



The State Bar of California

DATE: February 24, 2022

TO: Legal Services Trust Fund Commission Rules Committee

FROM: Catherine Blakemore, Legal Services Trust Fund Commission Rules Committee
Erica Connolly, Legal Services Trust Fund Commission Rules Committee

SUBJECT: Codification of Grant Administration Practices: Late Submissions of Grant Materials

EXECUTIVE SUMMARY

The Legal Services Trust Fund Commission Rules Committee (Rules Committee) is working to gather, codify, and revise, as necessary and appropriate, the decision points and considerations related to the grants administration process. The purpose of the codification process is to ensure consistency, ease of administration, and clarity for grantee applicants, the commission, and State Bar staff.

This memo presents the Rules Committee working group's recommendations on the following issues regarding late submissions of grant materials:

- Whether and when the commission should accept late grant materials;
- Whether late application materials for discretionary and non-discretionary grants should be treated the same or differently;
- Whether late application materials and late reporting materials should be treated the same or differently; and
- What, if any, penalty should be applied to applicants and grantees that submit late materials.

The working group sought feedback regarding the proposed recommendations from the legal aid community through the Legal Aid Association of California (LAAC) on January 28, 2022. LAAC convened with legal aid organizations and provided a summary of the feedback to the working group on February 10, 2022. The legal aid community requested several changes to the working group's recommendations; the community's requests and the working group's response to each are summarized in the discussion of the working group's recommendations. The working group will present its recommendations, the legal aid community's feedback, and the working group's responses to community feedback to the Rules Committee on February 24, 2022.

BACKGROUND

CODIFICATION PROCESS

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

Commission members form 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 to the legal aid community through the Legal Aid Association of California (LAAC) to obtain feedback. The working group and committee consider the feedback before making a final recommendation to the commission, and in turn, the Board of Trustees. The Board of Trustees must approve any recommendation made by the commission unless it makes a finding in writing that a recommendation conflicts with a statutory, fiduciary, or legal obligation of the State Bar.

GOVERNING AUTHORITIES

Applicants and grantees must comply with requirements set forth in Business & Professions Code sections 6210-6228, State Bar Rules and Appendices, Eligibility Guidelines for Legal Services Projects and Support Centers, General Grant Provisions, and Standards for Financial Management Systems and Audits.

State Bar Rules require timely submissions of grant application and reporting materials. Pursuant to State Bar Rule 3.680, "[t]o be considered for a Trust Fund Program grant, a qualified legal services project or qualified support center seeking a Trust Fund Program grant must submit a **timely and complete application** for funding in the manner prescribed by the Commission," (emphasis added). State Bar Rule 3.680 also requires a budget and budget narrative be "submitted within thirty days of receipt of notice of tentative allocation."

Similarly, State Bar Rule 3.681 provides that "[t]he recipient of a Trust Fund Program grant **must...** (D) annually submit information that describes, in the manner required by the Commission, the grant recipient's maintenance of quality service and professional standards and compliance with program requirements," and "(F) **submit timely quarterly financial reports and any other information** reasonably required by the Commission," (emphasis added).¹

State Bar staff's review of the governing authorities found just one instance in which statute or State Bar Rules give clear direction on processing late submissions. State Bar Rules Appendix A:

¹ State Bar Rules include deadlines for: organizations' appeals for reconsideration when denied funding, commission decisions regarding appeals for reconsideration of denied funding, State Bar staff investigations into complaints against grantees, and grantee and complainant responses to State Bar staff investigations into complaints against grantees. These deadlines, though clear in the governing authorities, are not relevant to the handling of late grant application and reporting materials.

Schedule of Charges and Deadlines includes a deadline for audited or reviewed financial statements, which are due on May 1 of each year. The schedule reads “[u]pon written request, an extension up to the [IOLTA/EAF] application deadline may be granted by the State Bar staff. Upon a showing of extraordinary circumstances², the Commission may grant an extension beyond the application deadline. Under no circumstances shall such extension be granted beyond the date upon which grant allocations are determined.”

To promote compliance with Trust Fund Program requirements, State Bar Rule 3.681(G) allows the commission to charge grant recipients noncompliance fees set forth in the Schedule of Charges and Deadlines “for processing documents that are substantially noncompliant with Trust Fund Requirements or that are late without permission.” However, no language has been added to the Schedule of Charges and Deadlines to include such noncompliance fees for any Trust Fund Program materials.

CURRENT PRACTICE

In the absence of clear guidance on what is considered a “timely and complete” submission, State Bar currently staff defer to the commission and its committees to determine whether late applications will be accepted for review. Late application submissions—regardless of how late they are received after the deadline—are reported to the commission or a committee of its members for discussion and approval. The commission and committees may choose not to accept late application materials but have historically voted to accept them, particularly for IOLTA/EAF grants. The commission has not applied a penalty for late submissions.

For example, State Bar staff reported six late 2022 IOLTA/EAF applications to the Eligibility and Budget Review (EBR) Committee at its June 25, 2021, meeting.³ Five of the late submissions were submitted within one hour of the deadline; the sixth was submitted during the following business day.⁴ Some members of the EBR committee expressed hesitation to deny applicants funding because of a late application while others expressed frustration with applicants failing to meet the deadline without consequence. After discussion, the committee voted 7-3 to accept the six late submissions for consideration. At the November 4, 2021, EBR committee meeting, State Bar staff reported seven late IOLTA/EAF budget proposals which the committee also voted to accept.^{5,6}

² State Bar Rules do not define “extraordinary circumstances.” In 2019, a qualified legal services project (QLSP) was found ineligible for 2020 IOLTA/EAF funding after submitting several late documents including a late audit. The QLSP appealed the determination to the commission and the commission found that health concerns faced by the executive director were the cause of the delays and qualified as “extraordinary circumstances.” In 2020, several organizations were granted extensions because of delays related to the COVID-19 pandemic.

³ The EBR committee is responsible for discussing and approving IOLTA/EAF grant application and reporting materials and making recommendations to the commission.

⁴ See agenda item VI.A, “Action on Acceptance or Rejection of Late Submitted Applications” from the June 25, 2021, EBR committee meeting: <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000027640.pdf>

⁵ See agenda item V.A, “Discussion and Potential Action on Budget-Related Issues: Late Submissions, Purchase of Real Property/Capital Additions, Deviations from Standard Program/Administrative Expense Ratios, Possible Non-Qualifying Activities” from the November 4, 2021, EBR committee meeting: <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000028243.pdf>

⁶ The committee did not discuss State Bar Rule 3.680 requiring budgets and budget narratives to be submitted within 30 days of notice of a tentative allocation. Current office practice is to set budget and budget narrative deadlines approximately 30 days after the release of tentative allocations; however, if the 30-day mark falls on a

Some organizations have repeatedly submitted IOLTA/EDF application materials after the posted deadline. In the 2022 IOLTA/EDF application cycle, two of the six late applications and four of the seven late budgets were submitted by organizations that had submitted late IOLTA/EDF materials in the prior two application cycles (see table). All late applications and budgets were accepted, and the organizations received IOLTA/EDF funding.

| Late IOLTA/EDF Application Materials (2020-2022) | | |
|---|--|--|
| Application Cycle | Late Application Submissions | Late Budget Submissions |
| 2022 | 6 (2 applicants with previous late submission) | 7 (4 applicants with previous late submission) |
| 2021 | 3 (1 applicant with previous late submission) | 3 (1 applicant with previous late submission) |
| 2020 | 1 | 6 (1 applicant with previous late submission) |

Because State Bar staff have the authority to grant extensions for audited and reviewed financial statements, late financial statements go to the EBR committee for approval only if an extension is requested beyond the IOLTA/EDF application deadline. State Bar Rules state that applicants must request these extensions in writing. Since the 2020 application cycle, the EBR committee has granted approximately 25 extensions. Most extensions were granted in response to the COVID-19 pandemic.⁷

After they receive grant funds, grantees are required to submit a series of evaluations and reports detailing their grant spending and activities. State Bar staff have greater discretion in accepting late reporting materials. State Bar staff, the commission, and its committees do not typically reject late evaluations and reports because State Bar staff need to collect and share the data and information provided. State Bar staff occasionally report late submissions to the commission and committees, but office practice varies by grant and reporting item.

