

LEGAL SERVICES TRUST FUND COMMISSION
RULES COMMITTEE MEETING
Meeting Summary and Action Items
Friday, September 24, 2021, 12:00 p.m. – 3:00 p.m.
State Bar of California (Conference Call via Zoom)

Roll Call

Members Present

Chair Amin Al-Sarraf
Catherine Blakemore
Erica Connolly
Corey Friedman
Jim Meeker

Liaisons

Salena Copeland (Legal Aid
Association of California)
Bonnie Hough (Judicial Council
of California)
Zach Newman (Legal Aid
Association of California)

Staff

Brady Dewar
Elizabeth Hom
Chris McConkey
Deborah McReynolds
Doan Nguyen
Dan Passamaneck
Kim Warmesley

Advisors

Hon. Brad Seligman

Members Absent

Louise Bayles-Fightmaster

OPEN SESSION

The chair called the meeting to order at 12:04 p.m.

I. ROLL CALL

Roll call was taken, and quorum was established.

II. CALL FOR PUBLIC COMMENT

The chair invited members of the public to comment on any items on the agenda.

Jocelyn D. Larkin, Executive Director of the Impact Fund, addressed Item IV.B.

III. CONSENT

A. Approval of Meeting Summary and Action Items from August 24, 2021, Meeting

The committee approved the August 24, 2021, meeting summary and action items by unanimous roll call vote (Meeker moved, Blakemore seconded).

IV. DISCUSSION AND ACTION ITEMS

A. Discuss and Approve Recommendations Regarding Exchanged Funds

The committee held this item to discuss later in the meeting.

B. Discuss and Approve Recommendations Regarding Passthrough Funds

Senior Program Analyst Dan Passamaneck thanked the commission's passthrough working group members and Liaison Copeland for their role in developing staff's recommendations. Staff presented about the regulatory structure and process for passthrough funds. It also described how these funds can affect eligibility for awards, their differences from exchanged funds, and proposed revisions for exchanged funds rules.

Staff presented about State Bar Rule 3.671's provisions regarding "primary purpose and function" determinations. The rule creates a presumption of primary purpose eligibility for Interest on Lawyers' Trust Accounts (IOLTA) funding that looks at organizational spending on qualified legal services project (QLSP) or support center activities. The current process considers each organization's total corporate spending excluding non-cash and passthrough spending. Then it determines the organization's qualified expenditures (QEs) and QE ratio.

Staff determines whether to apply the IOLTA funding formula to the applicant as a QLSP or support center. Support centers receive equal shares of those funds available to support centers. For QLSPs, staff deducts IOLTA, Equal Access Fund, Shriver, and exchanged monies that other programs claim. Exchanged funds are those that one QLSP gives to another QLSP.

The committee discussed why currently QLSPs but not support centers deduct certain exchanged funds on the IOLTA application. The funding formula is different for support centers such that exchanged funds would not influence their award figures. Nonetheless, staff will look into the historical reason for this difference in the applications.

Currently, the IOLTA application directs applicants to deduct passthrough dollars when the program has no oversight of the funded work. In January, staff surveyed programs about whether they have passthrough funds. Fifty-two programs participated. Fifteen QLSPs reported 58 passthroughs. Staff concluded that both QLSPs and support centers make subgrants that they consider to be passthroughs, using funds from a variety of sources.

Staff described some issues with the current definition of passthrough spending. There are missing definitions, inconsistent terms, and areas where the rules are too focused. Missing definitions include "outside source" and "restrictions requiring passthrough of specified amount". Inconsistent terms include "organization" and "funded work". In some areas, the current rules are so focused that they exclude some types of passthroughs.

Staff presented recommendations from its memo for today's meeting, namely that passthrough spending be transactions that meet one of the following criteria:¹

¹ Staff's September 24, 2021, memo is available at <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000028067.pdf>.

a) Funds received from an outside source under terms or conditions that require those funds to be paid out to an external sub-recipient or category of sub-recipients and which allow the applicant no oversight or control over who receives the passthrough funds or the execution of the funded work. If the applicant organization is claiming the expenditure as a passthrough under this criteria, administrative expenses related to the management and disbursement of these funds must be deducted as non-qualifying expenditures; or

b) Funds received pursuant to a fiscal sponsorship relationship where the applicant organization is providing funding to a sub-recipient that is an unincorporated entity unable to receive the funds directly and where the applicant organization exercises oversight and control over the sub-recipient. If the applicant organization is claiming the expenditure as a passthrough under this criteria, administrative expenses related to the fiscal sponsorship must be deducted as non-qualifying expenditures; or

c) Funds received from an outside source under terms or conditions that require those funds to be paid out to assist individuals directly based on criteria set by the provider of the funds, and which require the organization to exercise oversight or control over how the funds are distributed and continued oversight over how the individuals spend the funds. If the applicant organization is claiming the expenditure as a passthrough under this criteria, administrative expenses related to the selection, disbursement, and oversight of the direct assistance funds must be deducted as non-qualifying expenditures; or

d) Funds received from an outside source under terms or conditions that require those funds to be granted to an external sub-recipient or category of sub-recipients and which allow the applicant organization oversight over the grant selection process, but no oversight or control over execution of the funded work. If the applicant organization is claiming the expenditure as a passthrough under this criteria, administrative expenses related to the management and disbursement of these funds must be deducted as non-qualifying expenditures.

