds for that county to those programs which apply on a pro rata basis, based upon the amount of their total budget expended for free legal services in that county as compared to the total expended for free legal services by all programs meeting the standards of subparagraph (A) of paragraph (3) and paragraphs (1) and (2) of subdivision (b) of Section 6214 in that county. The State Bar shall distribute any funds for which no program has qualified pursuant hereto, in accordance with the provisions of subparagraph (A) of paragraph (1) of this subdivision.

(2) In any county in which there is no qualified legal services projects providing services, the State Bar shall reserve for the remainder of the fiscal year for distribution the pro rata share of funds as provided for by this article. Upon application of a qualified legal services project proposing to provide legal services to the indigent of the county, the State Bar shall distribute the funds to the project. Any funds not so distributed shall be added to the funds to be distributed the following year.

(c) Fifteen percent of the funds remaining after payment of administrative costs allocated for the purposes of this article shall be distributed equally by the State Bar to qualified support centers which apply for the funds. The funds provided to support centers shall be used only for the provision of legal services within California. Qualified support centers that receive funds to provide services to qualified legal services projects from sources other than this article, shall submit and shall have approved by the State Bar a plan assuring that the services funded under this article are in addition to those already funded for qualified legal services projects by other sources.

(Amended by Stats. 1984, Ch. 784, Sec. 3.)

6217. With respect to the provision of legal assistance under this article, each recipient shall ensure all of the following:

(a) The maintenance of quality service and professional standards.

(b) The expenditure of funds received in accordance with the provisions of this article.

(c) The preservation of the attorney-client privilege in any case, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to indigent persons.

(d) That no one shall interfere with any attorney funded in whole or in part by this article in carrying out his or her professional responsibility to his or her client as established by the rules of professional responsibility and this chapter.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

6218. All legal services projects and support centers receiving funds pursuant to this article shall adopt financial eligibility guidelines for indigent persons.

(a) Qualified legal services programs shall ensure that funds appropriated pursuant to this article shall be used solely to defray the costs of providing legal services to indigent persons or for such other purposes as set forth in this article.

(b) Funds received pursuant to this article by support centers shall only be used to provide services to qualified legal services projects as defined in subdivision (a) of Section 6213 which are used pursuant to a plan as required by subdivision (c) of Section 6216, or as permitted by Section 6219.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

6219. Qualified legal services projects and support centers may use funds provided under this article to provide work opportunities with pay, and where feasible, scholarships for disadvantaged law students to help defray their law school expenses.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

6220. Attorneys in private practice who are providing legal services without charge to indigent persons shall not be disqualified from receiving the services of the qualified support centers.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

6221. Qualified legal services projects shall make significant efforts to utilize 20 percent of the funds allocated under this article for increasing the availability of services to the elderly, the disabled, juveniles, or other indigent persons who are members of disadvantaged and underserved groups within their service area.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

6222. A recipient of funds allocated pursuant to this article annually shall submit a financial statement to the State Bar, including an audit of the funds by a certified public accountant or a fiscal review approved by the State Bar, a report demonstrating the programs on which they were expended, a report on the recipient's compliance with the requirements of Section 6217, and progress in meeting the service expansion requirements of Section 6221.

The Board of Trustees of the State Bar shall include a report of receipts of funds under this article, expenditures for administrative costs, and disbursements of the funds, on a county-by-county basis, in the annual report of State Bar receipts and expenditures required pursuant to Section 6145.

(Amended by Stats. 2011, Ch. 417, Sec. 60. (SB 163) Effective January 1, 2012.)