DISCUSSION

IMPORTANCE OF TIMELY SUBMISSIONS IN GRANT ADMINISTRATION AND OVERSIGHT

State Bar Rules and commission processes require timely and complete submissions of grant materials for efficient grant-making. Late and incomplete applications create delays for State Bar staff, commissioners, and grantees. They hinder the State Bar and the commission's ability to efficiently process applications and make timely award decisions, calculations, and disbursements. State Bar staff cannot accurately calculate formula grant amounts without a complete list of approved applicants. Delays in calculating award amounts may then delay

weekend or holiday, State Bar staff may set the posted deadline 31-33 days after tentative allocations are released. In 2021, the deadline for budget and budget narratives was set 32 days after tentative allocations were shared with applicants.

⁷ During the 2021 IOLTA/EDF application cycle, in response to the COVID-19 pandemic, State Bar staff and the committee were more flexible when granting extensions. In consultation with the commission, State Bar staff moved the deadline for audited and reviewed financial statements to the IOLTA/EDF application deadline. In effect, all applicants received an automatic "extension" during the 2021 application cycle. The committee granted further extensions beyond the application deadline for 17 organizations.

drafting grant agreements and disbursing grant funds, which affects even applicants that submitted their materials on time.

In addition to application materials, grantee evaluations and reports are an important tool for the commission to ensure grant expenditures and deliverables meet statutory requirements. State Bar staff and the commission engage in thoughtful discussions to identify submission timelines that aim to give grantees sufficient opportunity to compile and report the required information. Timely submission of reporting materials is important to ensuring timely and effective oversight of grant funds.

Finally, a grantee's ability to comply with application and reporting deadlines is one indicator of its administrative capacity. There are concerns that if an organization cannot consistently comply with Trust Fund Program deadlines, it may be a sign of governance and organizational deficiencies. Tracking late submissions and obtaining information about the reasons for those late submissions is therefore a tool for the commission to evaluate and support organizations' administrative capacity.

Despite the importance of timely and complete submissions, the working group recognizes that legitimate reasons for delays may occasionally exist. For example, the State Bar's grant administration platform, SmartSimple, has on occasion had technical issues that prohibited or significantly hindered applicants and grantees from submitting materials right before a deadline. During the COVID-19 pandemic, some qualified legal service projects and support centers also faced unexpected staffing absences that led to difficulties preparing and submitting timely applications and reports.

PROMOTING COMPLIANCE WITH APPLICATION DEADLINES

To promote compliance with State Bar Rules and to provide increased transparency, predictability, and fairness for grantees, the working group recommends codifying a model for reviewing and approving late application materials. For an application to be considered a timely and complete submission, it must be submitted at or before the posted deadline and must be substantially complete; that is, each required question must be answered. Submissions that are not substantially complete by the deadline will be considered late.

The working group recommends providing State Bar staff the discretion—but not the obligation—to **accept** late application, budget, and budget narrative ("application materials") submissions up to one business day after the posted deadline, upon written request by the applicant or grantee.^{8,9} The written request must include an explanation for why the organization failed to submit timely and complete materials. If State Bar staff decline to accept

⁸ The time limit for staff's discretionary authority for submissions on the following business day shall be the same as the posted deadline, i.e., if the materials were due at 5:00 p.m. on a Friday, staff's discretionary authority extends until 5:00 p.m. on the following Monday.

⁹ Current office practice is to set budget and budget narrative deadlines approximately 30 days after the release of tentative allocations, in an effort to conform to State Bar Rule 3.680(E); however, if the 30-day mark falls on a weekend or holiday, State Bar staff may set the posted deadline 31-33 days after tentative allocations are released. The review and approval process proposed in this memo would allow State Bar staff authority to accept submissions up to one business day after the posted deadline.

late application materials, staff would refer it to the relevant committee for review and a decision.¹⁰ Application materials submitted later than one business day would also be referred to the relevant committee. State Bar staff would report all late submissions, including those accepted by State Bar staff, to the committee to track compliance with deadlines.

The working group recommends that committees have the authority to **accept**, **accept with conditions**, or **reject** a late submission.¹¹ Under the proposed model, when determining whether to accept a late submission, and any conditions for late acceptance, State Bar staff and the relevant committee would be tasked with considering the following factors:

- How late after the deadline the submission was received;
- The completeness of the applicant's submission;
- The reasonableness of the applicant's explanation for the late submission;
- Any mitigating factors that the applicant provides to the committee;
- The number of late submissions—of both application and reporting materials—made by the applicant in the preceding three years; and
- Other similar factors State Bar staff and the committee determine are relevant.

Conditional acceptance might include one or more of the following: the committee sending a letter to the organization's governing body to notify them of the late submission; requiring a corrective action plan; requiring additional monitoring; or any other action the committee deems appropriate. The working group believes these types of conditions are tools with which committees can promote compliance with grant requirements, support organizations' administrative and governance capacities, and satisfy the commission's oversight duties.

For audited and reviewed financial statements, the working group recommends maintaining State Bar staff's authority to grant extensions up to the IOLTA/EAF application deadline, as outlined in the State Bar Rules Schedule of Charges and Deadlines. The working group recommends that the committee maintain authority to grant extensions beyond the IOLTA/EAF application deadline upon a showing of "extraordinary circumstances." When "extraordinary circumstances" are not present, the working group recommends the committee have authority to grant an extension with conditions or deny the extension. Conditional extensions might include the committee sending a letter to the organization's governing body to notify them of the late submission, requiring a corrective action plan, requiring additional monitoring, and/or any other similar action the committee deems appropriate.

CONSIDERATION OF DISCRETIONARY VERSUS NON-DISCRETIONARY GRANTS

In addition to IOLTA/EAF grants where awards are allocated based on a statutory formula, several Trust Fund Program grants are discretionary. For discretionary funds, State Bar staff, the commission, and its committees review the merits of submitted applications to determine which applicants receive funding and in what amounts. A common selection criterion in

¹⁰ For IOLTA/EAF applications, the relevant committee is the Eligibility and Budget Review Committee. For discretionary grant funds, the Bank Grants Committee, Homelessness Prevention Funds Committee, and Partnership Grants Committee are the relevant committees that review application materials and determine grant awards.

¹¹ An applicant that is denied IOLTA/EAF funding is entitled to written notice of the denial and may request reconsideration by the commission, per State Bar Rule 3.691.

discretionary grant scoring rubrics is “administration” or “organizational capacity,” a measure of the applicant’s staffing, leadership, and resources. An applicant’s history of compliance with grant requirements is a relevant factor in scoring administrative or organizational capacity; therefore, a history of late submissions may also be considered when evaluating this rubric category.

To maintain consistency across grants, the working group recommends a similar review and approval process for late discretionary grant application materials (applications, budgets, and budget narratives). The working group recommends that staff have the authority to accept late application materials up to one business day after the posted deadline; it also recommends committees have the authority to accept, accept with conditions, or reject a late submission. It is worth noting that committees may be less willing to accept late discretionary grant applications, given the competitive nature of those funding opportunities.¹²

The difference between discretionary and non-discretionary grants, however, would be the applicant’s mechanism for appeal if a late application is rejected. If the commission rejects a late IOLTA/EAF application or otherwise finds an applicant ineligible for IOLTA/EAF funding, the applicant is entitled to a written notice of denial and may request reconsideration by the commission, per State Bar Rule 3.691. By contrast, committees overseeing discretionary grant funds—the Bank Grants Committee, the Homelessness Prevention Funds Committee, and the Partnership Grants Committee—have authority to reject a late application without a formal appeals process.