Liaison Copeland noted that staff's examples for this recommendation are helpful. Judge Seligman recommended that staff's examples be available to programs.

The committee discussed instances where an organization is providing case assistance or vouchers to individuals (e.g. vouchers to pay for legal help) and sought clarification about the term "oversight or control" in subsection (a). Following discussion, the committee replaced the word "oversight" with "discretion" since "oversight" was too ambiguous.

The chair took additional public comment at this time.

Alison Kamhi, Supervising Attorney at Immigrant Legal Resource Center, addressed item IV.B.

The committee discussed whether the phrase “and continued oversight over how the individuals spend the funds” might be unnecessary. The intention of (c) is to exempt from passthroughs situations where the organization maintains control over the services that the subgrants fund.

Staff noted that part (a) covers situations where a funder tells the program that it must give another entity part of the funds without any discretion on the program’s part. Part (b) covers fiscal sponsorships. Part (c) covers direct assistance payments. Part (d) covers situations where the program selects grantees without overseeing their work.

In part (c), the committee considered whether the word “may” should appear before “require” in “and which require the organization to exercise oversight or control over how the funds are distributed...”. Staff proposed “regardless of whether” instead.

In part (d), the committee discussed whether to delete “that is an unincorporated entity unable to receive the funds directly”. The committee also discussed whether to add “or fiscal agency relationship” after “Funds received pursuant to a fiscal sponsorship...”. Staff noted the need to define “fiscal agent” if adding the latter.

The chair took additional public comment at this time.

Amy Daniewicz, Grant Program Director at Impact Fund, addressed item IV.B.

Staff expressed concern about adding “fiscal agency relationship” to (d) without giving programs a chance to evaluate that proposal. The committee discussed condensing the four sections into three sections in the following order: (a), (d), and then (c).

Discuss and Approve Recommendations Regarding Exchanged Funds (continued)

Staff reported that IOLTA applications were revised in 2018 to include a line for reporting and excluding exchanged funds. Review of the data from the first three years of applications indicates that QLSPs and support centers seem to be categorizing similar subgrants differently resulting in a variance of about \$64 million between the two types of organizations.

Staff presented about strengthening exchanged fund procedures. Programs provided the feedback to staff that they agree with the working group’s recommendation to codify the current exchanged funds procedures for QLSPs. Providers also agree with the recommendation to extend the exchanged funds reporting requirements to all applicants.

Staff presented proposed revisions to State Bar Rule 3.671, regarding applicants' primary purpose and function. The revision would change the words "exempt from the" to "not deducted as" in 3.671(C)(2)(c). Liaison Copeland noted that if a program's situation were slightly different, then it might fall out of the scope of these revisions.

The committee turned to staff's proposed resolution. The committee approved the following resolution by majority roll call vote (Connolly moved, Friedman seconded):

RESOLVED, that the Rules Committee of the Legal Services Trust Fund Commission approves the following working group recommendations related to the definition and treatment of exchanged funds:

Exchanged funds are funds paid by any applicant for IOLTA grants to any other applicant. Exchanged funds shall be administered in the application process as follows:

- a) If both the payor and the recipient are QLSPs, only one may count exchanged funds for purposes of calculating grant allocations. Absent a written agreement that states otherwise, funds exchanged between two QLSPs shall be credited to the recipient for purposes of determining grant allocations.
- b) Exchanged funds will be considered for eligibility purposes for both the payor and recipient for purposes of this rule.
- c) The following funds are not deducted as exchanged funds:
 - i. IOLTA, Equal Access Fund, Shriver Grant, or other funds that do not count toward IOLTA grant allocations by statute, rule, or their own terms.
 - ii. Funds exchanged by or with SCs, because there is no impact on grant allocations.

The vote was as follows:

Yes (4): Al-Sarraf, Connolly, Friedman, Meeker.

No (0): None.

Abstention (0): None.

Absent (2): Bayles-Fightmaster, Blakemore.

Staff explained why support centers should report on exchanged funds as well. It would be more equitable vis-à-vis QLSPs and provide the State Bar with valuable information. The committee then drafted a resolution to implement this.

The committee approved the resolution by majority roll call vote (Connolly moved, Friedman seconded):

RESOLVED, that SCs be treated similarly to QLSPs in reporting Exchanged Funds.

The vote was as follows:

Yes (4): Al-Sarraf, Connolly, Friedman, Meeker.

No (0): None.

Abstention (0): None.

Absent (2): Bayles-Fightmaster, Blakemore.

Program Manager Nguyen described next steps for the Rules Committee. Staff recommend spending the committee's meeting in November on passthroughs and planning for next year. This would postpone defining "civil legal services" and "primary purpose" until next year.

V. ADJOURN

There being no other business, the meeting adjourned at 2:31 p.m.