6223. 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.
- (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.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

6224. The State Bar shall have the power to determine that an applicant for funding is not qualified to receive funding, to deny future funding, or to terminate existing funding because the recipient is not operating in compliance with the requirements or restrictions of this article. A denial of an application for funding or for future funding or an action by the State Bar to terminate an existing grant of funds under this article shall not become final until the applicant or recipient has been afforded reasonable notice and an opportunity for a timely and fair hearing. Pending final determination of any hearing held with reference to termination of funding, financial assistance shall be continued at its existing level on a month-to-month basis. Hearings for denial shall be conducted by an impartial hearing officer whose decision shall be final. The hearing officer shall render a decision no later than 30 days after the conclusion of the hearing. Specific procedures governing the conduct of the hearings of this section shall be determined by the State Bar pursuant to Section 6225.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

6225. The Board of Trustees of the State Bar shall adopt the regulations and procedures necessary to implement this article and to ensure that the funds allocated herein are utilized to provide civil legal services to indigent persons, especially underserved client groups such as but not limited to the elderly, the disabled, juveniles, and non-English-speaking persons.

In adopting the regulations the Board of Trustees shall comply with the following procedures:

- (a) The board shall publish a preliminary draft of the regulations and procedures, which shall be distributed, together with notice of the hearings required by subdivision (b), to commercial banking institutions, to licensees of the State Bar, and to potential recipients of funds.
- (b) The board shall hold at least two public hearings, one in southern California and one in northern California where affected and interested parties shall be afforded an opportunity to present oral and written testimony regarding the proposed regulations and procedures.

(Amended by Stats. 2018, Ch. 659, Sec. 141. (AB 3249) Effective January 1, 2019.)

6226. The program authorized by this article shall become operative only upon the adoption of a resolution by the Board of Trustees of the State Bar stating that regulations have been adopted pursuant to Section 6225 which conform the program to all applicable tax and banking statutes, regulations, and rulings.

(Amended by Stats. 2011, Ch. 417, Sec. 62. (SB 163) Effective January 1, 2012.)

6227. Nothing in this article shall create an obligation or pledge of the credit of the State of California or of the State Bar of California. Claims arising by reason of acts done pursuant to this article shall be limited to the moneys generated hereunder.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

6228. If any provision of this article or the application thereof to any group or circumstances is held invalid, such invalidity shall not affect the other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

(Added by Stats. 1981, Ch. 789, Sec. 1.)

Legal Services Trust Fund Program Eligibility Guidelines for Legal Services Projects, Guideline 2.3.4 and Commentary

2.3.4. who are indigent

Commentary:

An indigent person is defined by the Business and Professions Code §§6213(d), 6213(g), 6213(h), and 6213(i) as follows:

“‘Indigent person’ means a person whose income is (1) 125% or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project which provides free services of attorneys in private practice without compensation, ‘indigent person’ also means a person whose income is 75% or less of the maximum levels of income for lower income households as defined in §50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.”

Your application must state the percentage of your organization’s services that were provided during the previous calendar year to clients who did not fall within this definition. You must adopt written financial eligibility guidelines and submit them with your application. If your eligibility criteria include persons who are not indigent within the definition of §6213(d) above, explain how you determined the percentage of clients served that falls outside the definition. If you did not have written financial eligibility guidelines in the prior year, your application must explain the basis of your computation of percentage and supply objective support for the computation. [B&P Code §§6213(d) and 6218.] 8 If you provide legal services for the benefit of a group or class of persons beyond the specific individuals or organizations who are your clients, you may consider the services as “legal services provided to indigent persons” only if the legal matter is primarily for the benefit of indigent persons.

In determining whether a legal matter is primarily for the benefit of indigent persons, the Commission may consider the following factors and any others that aid in making that determination: (1) the forum in which the matter is being pursued, e.g., courts, administrative agency, legislature, etc.; (2) whether named clients are indigent persons or qualifying organizations (under Commentary 2.3.3 above); (3) in the case of a class action, the definition of the class contained in the complaint and proposed or actual class certification orders; (4) a description of the group of individuals that would benefit from a favorable resolution of the legal matter; (5) whether a majority of those who would benefit are indigent persons; (6) the relation of the legal issues raised by the matter to the needs of indigent persons; and (7) whether indigent persons are disproportionately impacted by the legal issues raised by the matter.