PROMOTING COMPLIANCE WITH REPORTING DEADLINES

The effects of a late **application** submission are clear; delays in identifying eligible grant recipients create delays in calculating and disbursing funds to applicants. The impact of rejecting a late application is also clear; the applicant is ineligible for funding. On the other hand, the effects of a late **reporting** submission vary by grant.

The reports created by State Bar staff with data from grantee evaluations and financial reports vary in length, content, and audience. Grantee evaluations prior to 2022 were largely used to develop reports to the Judicial Council and the commission to assist those entities in grant oversight. The content and due dates of reports were largely determined by State Bar staff, the Judicial Council, and the commission. Beginning in 2022, the State Bar and Judicial Council must annually report EAF and federally funded grant expenditures and outcomes to the California Department of Finance (DOF). Also beginning in 2022, the State Bar and Judicial Council must provide quarterly reports to DOF on federally funded grants, including the 2021/2022-2024 homelessness prevention (HP III) grants. These new annual and quarterly reporting requirements have firm, non-negotiable deadlines that the State Bar and Judicial Council must adhere to.

Regardless of the audience and time-sensitivity of evaluations and reports, Trust Fund Program requirements direct grantees to timely submit **all** required materials. Grant agreements—

¹² Committees overseeing discretionary grant funds may wish to include on future Requests for Proposals and scoring rubrics that the timeliness of an application may be relevant in the scoring of that application.

contracts signed by State Bar staff and the chief executive and board chair of the organization before grant funds are dispersed—require grantees to submit required evaluations and reports and allow the State Bar to terminate and recover funding if grantees fail to comply.

Because of the importance of timely reporting submissions, the working group considered recommending the same process for handling late evaluations and reports as is recommended for late application materials. However, requiring committee approval to accept reporting materials submitted beyond one business day after the deadline would be particularly onerous for staff and committee members. Committee meeting schedules do not necessarily align with the reporting deadlines for all grants.

Instead, the working group recommends that State Bar staff maintain authority to accept late reporting submissions. State Bar staff should notify the committee of late reporting submissions so they can be considered when evaluating the organization’s administrative and organizational capacity and when determining whether to accept any future late applications from the organization. That is, while the committees would not need to vote to accept late reports and evaluations, committees may be less likely to accept (or accept with conditions) future late application materials from an organization with a demonstrated history of late reports and evaluations. The committee would also have the authority to send a letter to an organization’s governing body, request a corrective action plan, require additional monitoring, or take other action as deemed appropriate by the committee to evaluate the organization’s administrative capacity and support future compliance with Trust Fund Program requirements.

CONSIDERATION OF FINANCIAL PENALTIES

While State Bar Rule 3.681(F) allows the commission to charge fees for documents that are “late without permission,” the working group does not recommend the commission do so. The working group aims to create accountability for late submissions while continuing to maintain a positive relationship between the commission and grantees. Enforcing a financial penalty on grantees, which would negatively impact both the legal services provider and its clients, seems counter to that goal.

LEGAL AID COMMUNITY FEEDBACK

The legal aid community provided several points of feedback which were summarized by LAAC and shared with the working group on February 10, 2022.¹³ LAAC staff indicated that approximately 10 legal aid organizations participated in a feedback call or provided comment to LAAC via email. In addition, LAAC staff solicited feedback from the 11 Legal Services Corporation-funded providers (that also receive IOLTA/EAF funds) in a separate call and they generally concurred.

Extension of State Bar Staff Approval Authority

The legal aid community requested the working group increase the length in which State Bar staff have the authority to accept late submissions from one business day after the posted

¹³ See Attachment B for the preliminary recommendations provided to LAAC on January 28, 2021, and Attachment C for LAAC’s summary of the legal aid community’s feedback provided to the working group on February 10, 2021.

deadline to two business days. LAAC writes “[w]e would like for staff to have discretion for two business days because it gives them more time to seek a remedy (i.e., get an organization to submit late materials). Most applications were merely hours or a day late, and this would facilitate more capacity for [State] Bar staff to communicate with organizations. It could remediate panic and scrambling by the organization, resulting in better applications and more compliance with this new rule.”

The working group is not strongly opposed to extending the length of State Bar staff’s authority to two business days but does not feel additional time is necessary. The working group recommends granting State Bar staff authority to accept late submissions up to one business day after the posted deadline because most late application materials are submitted within that timeframe. In addition, most deadlines are scheduled on Fridays, so under this proposal, State Bar staff would have discretion to accept most application submissions up to three days after the deadline (the weekend, plus the following Monday). Given the amount of time that organizations are typically given to complete application materials (approximately one month), the working group does not believe that the period of State Bar staff discretion needs to be extended an additional business day.

The working group also wishes to clarify that application materials submitted after the posted deadline—whether submitted hours after the deadline, in one business day after the deadline, or in two business days after the deadline—are, and would continue to be, considered late and therefore out of compliance with State Bar Rule 3.680’s requirement of a “timely and complete application.” Thus, the length of State Bar staff’s authority to accept late submissions would not impact a program’s compliance with the rule.

State Bar Staff Reminders and Notifications of Missed Deadlines

The legal aid community requested the working group provide more detail about specific actions taken by State Bar staff to communicate deadlines to organizations. Specifically, “[t]he legal aid community articulated a need for maintaining or creating one-week and day-of reminders as well as immediate communication when they have missed a deadline, within the proposed one- or two-day time period.” The legal aid community did not request such reminders be codified in the language of the proposed rule but asked that they be documented in the memo.

State Bar staff’s current practice is to post the administrative calendar of grant application and reporting deadlines to SmartSimple and share it with organizations via email. Any changes to the administrative calendar or deadlines are posted on SmartSimple and emailed to all organizations. State Bar staff also often include reminders of upcoming application and reporting deadlines in emails to all organizations. After a deadline has passed, State Bar staff’s current practice is to contact organizations that do not submit timely application materials after indicating an intent to apply or do not submit timely required reports. For example, organizations that do not submit an IOLTA/EAF application after submitting an audited or reviewed financial statement are contacted. State Bar staff contact organizations in an effort to assist them with submitting materials as quickly as possible, and State Bar staff intend to continue to send such reminders. However, the working group notes that it is the obligation of applicants and grantees to meet posted deadlines. State Bar staff have no duty to send

reminders, nor should the fact that State Bar staff extends this courtesy to organizations be construed as State Bar staff assuming such a duty. Accordingly, the working group will advise that committees should not view the lack of a State Bar staff reminder as a reasonable explanation for a late submission.

Communication with Organization's Governing Bodies

The legal aid community recommended striking mention of contacting an organization's governing body in response to a late submission, or alternatively requested additional language to indicate that "communication with an organization's board would likely only be used for egregious late applications or when an organization is a repeat late-applicant." The community indicated that "organizations that have multiple late applications should be assisted, not punished, in fixing any repetitive non-compliance. Additional monitoring or other corrective action plans (technical or other support) could avoid punitive steps and ensure that communication between the [State] Bar and those organizations facilitates on-time submission."

The working group included an option for committees to accept late materials with conditions (including contacting an organization's governing body) in an effort to support, not punish, organizations that submit late materials. The working group's recommendation is also an attempt to avoid the draconian consequence of denying untimely applications, potentially resulting in a significant loss of funding. Instead, the working group aims to provide committees with options to promote compliance with deadlines and increase transparency of expectations for organizations.

Conditions imposed by the committee on organizations would be dependent on the circumstances surrounding the late submission, including the length of the delay, the reason for the delay, and the organization's history of late submissions. For example, technical assistance may be preferred for a grantee who has rarely missed a deadline and whose materials are complete. Alternatively, contact with an organization's governing body may be preferred in instances of repeated late submissions or substantially incomplete materials. Such contact with the governing body would aim to ensure sufficient oversight of the organization's administrative functions and improve future compliance with Trust Fund Program requirements.

Relationship Between Late Submissions and the Provision of Legal Services

The legal aid community took issue with an implied connection—stated in the original draft of the working group's memorandum—between late submissions and the quality of legal services provided. While the working group does not necessarily agree with the legal aid community's position that there is no connection between the two, it removed suggestions of a connection from this memorandum. However, the working group notes that a pattern of lateness can be a relevant factor in judging an organization's administrative capacity. Requests for Proposals and scoring rubrics for discretionary grants allow committees and State Bar staff to consider an organization's history of Trust Fund Program compliance when assessing "administration" or "organizational capacity." Similarly, State Bar Rule 3.661(A) requires that the "[c]ommission must monitor and evaluate a recipient's compliance with Trust Fund Requirements and grant terms." A pattern of late submissions would be directly relevant in assessing an organization's

administrative capacity for the purposes of scoring discretionary grants, and to the commission's oversight activities for non-discretionary funds.

Consideration of Mitigating Circumstances

The legal aid community requested that mitigating factors be considered when State Bar staff and the committee evaluate whether to accept, accept with conditions, or reject late application materials. The working group incorporated this request. Examples of mitigating factors that a program might wish to bring to State Bar staff or the committee might include (but are not limited to) SmartSimple glitches, internet outages, or other considerations outside of the organization's control.

The legal aid community also indicated that mitigating factors outside of the organization's control might impact their ability to submit timely audited and reviewed financial statements. The community suggested "automatic extensions (to the extent the rule allows) when a third party (auditor) is contributing to the lateness..." The working group does not recommend incorporating automatic extensions. If difficulties with a third party constitute extraordinary circumstances, the committee has the authority to grant extensions beyond the IOLTA/EAF application deadline. If difficulties with a third party do not constitute extraordinary circumstances, the committee would have the authority to grant an extension with conditions. Conditions might include (but are not limited to) requesting that the organization submit an audit schedule or a confirmation letter when the organization secures a new auditor, if necessary.

Rejection of Particularly Late Submissions

The working group considered recommending State Bar staff be given authority to reject particularly late submissions—for example, those submitted over 15 business days (3 weeks) after the posted deadline and solicited community feedback on the idea. The legal aid community was not immediately opposed, but the working group ultimately decided this authority was not necessary. The working group notes, however, that if an application is submitted so late that it would be impracticable to administer funding on time, that application would likely be very disfavored by the relevant committee.

WORKING GROUP RECOMMENDATIONS

The working group's recommendations are summarized below:

- A submission that is not substantially complete by the posted deadline is late.
- For late **audited and reviewed financial statements**...
 - State Bar staff maintain the authority to grant extensions up to the IOLTA/EAF application deadline.
 - The committee maintains the authority to grant extensions beyond the IOLTA/EAF application deadline upon a showing of extraordinary circumstances. In cases without extraordinary circumstances, the committee may grant an extension with conditions or deny an extension.
- For late **application materials** (applications, budgets, and budget narratives)...
 - State Bar staff may—but are not obligated to—accept late submissions up to one business day after the posted deadline, upon written request and an explanation

of the delay. State Bar staff must report late submissions, including those accepted, to the committee. If State Bar staff do not accept the late submission, State Bar staff must provide its recommendation to the relevant committee for consideration.

- The committee may accept, accept with conditions, or reject submissions that are submitted beyond one business day after the posted deadline or that are submitted up to one business day after the posted deadline but not accepted by State Bar staff, upon written request and an explanation of the delay.
- When evaluating whether to accept the submission, State Bar staff and the committee should consider how late after the deadline the submission was received, the completeness of the submitted application, the reasonableness of the applicant's explanation for the delay, any mitigating factors that the applicant provides to the committee, the number of late submissions—of both application and reporting materials—made by the applicant in the last three years, and other similar factors State Bar staff and the committee determine are relevant to their decision.
- For late submissions of **reporting materials** (reports and evaluations)...
 - State Bar staff maintain authority to accept late submissions, upon written request and an explanation of the delay. State Bar staff must report late submissions, including those accepted, to the committee.
 - Upon a report of late submissions, the relevant committee has the authority to take action it deems appropriate to evaluate the organization's administrative capacity and support future compliance with Trust Fund Program requirements. Such action may include sending a letter to the organization's governing body, requesting a corrective action plan, requiring additional monitoring, or any other action the committee deems appropriate.
- A history of late submissions—of both application and reporting materials—may be a relevant factor in determining an organization's administrative or organizational capacity for the purposes of evaluating discretionary grant applications, and in assessing overall compliance with Trust Fund Program requirements.

See Attachment A for proposed rule revisions. This is not the final recommended rule language but rather a reference point for discussing specific modifications.

ATTACHMENT LIST

- A.** Proposed Revisions to State Bar Rules
- B.** Working Group Preliminary Recommendations Memorandum to the Legal Aid Association of California, January 28, 2022
- C.** Legal Aid Association of California Community Feedback Regarding Working Group Preliminary Recommendations, February 10, 2022

Article 3. Applications and distributions

Rule 3.680 Application for Trust Fund Program grants

To be considered for a Trust Fund Program grant, a qualified legal services project or qualified support center seeking a Trust Fund Program grant must submit a timely and complete application for funding in the manner prescribed by the Commission. The applicant must agree to use any grant in accordance with grant terms and legal requirements.

(A) A qualified legal services project must meet statutory criteria.

(B) A qualified support center must agree to offer support services in two or more of the following ways: consultation, representation, information services, and training. The board of directors of the support center must establish priorities for providing such services after consulting with legal services attorneys and other relevant stakeholders.

(C) A support center not in existence prior to December 31, 1980 must demonstrate that it is deemed to be of special need by a majority of qualified legal services projects in accordance with Trust Fund Program procedures. Upon request, the Commission must make available to the applicant a list of all the names and addresses of qualified legal services projects.

(D) A nonprofit corporation that believes it meets the criteria for a qualified legal services project and qualified support center may submit two applications, one as a project and one as a support center, indicating in each application whether it is to be considered the primary or secondary application. The Commission will consider the secondary application only if the primary application is not approved. No applicant may receive a grant as a qualified legal services project and as a qualified support center.

(E) An application must include

(1) an audited financial statement by an independent certified public accountant for the fiscal year that concluded during the prior calendar year. A financial review in lieu of an audited financial statement may be submitted by an applicant whose gross corporate expenditures were less than the amount specified in the Schedule of Charges and Deadlines;

(2) information about the maintenance of quality service and professional standards and how the applicant maintains standards, such as internal quality control and review procedures; experience and educational requirements of attorneys and paralegals; supervisory structure, procedures, and responsibilities; job descriptions and current salaries for all filled and unfilled professional and management positions; and fiscal controls and procedures.

(3) a budget and budget narrative, which must be submitted within thirty days of receipt of a notice of tentative allocation, explaining how funds will be used to provide civil legal services to indigent persons, especially underserved client groups such as, the elderly, the disabled, juveniles, and non-English-speaking persons within the applicant's service area; and

(4) information about program activities, such as substantive practice areas, extent and complexity of services, a summary of litigation, and populations served.

(F) State Bar staff may accept application materials, except for audited financial statements or financial reviews, which are addressed in Appendix A of these Rules, submitted up to one business day after the posted deadline. The Commission or a committee of its members may accept, accept with conditions, or reject application materials that are submitted beyond one business day after the posted deadline or that are submitted up to one business day after the posted deadline but not accepted by State Bar staff. Factors that the Commission or committee may consider when determining whether to accept a late application include, but are not limited to,

(1) How late after the deadline the submission was received;

(2) The completeness of the submission;

(3) The reasonableness of the applicant's explanation for the delay;

(4) Any mitigating factors that the applicant provides to the committee; and

(5) The number of late application or reporting submissions made by the grantee applicant in the preceding three years.