If legal services for the benefit of a group or class of persons beyond the specific individuals or organizations who are your clients constitute more than 10% of your legal services, your application must identify the ten such legal matters on which you expended the largest amount of funds in the prior calendar year. For each of the matters so identified in your application,

describe who would benefit from the services, state whether the matter is primarily for the benefit of indigent persons and, if so, explain the reasons you reached that conclusion. For any such matter that is primarily for the benefit of indigent persons, your description should include the information listed as items (1) through (7) in the preceding paragraph; you must quantify the percentage of your clients who are indigent persons (or organizations qualifying under Commentary 2.3.3 above) and the percentage of the persons who would benefit from the services who are indigent persons. Explain the basis of this information. You need not disclose information protected by the attorney-client privilege.

If some portion of your legal services are for the benefit of a group or class of persons beyond your specific clients and are not primarily for the benefit of indigent persons, identify the percentage of overall services provided in such matters and explain the basis of your computation.

DATE: October 4, 2020

TO: Amin Al-Sarraf, Chair, LSTFC Rules Committee

CC: Corey Friedman, Member, LSTFC Rules Committee
Richard Reinis, Member, LSTFC Rules Committee
Judge Brad Seligman, Member, LSTFC Rules Committee

FROM: Salena Copeland, Executive Director, Legal Aid Association of California

SUBJECT: LAAC Comments on Proposed Changes to Rules of the State Bar to Define and Demonstrate Indigency

Thank you so much for the opportunity to comment on these proposals prior to the Rules Committee discussion. LAAC convened legal services leaders from both QLSPs and Support Centers on Wednesday, September 30 and Friday, October 2 in an effort to hear concerns from the community and understand if there was consensus or disagreement about the proposed changes.

In contrast to the relatively uncontroversial proposed changes in the primary purpose memo, this discussion raised issues that reflected somewhat of a split in the opinions of our community members. Below, I will try to summarize what seemed to be consensus agreement and what seemed to be more of a split. Additionally, I encouraged organizations to submit short comments directly to Doan when their organization had a deeper understanding of how the proposed changes might impact their organization (especially with the proposed changes to ILAW reporting).

Definition of Income and Indigency

There was unanimous agreement that the current income threshold of 125% is far too low for organizations. Everyone gave specific examples of other sources of funding, including government grants, which allow for 200% or even higher thresholds. It seems the community would strongly support a change in the rules revision process that would allow a higher threshold (knowing, of course, that a more radical shift would need legislative approval).

One suggestion, which many LSC-funded organizations supported, is to more clearly follow the LSC guidelines for income exceptions under Section 1611.5 of Title 45 of the Code of Federal Regulations: <https://www.law.cornell.edu/cfr/text/45/1611.5>. In practice, this allows a new absolute ceiling of 200%, rather than 125%, when income exceptions are accounted for. All organizations supported clarity around income exceptions, as it seems like there is some gray area in what can and cannot be excluded now.

There also were many organizations that would support increasing the income level to HUD income limits by county (Alameda 2020 example here: <https://www.huduser.gov/portal/datasets/il/il2020/2020summary.odn>) Because many legal aid organizations have grants or contracts that are tied to HUD income levels, they stated that this might make record-keeping easier.

Another alternative, but similar to HUD, would be to tie it again to county comparisons to Area Median Income, but instead of the 80% AMI for HUD, another amount, such as 50 or 60%, which is still significantly higher than the 125% of poverty level currently used. It also takes into account regional differences income and expenses.

Yet another alternative, which our community has discussed for over a decade (at least as long as my legal aid career) is just changing the threshold through legislative action to 200% of poverty. I note, though, that this does not take into account regional differences, and it is lower than 50% of AMI (and therefore lower than “very low income limits” under HUD).