Appendix A: Schedule of Charges and Deadlines

| <i>Rule</i> | <i>Description</i> | <i>Amount</i> | <i>Deadline</i> |
|-------------|---|---------------|--|
| 3.680(E)(1) | <p>Threshold amount of gross corporate expenditures requiring submission of an audited financial statement.</p> <p>Deadline for applicant to submit an audited or reviewed financial statement for the fiscal year that concluded during the prior calendar year.</p> | \$500,000 | <p>Not applicable</p> <p>Promptly when available, and no later than May 1. Upon written request, an extension up to the application deadline may be granted by the State Bar staff. Upon a showing of extraordinary circumstances, the Commission may grant an extension beyond the application deadline. <u>If no extraordinary circumstances exist, the Commission may grant an extension with conditions.</u> Under no circumstances shall such extension be granted beyond the date upon which grant allocations are determined.</p> |



The State Bar of California

DATE: January 28, 2022

TO: Salena Copeland, Executive Director, The Legal Aid Association of California

FROM: Catherine Blakemore, Legal Services Trust Fund Commission Rules Committee
Erica Connolly, Legal Services Trust Fund Commission Rules Committee

SUBJECT: Codification of Grant Administration Practices: Accountability for Late Submissions of Grant Materials

EXECUTIVE SUMMARY

The Legal Services Trust Fund Commission Rules Committee (Rules Committee) is working to gather, codify, and revise, as necessary and appropriate, the decision points and considerations related to the grants administration process. The purpose of the codification process is to ensure consistency, ease of administration, and clarity for grantee applicants, the commission, and State Bar staff.

This memo presents a working group of the committee's preliminary recommendations on the following issues regarding accountability for late submissions of grant materials:

- Whether and when the commission should accept late grant materials;
- Whether late application materials for discretionary and non-discretionary grants should be treated differently;
- Whether late application materials and late reporting materials should be treated differently; and
- What, if any, penalty should be applied to applicants and grantees that submit late materials.

The working group is seeking feedback regarding the proposed recommendations from the legal aid community through the Legal Aid Association of California (LAAC). The working group will present the recommendations and the legal aid community's feedback to the Rules Committee on February 24, 2022.

BACKGROUND

CODIFICATION PROCESS

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

Commission members form 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 before making a final recommendation to the commission, and in turn, the Board of Trustees. The Board of Trustees must approve any recommendation made by the commission unless it makes a finding in writing that a recommendation conflicts with a statutory, fiduciary, or legal obligation of the State Bar.

GOVERNING AUTHORITIES

Applicants and grantees must comply with requirements set forth in Business & Professions Code sections 6210-6228, State Bar Rules and Appendices, Eligibility Guidelines for Legal Services Projects and Support Centers, General Grant Provisions, and Standards for Financial Management Systems and Audits.

State Bar Rules require timely submissions of grant application and reporting materials. Pursuant to State Bar Rule 3.680, "[t]o be considered for a Trust Fund Program grant, a qualified legal services project or qualified support center seeking a Trust Fund Program grant must submit a **timely and complete application** for funding in the manner prescribed by the Commission," (emphasis added). State Bar Rule 3.680 also requires a budget and budget narrative be "submitted within thirty days of receipt of notice of tentative allocation."

Similarly, State Bar Rule 3.681 provides that "[t]he recipient of a Trust Fund Program grant **must...** (D) annually submit information that describes, in the manner required by the Commission, the grant recipient's maintenance of quality service and professional standards and compliance with program requirements," and "(F) **submit timely quarterly financial reports and any other information** reasonably required by the Commission," (emphasis added).¹

State Bar staff's review of the governing authorities found just one instance in which statute or State Bar Rules give clear direction on processing late submissions. State Bar Rules Appendix A: Schedule of Charges and Deadlines includes a deadline for audited or reviewed financial

¹ State Bar Rules include deadlines for: organizations' appeals for reconsideration when denied funding, commission decisions regarding appeals for reconsideration of denied funding, State Bar staff investigations into complaints against grantees, and grantee and complainant responses to State Bar staff investigations into complaints against grantees. These deadlines, though clear in the governing authorities, are not relevant to the handling of late grant application and reporting materials.

statements, which are due on May 1 of each year. The schedule reads “[u]pon written request, an extension up to the [IOLTA/EAF] application deadline may be granted by the State Bar staff. Upon a showing of extraordinary circumstances², the Commission may grant an extension beyond the application deadline. Under no circumstances shall such extension be granted beyond the date upon which grant allocations are determined.”

To promote compliance with Trust Fund Program requirements, State Bar Rule 3.681(G) allows the commission to charge grant recipients noncompliance fees set forth in the Schedule of Charges and Deadlines “for processing documents that are substantially noncompliant with Trust Fund Requirements or that are late without permission.” However, no language was ever added to the Schedule of Charges and Deadlines to include such noncompliance fees for any Trust Fund Program materials.

CURRENT PRACTICE

In the absence of clear guidance on what is considered a “timely and complete” submission, State Bar staff defer to the commission and its committees to determine whether late applications will be accepted for review. Late application submissions—regardless of how late they are received after the deadline—are reported to the commission or a committee of its members for discussion and approval. The commission and committees may choose not to accept late application materials but have historically voted to accept them, particularly for IOLTA/EAF grants. The commission does not apply a penalty for late submissions.

For example, State Bar staff reported six late 2022 IOLTA/EAF applications to the Eligibility and Budget Review (EBR) Committee at its June 25, 2021, meeting.³ Five of the late submissions were submitted within one hour of the deadline; the sixth was submitted during the following business day.⁴ Some members of the EBR committee expressed hesitation to deny applicants funding because of a late application while others expressed frustration with applicants failing to meet the deadline without consequence. After discussion, the committee voted 7-3 to accept the six late submissions for consideration. At the November 4, 2021, EBR committee meeting, State Bar staff reported seven late IOLTA/EAF budget proposals which the committee also voted to accept.^{5,6}

² State Bar rules do not define “extraordinary circumstances.” In 2019, a qualified legal services project (QLSP) was found ineligible for 2020 IOLTA/EAF funding after submitting several late documents including a late audit. The QLSP appealed the determination to the commission and the commission found that health concerns faced by the executive director were the cause of the delays and qualified as “extraordinary circumstances.” In 2020, several organizations were granted extensions because of delays related to the COVID-19 pandemic.

³ The EBR committee is responsible for discussing and approving IOLTA/EAF grant application and reporting materials and making recommendations to the commission.

⁴ See agenda item VI.A, “Action on Acceptance or Rejection of Late Submitted Applications” from the June 25, 2021, EBR committee meeting: <https://board.calbar.ca.gov/docs/agendaltem/Public/agendaitem1000027640.pdf>

⁵ See agenda item V.A, “Discussion and Potential Action on Budget-Related Issues: Late Submissions, Purchase of Real Property/Capital Additions, Deviations from Standard Program/Administrative Expense Ratios, Possible Non-Qualifying Activities” from the November 4, 2021, EBR committee meeting: <https://board.calbar.ca.gov/docs/agendaltem/Public/agendaitem1000028243.pdf>

⁶ The committee did not discuss State Bar Rule 3.680 requiring budgets and budget narratives to be submitted within 30 days of notice of a tentative allocation. Current office practice is to set budget and budget narrative

Some organizations have repeatedly submitted IOLTA/EDF application materials after the posted deadline. In the 2022 IOLTA/EDF application cycle, two of the six late applications and four of the seven late budgets were submitted by organizations that had submitted late IOLTA/EDF materials in the prior two application cycles (see table). All late applications and budgets were accepted, and the organizations received IOLTA/EDF funding.

| Late IOLTA/EDF Application Materials (2020-2022) | | |
|---|--|--|
| Application Cycle | Late Application Submissions | Late Budget Submissions |
| 2022 | 6 (2 applicants with previous late submission) | 7 (4 applicants with previous late submission) |
| 2021 | 3 (1 applicant with previous late submission) | 3 (1 applicant with previous late submission) |
| 2020 | 1 | 6 (1 applicant with previous late submission) |

Because State Bar staff have the authority to grant extensions for audited and reviewed financial statements, late financial statements only go to the EBR committee for approval if an extension is requested beyond the IOLTA/EDF application deadline. State Bar Rules state applicants must request these extensions in writing. Since the 2020 application cycle, the EBR committee has granted approximately 25 extensions. Most extensions were granted in response to the COVID-19 pandemic.⁷

After they receive grant funds, grantees are required to submit a series of evaluations and reports detailing their grant spending and activities. State Bar staff have greater discretion in accepting late reporting materials. State Bar staff, the commission, and its committees do not typically reject late evaluations and reports, because State Bar staff need to collect and share the data and information provided. State Bar staff occasionally report late submissions to the commission and committees, but office practice varies by grant and reporting item.

DISCUSSION

IMPORTANCE OF TIMELY SUBMISSIONS IN GRANT ADMINISTRATION AND OVERSIGHT

State Bar Rules and commission processes require timely and complete submissions of grant materials for efficient grant-making. Late and incomplete applications create delays for State Bar staff, committee and commission members, and the grantees. They hinder the State Bar

deadlines approximately 30 days after the release of tentative allocations; however, if the 30-day mark falls on a weekend or holiday, State Bar staff may set the posted deadline 31-33 days after tentative allocations are released. In 2021, the deadline for budget and budget narratives was set 32 days after tentative allocations were shared with applicants.

⁷ During the 2021 IOLTA/EDF application cycle, in response to the COVID-19 pandemic, State Bar staff and the committee were more flexible when granting extensions. In consultation with the commission, State Bar staff moved the deadline for audited and reviewed financial statements to the IOLTA/EDF application deadline. In effect, all applicants received an automatic “extension” during the 2021 application cycle. The committee granted further extensions beyond the application deadline for 17 organizations.

and the commission's ability to efficiently process applications and make timely award decisions, calculations, and disbursements. State Bar staff cannot accurately calculate formula grant amounts without a complete list of approved applicants. Delays in calculating award amounts may then delay drafting grant agreements and disbursing grant funds, which affects even applicants that submitted their materials on time.

In addition to application materials, grantee evaluations and reports are an important tool for the commission to ensure grant expenditures and deliverables meet statutory requirements. State Bar staff and the commission engage in thoughtful discussions to identify submission timelines that aim to give grantees sufficient opportunity to compile and report the required information. Timely submission of reporting materials is important to ensuring timely and effective oversight of grant funds.

Finally, a grantee's ability to comply with application and reporting deadlines is one indicator of its administrative and organizational capacity as a civil legal services provider. There are concerns that if an organization cannot consistently comply with Trust Fund Program deadlines, it may be sign of other governance and organizational deficiencies which may impact the quality of legal services provided. A process to track and evaluate late submissions could then also be a tool to evaluate broader organizational health.

Despite the importance of timely and complete submissions, the working group recognizes that legitimate delays may occasionally occur. For example, the State Bar's grant administration platform, SmartSimple, has on occasion suffered technical issues that prohibited or significantly hindered applicants and grantees from submitting materials right before a deadline. During the COVID-19 pandemic, some qualified legal service projects and support centers also faced unexpected staffing absences that led to difficulties preparing and submitting timely applications and reports.

PROMOTING COMPLIANCE WITH APPLICATION DEADLINES

To promote compliance with State Bar Rules and to provide increased transparency, predictability, and fairness for grantees, the working group recommends codifying a model for reviewing and approving late application materials. For an application to be considered a timely and complete submission, it must be submitted at or before the posted deadline and must be substantially complete; that is, each required question must be answered. Submissions that are not substantially complete by the posted deadline will be considered late.

The working group recommends providing State Bar staff the discretion to **accept** late application, budget, and budget narrative submissions up to one business day after the posted deadline, upon written request by the applicant or grantee.^{8,9} The written request must include

⁸ The time limit for staff's discretionary authority for submissions on the following business day shall be the same as the posted deadline, i.e., if the materials were due at 5:00 p.m. on a Friday, staff's discretionary authority extends until 5:00 p.m. on the following Monday.

⁹ Current office practice is to set budget and budget narrative deadlines approximately 30 days after the release of tentative allocations, in an effort to conform to State Bar Rule 3.680(E); however, if the 30-day mark falls on a weekend or holiday, State Bar staff may set the posted deadline 31-33 days after tentative allocations are

an explanation why the organization failed to submit a timely and complete application, budget, or budget narrative. If State Bar staff believe a late application should be **rejected** or **conditionally accepted**, staff would refer it to the relevant committee.¹⁰ Materials submitted later than one business day would also be referred to the relevant committee for review and a decision. State Bar staff would report all late submissions, including those accepted by State Bar staff, to the committee to track compliance with deadlines.

The working group recommends that committees have the authority to **accept**, **accept with conditions**, or **reject** a late submission.¹¹ Conditional acceptance might include one or more of the following: the committee sending a letter to the organization's governing board to notify them of the late submission; requiring a corrective action plan; requiring additional monitoring; or any other action the committee deems appropriate. Under the proposed model, when determining whether to accept a late application, State Bar staff and the committee would be tasked with considering the following factors:

- How late after the deadline the submission was received;
- The completeness of the applicant's submission;
- The reasonableness of the applicant's explanation for the late submission;
- The number of late submissions—of both application and reporting materials—made by the applicant in the preceding three years; and
- Other similar factors State Bar staff and the committee determine are relevant to its decision.

The working group is considering recommending that State Bar staff also have the authority to **reject** applications, budgets, and budget narratives that are submitted particularly late – for example, over 15 business days (3 weeks) after the posted deadline. However, the working group has not yet decided on a firm recommendation and invites community feedback on this idea in particular. Allowing staff to reject particularly late materials would disincentivize organizations from submitting applications, budgets, and budget narratives at a time that would substantially delay the grant-making process. If the working group were to recommend this staff authority, organizations that have materials rejected by staff would be able to appeal the rejection to the relevant committee for reconsideration.

For audited and reviewed financial statements, the working group recommends maintaining State Bar staff authority to grant extensions up to the IOLTA/EAF application deadline, as outlined in the State Bar Rules Schedule of Charges and Deadlines. The working group recommends that the committee maintain authority to grant extensions beyond the IOLTA/EAF application deadline upon a showing of “extraordinary circumstances.” When “extraordinary

released. The review and approval process proposed in this memo would allow State Bar staff authority to accept submissions up to one business day after the posted deadline.

¹⁰ For IOLTA/EAF applications, the relevant committee is the Eligibility and Budget Review Committee. For discretionary grant funds, the Bank Grants Committee, Homelessness Prevention Grants Committee, and Partnership Grants Committee are the relevant committees that review application materials and determine grant awards.

¹¹ An applicant who is denied IOLTA/EAF funding is entitled to written notice of the denial and may request reconsideration by the commission, per State Bar Rule 3.691.

circumstances” are not present, the working group recommends the committee have authority to grant an extension with conditions or deny the extension. Conditional extensions might include the committee sending a letter to the organization’s governing board to notify them of the late submission, requiring a corrective action plan, requiring additional monitoring, and/or any other similar action the committee deems appropriate.

CONSIDERATION OF DISCRETIONARY VERSUS NON-DISCRETIONARY GRANTS

In addition to IOLTA/EAF grants where awards are allocated based on a statutory formula, several Trust Fund Program grants are discretionary. For discretionary funds, State Bar staff, the commission, and its committees review the merits of submitted applications to determine which applicants receive funding and in what amounts. A common selection criterion in discretionary grant scoring rubrics is “administration” or “organizational capacity,” a measure of the applicant’s staffing, leadership, and resources. An applicant’s history of compliance with grant requirements is a relevant factor in scoring administrative or organizational capacity; therefore, a history of late submissions may also be considered when evaluating this rubric category.