There was some discussion, as well, about the difference between the threshold allowed by pro bono organizations and by those that do not receive the pro bono allocation. If a client at 150% of poverty is served by Organization A without a pro bono allocation, services to the client do not count as a qualifying expense. But if the client received the same services at Organization B (with a pro bono allocation) the services count. Organizations understand this is a statutory definition, but wanted to point out the practical implications.

It may help to create charts for the Rules Revision Committee discussion to show what these various income levels would mean for a family of 4. It may also help to add the data point of the average cost of a 2 bedroom apartment by region, if you are highlighting AMI based on a couple of regions.

I think this is a discussion that deserves longer input and legislative involvement, but it is clear that the community *does* support an increase to recognize that there are people who are very low income that the organizations are already serving, but the organizations cannot count services to those people for the purpose of IOLTA.

Indigency and Children

One issue that came up briefly, but for which we could not establish a clear recommendation, is that the community would like a little more guidance on establishing indigency for youth clients. Some QLSPs represent youth with zero income, but they would appreciate more guidance that that determination is appropriate.

Definition of Project for the Purposes of Pro Bono Work

One issue that came up in this discussion, and I hope to have a longer comment prepared by the meeting, is on the definition of “project” for the purposes of counting a higher income level for eligible clients. Although this is related to the discussion above, I am separating it out because it is an issue of statutory interpretation.

This came up in the context of a support center that constantly has to figure out when they are co-counseling with multiple QLSPs whether a client at a given income level is coming from a pro bono allocation organization or a non-pro bono allocation organization to see if the work would count as qualifying. Because there is some fluidity to the pro bono allocation (not all organizations get it year after year, and some may newly be awarded the allocation), it just becomes a tracking challenge.

In the statute, it states, “With regard to a project that provides free services of attorneys in private practice without compensation, ‘indigent person’ also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code.”

We understand that State Bar staff has interpreted “project” in this section to mean “an organization that receives the pro bono allocation” rather than a more broader definition of either a subproject of a larger organization or any nonprofit project (including those who do not receive the pro bono allocation) that is using pro bono services to serve that client. Although there was not broad consensus on this topic, it did seem that many organizations believed that if the client is being served by the pro bono “project” of a larger legal aid organization, even if they do not receive the pro bono allocation, perhaps the client should count as indigent for the purposes of qualified expenditures.

ILAW recommendations

The community was in strong support of all three of the proposed changes, with minor modifications.

1. Only requiring completion of the ILAW report if the amount of time devoted to these activities exceeds the lesser of the following: 10 percent of the organization’s legal services in a given year, or 100 hours (cumulatively), as determined by the organization; and
2. Allowing the use of internal data to provide justification for the activity if independent data is not available. One example would be for the organization to quantify the percentage of its indigent clients who experienced a particular problem in the past few years (as reported in its State Bar Case Summary Report) to demonstrate a nexus with the legal issue now being addressed through an impact litigation case or advocacy activity; and/or
3. Demonstrating disproportionate impact to indigent persons based on the nature of the activity, and—assuming the activity is successful in achieving its aims—the specific anticipated outcomes as they relate to the needs of indigent persons. While the intent behind the activity is certainly important, the working group believes that it needs to be anchored by relevant and current

information regarding the needs of indigent persons in the community served by the activity, even if these activities are not conducive to quantifying the percentage served who are indigent.

As to #1, we suggest changing to the “greater” of the following rather than the lesser. Some speakers on our call were concerned that leaving it as the “lesser” would make it unfair to smaller organizations that might have to report a larger number of activities than larger organizations that had many projects below both thresholds, due to the total number of activities. Interestingly, what some complained of was the mis-match between some organizations reporting a coalition activity as rising to the ILAW threshold, but other organizations within that coalition not reporting the activity, so guidance on how to report or not for coalitions would be helpful. One attorney stated that she likely spent 100 hours on the ILAW report alone, ensuring that their coalition activities matched with others on top of the organization’s reporting on their individual activities. I am certain this is not what State Bar staff intended!