To maintain consistency across grants, the working group recommends a similar review and approval process for late discretionary grant application materials (applications, budgets, and budget narratives). The working group recommends staff have the authority to accept late application materials up to one business day after the posted deadline¹²; it also recommends committees have the authority to accept, accept with conditions, or reject a late submission. It is worth noting that committees may be less willing to accept late discretionary grant applications, given the competitive nature of those funding opportunities.

The difference between discretionary and non-discretionary grants, however, would be the applicant’s mechanism for appeal if a late application is rejected. If the commission rejects a late IOLTA/EAF application or otherwise finds an applicant ineligible for IOLTA/EAF funding, the applicant is entitled to a written notice of denial and may request reconsideration by the commission, per State Bar Rule 3.691. However, the committees overseeing discretionary grant funds—the Bank Grants Committee, the Homelessness Prevention Grants Fund Committee, and the Partnership Grants Committee—have authority to reject a late application without a formal appeals process.

PROMOTING COMPLIANCE WITH REPORTING DEADLINES

The effects of a late **application** submission are clear; delays in identifying eligible grant recipients create delays in calculating and dispersing funds to applicants. The impact of rejecting a late application is also clear; the applicant is ineligible for funding. The effects of a late **reporting** submission vary by grant.

¹² Like with non-discretionary grants, the working group is considering recommending State Bar staff have the authority to reject discretionary grant applications, budgets, and budget narratives that are submitted particularly late – for example, over 15 business days after the posted deadline. However, the working group has not decided on a firm recommendation and invites community feedback.

The reports created by State Bar staff with data from grantee evaluations and financial reports vary in length, content, and audience. Grantee evaluations prior to 2022 were largely used to develop reports to the Judicial Council and the commission to assist those entities in grant oversight. The content and due dates of reports were largely determined by State Bar staff, the Judicial Council, and the commission. Beginning in 2022, the State Bar and Judicial Council must annually report EAF and federally funded grant expenditures and outcomes to the California Department of Finance (DOF). Also beginning in 2022, the State Bar and Judicial Council must provide quarterly reports to DOF on federally funded grants, including the 2021/2022-2024 homelessness prevention (HP III) grants. These new annual and quarterly reporting requirements have firm, non-negotiable deadlines that the State Bar and Judicial Council must adhere to.

Regardless of the audience and time-sensitivity of evaluations and reports, Trust Fund Program requirements direct grantees to timely submit **all** required materials. Grant agreements—contracts signed by State Bar staff and the organization before grant funds are dispersed—require grantees to submit required evaluations and reports and allow the State Bar to terminate and recover funding if grantees fail to comply.

Because of the importance of timely reporting submissions, the working group considered recommending the same process for handling late evaluations and reports as is recommended for late applications. However, requiring committee approval to accept reporting materials submitted beyond one business day after the deadline would be particularly onerous on committee members. Committee meeting schedules do not necessarily align with the reporting deadlines for all grants.

Instead, the working group recommends that State Bar staff maintain authority to accept late reporting submissions. State Bar staff should notify the committee of late reporting submissions so they can be considered when evaluating the organization's administrative and organizational capacity and when determining whether to accept any future late applications from the organization. That is, while the committees would not need to vote to accept late reports and evaluations, an organization with a demonstrated history of late reports and evaluations may be less likely to receive grant funds in the future. The committee would also have the authority to send a letter to an organization's board, request a corrective action plan, require additional monitoring, or take other action as deemed appropriate by the committee to evaluate the organization's administrative capacity and ensure compliance with Trust Fund Program requirements.

CONSIDERATION OF FINANCIAL PENALTIES

While State Bar Rule 3.681(F) allows the commission to charge fees for documents that are "late without permission," the working group does not recommend the commission do so. The working group aims to create accountability for late submissions while continuing to maintain a positive relationship between the commission and grantees. Enforcing a financial penalty on grantees, which would negatively impact both the legal services provider and its clients, seems counter to that goal.

WORKING GROUP PRELIMINARY RECOMMENDATIONS

The working group's preliminary recommendations are summarized below:

- A submission that is not substantially complete by the posted deadline is late.
- For late **audited and reviewed financial statements**...
 - State Bar staff maintain the authority to grant extensions up to the IOLTA/EAF application deadline.
 - The committee maintains the authority to grant extensions beyond the IOLTA/EAF application deadline upon a showing of extraordinary circumstances. In cases without extraordinary circumstances, the committee may grant an extension with conditions or deny an extension.
- For late **applications, budgets, and budget narratives**...
 - State Bar staff may accept late submissions up to one business day after the posted deadline, upon written request and an explanation of the delay. State Bar staff must report late submissions, even those accepted, to the committee.
 - The committee may accept, accept with conditions, or reject late submissions beyond one business day after the posted deadline, upon written request and an explanation of the delay.
 - When evaluating whether to accept the submission, State Bar staff and the committee should consider how late after the deadline the submission was received, the completeness of the submitted application, the reasonableness of the applicant's explanation for the delay, the number of late submissions—of both application and reporting materials—made by the applicant in the last three years, and other similar factors State Bar staff and the committee determine are relevant to their decision.
 - The working group is considering recommending State Bar staff have authority to reject particularly late submissions – for example, those submitted over 15 business days (3 weeks) after the posted deadline. Organizations whose materials are rejected by staff would be able to appeal the rejection to the relevant committee for reconsideration.
- For late submissions of **reporting materials** (reports and evaluations)...
 - State Bar staff maintain authority to accept late submissions, upon written request and an explanation of the delay. State Bar staff must report late submissions, even those accepted, to the committee.
 - Upon a report of late submissions, the relevant committee has the authority to take action it deems appropriate to evaluate the organization's administrative capacity and ensure compliance with Trust Fund Program requirements. Such action may include sending a letter to the organization's board, requesting a corrective action plan, requiring additional monitoring, or any other action the committee deems appropriate.
- A history of late submissions—of both application and reporting materials—may be a relevant factor in determining an organization's administrative or organizational capacity for the purposes of evaluating discretionary grant applications, and in assessing

overall compliance with Trust Fund Program requirements.

See Attachment A for proposed rule revisions. This is not the final recommended rule language but rather a reference point for discussing specific modifications.

NEXT STEPS

Comments regarding the working group's preliminary recommendations should be sent to Senior Program Analyst Danielle MacRae at Danielle.MacRae@calbar.ca.gov. The working group will receive and review community feedback from LAAC through February 11, 2022, and present its final recommendations at the Rules Committee meeting on February 24, 2022.

ATTACHMENT LIST

A. Proposed Revisions to State Bar Rules

Article 3. Applications and distributions

Rule 3.680 Application for Trust Fund Program grants

To be considered for a Trust Fund Program grant, a qualified legal services project or qualified support center seeking a Trust Fund Program grant must submit a timely and complete application for funding in the manner prescribed by the Commission. The applicant must agree to use any grant in accordance with grant terms and legal requirements.

(A) A qualified legal services project must meet statutory criteria.

(B) A qualified support center must agree to offer support services in two or more of the following ways: consultation, representation, information services, and training. The board of directors of the support center must establish priorities for providing such services after consulting with legal services attorneys and other relevant stakeholders.

(C) A support center not in existence prior to December 31, 1980 must demonstrate that it is deemed to be of special need by a majority of qualified legal services projects in accordance with Trust Fund Program procedures. Upon request, the Commission must make available to the applicant a list of all the names and addresses of qualified legal services projects.

(D) A nonprofit corporation that believes it meets the criteria for a qualified legal services project and qualified support center may submit two applications, one as a project and one as a support center, indicating in each application whether it is to be considered the primary or secondary application. The Commission will consider the secondary application only if the primary application is not approved. No applicant may receive a grant as a qualified legal services project and as a qualified support center.

(E) An application must include

(1) an audited financial statement by an independent certified public accountant for the fiscal year that concluded during the prior calendar year. A financial review in lieu of an audited financial statement may be submitted by an applicant whose gross corporate expenditures were less than the amount specified in the Schedule of Charges and Deadlines;

(2) information about the maintenance of quality service and professional standards and how the applicant maintains standards, such as internal quality control and review procedures; experience and educational requirements of attorneys and paralegals; supervisory structure, procedures, and responsibilities; job descriptions and current salaries for all filled and unfilled professional and management positions; and fiscal controls and procedures.