Generally, as to #1, it seems like organizations understand the need to have some way to make sure that State Bar staff know this work is qualifying work and for qualifying clients, but they all felt it would be easier if they reported fewer activities – and easier on State Bar staff.

As to #2, there was broad support. I believe, from my past attendance at LSTFC meetings, that this is frequently allowed, but it is not clearly defined for all programs.

As to #3, again, there was broad support. They suggested a revision to include activities intended to prevent homelessness – for example, impact litigation or policy work that would help keep people in their homes or help open up access to government benefits, even if many of those who would be helped might be over the current 125% of poverty level (but if the organization failed in the litigation or advocacy work, the intended beneficiaries of the work would fall below the threshold). There was also a brief discussion of disproportionate impact in the area of addressing domestic violence. Although intimate partner violence happens at all income levels, the economic impact of the violence disproportionately impacts those at the lowest income level and who are eligible for IOLTA services.

I suspect that you will receive a few more comments prior to the October 16 meeting. Additionally, once the final memo is posted on the meeting portal, we may have updated comments.

Thank you so much for the opportunity to review this draft memo and for all your work to try to make this reporting easier on both State Bar staff and legal aid staff. I look forward to the discussion.

October 2, 2020

TO: Doan T. Nguyen, Acting Program Manager, Office of Access & Inclusion

RE: Public Advocates Comments on September 23, 2020 Indigency Codification Memo

Thank you for the opportunity to provide feedback on the September 23 memo on “Proposed Changes to Rules of the State Bar to Define and Demonstrate Indigency.” We particularly appreciate staff’s thoughtful attention to clarifying the guidance related to qualified Impact Litigation and Advocacy Work (ILAW).

We believe the framework articulated at the beginning of the memo is the right approach — that is, to provide a menu of options for qualified legal services projects (QLSPs) to demonstrate that they are providing services to indigent persons when working on behalf of a group or class of persons. This approach recognizes the different ways in which QLSPs provide free civil legal services to indigent persons, from direct services to impact litigation and legal advocacy, and combinations of these approaches.

We would like to comment on the three options proposed for ILAW reporting on page 7. We agree with staff’s statement of the underlying rationale to allow grant recipients to engage in broad, impactful work while ensuring that these services primarily benefit indigent persons, as well as the intent to overcome the hurdle of quantification that current guidance presents.

We are in general support of the three options presented on page 7. Our specific comments are as follows:

1. The three options on page 7 are related to one another with “and/or.” The context makes it clear that you chose that language to ensure that a program may utilize any one of these options alone, but also that a program may rely on two, or all three, as applicable. We support this approach and ask that it be made more explicit in the final guidance, due to the potential ambiguity of “and/or.”
2. Option 2 (use of internal data) gives one example, which is an appropriate one. However, we believe there are other related scenarios which would also fit the category. For example, many non-legal community-based organizations have access to data about the needs of their indigent members or indigent community members more broadly (e.g., through a renter helpline or clinic or a survey of member/community needs). Data shared with legal services organizations from such groups should also be a recognized basis for satisfying this option. We also recommend explicitly allowing legal organizations that focus on impact litigation and legal advocacy but do not provide direct services to rely on data from direct-services legal organizations within their service area.
3. Under Option 3 (disproportionate impact to indigent persons), the proposal calls for “relevant and current information” that need not be quantified. We support this provision. As we noted in our previous comments, many matters that we and other IOLTA attorneys take on address urgent needs of indigent people, and while they may also confer some benefit on others they disproportionately benefit indigent residents precisely because of the conditions associated with their poverty. For instance, law-reform litigation or advocacy aimed at protecting indigent

renters from eviction provides an enormous benefit to indigent renters, who are far more likely than other renters to be rendered homeless by eviction; therefore, even if this work may provide some benefit to non-indigent renters, who would experience much less severe harms as a result of eviction, it is properly understood as providing a disproportionate benefit to indigent renters, even if a majority of renters are non-indigent.