(3) a budget and budget narrative, which must be submitted within thirty days of receipt of a notice of tentative allocation, explaining how funds will be used to provide civil legal services to indigent persons, especially underserved client groups such as, the elderly, the disabled, juveniles, and non-English-speaking persons within the applicant's service area; and

(4) information about program activities, such as substantive practice areas, extent and complexity of services, a summary of litigation, and populations served.

(F) State Bar staff may accept application materials, except for audited financial statements or financial reviews, which are addressed in Appendix A of these Rules, submitted up to one business day after the posted deadline. The Commission or a committee of its members may accept, accept with conditions, or reject application materials that are submitted beyond one business day after the posted deadline or that are submitted up to one business day after the posted deadline but not accepted by State Bar staff. Factors that the Commission or committee may consider when determining whether to accept a late application include, but are not limited to,

(1) How late after the deadline the submission was received;

(2) The completeness of the submission;

(3) The reasonableness of the delay; and

(4) The number of late application or reporting submissions made by the grantee applicant in the preceding three years.

Appendix A: Schedule of Charges and Deadlines

| <i>Rule</i> | <i>Description</i> | <i>Amount</i> | <i>Deadline</i> |
|-------------|---|---------------|--|
| 3.680(E)(1) | <p>Threshold amount of gross corporate expenditures requiring submission of an audited financial statement.</p> <p>Deadline for applicant to submit an audited or reviewed financial statement for the fiscal year that concluded during the prior calendar year.</p> | \$500,000 | <p>Not applicable</p> <p>Promptly when available, and no later than May 1. Upon written request, an extension up to the application deadline may be granted by the State Bar staff. Upon a showing of extraordinary circumstances, the Commission may grant an extension beyond the application deadline. <u>If no extraordinary circumstances exist, the Commission may grant an extension with conditions.</u> Under no circumstances shall such extension be granted beyond the date upon which grant allocations are determined.</p> |

“The Unified Voice of Legal Services”



February 10, 2022

Legal Services Trust Fund Commission Rules Committee (Rules Committee)
State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Codification of Grant Administration Practices: Accountability for Late Submissions of Grant Materials

To the Legal Services Trust Fund Commission Rules Committee,

I am writing on behalf of the Legal Aid Association of California (LAAC) to provide feedback gathered from our community via email as well as a call on February 4 regarding the January 28 memo pertaining to late submissions of grant materials. We appreciate your invitation to provide this feedback and to hear our community's thoughts and concerns.

LAAC is a statewide membership association of over 100 public interest law nonprofits that provide free civil legal services to low-income people and communities throughout California. LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of low-income and vulnerable populations. LAAC serves as California's unified voice for legal services and is a zealous advocate advancing the needs of the clients of legal services on a statewide level regarding funding and access to justice.

Legal Aid Community's Response to Codification of Grant Administration Practices: Accountability for Late Submissions of Grant Materials Memo

(1) Request: Increase the number of days for acceptance by State Bar staff for late submissions from one to two days.

- **Current proposal:** "State Bar staff may accept late submissions up to one business day after the posted deadline, upon written request and an explanation of the delay."
- **Rationale:** We would like for staff to have discretion for two business days because it gives them more time to seek a remedy (i.e., get an organization to submit late materials). Most applicants were merely hours or a day late, and this would help facilitate more capacity for Bar staff to communicate with organizations. It could remediate panic and scrambling by the organization, resulting in better applications and more compliance with this new rule.

- **Other issues with this rule:** We also recommend amending the language to make it clearer in regard to the distinction between this bullet point and the one following it, in terms of the precise timeline. Specifically, does this rule constitute automatic acceptance or staff discretion despite an application being one (or two, as we propose) day(s) late? It reads this way in connection with the bullet point that follows (i.e., after one (or two) day(s) late). Greater clarity on scope of staff authority during the first couple days versus beyond would be helpful.

(2) Request: In connection with (1) above, we would like to see more specific articulation of reminders and grace periods. We note that this does not need to be in the rule, but it is relevant in the discussion of late applications. We understand that this is the current practice of State Bar staff. Most prominently, there should be a generalized and/or personalized notice provided to organizations within a specific amount of time of missing a deadline. We believe this post-deadline notice is akin to many notice requirements in a variety of laws.

- **Current Proposal:** Same section as (1) above.
- **Rationale:** Legal aid community members would like to have more language around specific actions taken by Bar staff to communicate with organizations—this does not need to be in the rule, but can be part of the report that staff give to commissioners when staff reports on late applicants. The legal aid community articulated a need for maintaining or creating one-week and day-of reminders as well as immediate communication when they have missed a deadline, within the proposed one- or two-day time period. LAAC understands that State Bar staff members already do this. Namely, we heard about how important it is for organizations to receive communication that the deadline had passed and that immediate submission was needed. They reported greatly appreciating when Bar staff reached out to them individually in the past. Thus, maintaining the current practice or creating (where necessary) automatic reminder emails at these intervals, sent to multiple organizational contacts, would be positive. Again, we heard that State Bar staff already sends emails, and the problem may likely be with a need to have more “secondary contacts” on Smart Simple. Organizations that shared with LAAC that they were late explained that it tended to have to do with staffing changes and clerical, scheduling, or other communication issues, primarily during the pandemic—issues that could be resolved, at least in part, through continuing a practice of automated reminders.
- **Other issues with this rule:** Connected to this, a major theme is that they want to be seen as acting in good faith and that there should be a presumption that there is a legitimate reason for the delay (which would, of course, be provided in writing as described in the proposal).

(3) Request: First, any specific discussion of an organization's board could be removed. Second, while not in the actual rule as proposed but discussed elsewhere in the memo, we do not believe there is a connection between the fact that an organization is one or two days late in submitting their materials and the quality of the legal services provided by the attorneys and other staff at that legal aid nonprofit, and one should not be intimidated (i.e., references to “organizational health”). Our recommendation is to strike mentioning the board as well as

refrain from connecting service quality with lateness. In the alternative, the Bar could create language to say that communication with the organization's board would likely only be used for egregious late applications or when an organization is a repeat late-applicant. Additionally, programs seemed to view lateness as being directly connected to not receiving funding and, as a result, it may be helpful to include more clarity around this, such as language indicating that the Commission should take reasonable or proportional action in response to late submissions, as it sees fit, to clarify to organizations that this kind of mistake does not equal all of their funding being pulled.

- **Current Proposal:** “Upon a report of late submissions, the relevant committee has the authority to take action it deems appropriate to evaluate the organization’s administrative capacity and ensure compliance with Trust Fund Program requirements. Such action may include sending a letter to the organization’s board, requesting a corrective action plan, requiring additional monitoring, or any other action the committee deems appropriate.” Similar discussion: “There are concerns that if an organization cannot consistently comply with Trust Fund Program deadlines, it may be a sign of other governance and organizational deficiencies which may impact the quality of legal services provided. A process to track and evaluate late submissions could then also be a tool to evaluate broader organizational health” (Pg. 5).
- **Rationale:** As described elsewhere, we feel that organizations that have multiple late applications should be assisted, not punished, in fixing any repetitive non-compliance. Additional monitoring or other corrective action plans (technical and other support) could avoid punitive steps and ensure that communication between the Bar and those organizations facilitates on-time submission. Essentially, organizations engaged in a long discussion during our call regarding the relationship between the “punishment” and the problem of late submissions. In one sense, they felt that if they were to not receive funding for a clerical or scheduling error, as discussed above, this would not just harm the organization but the clients who depend on their services. So, while the current set of proposals does not include a discussion of non-funding an organization, some of the memo reads as though lateness could go to “organizational health” and thereby a loss of funding. They felt that lateness, especially of the one-to-two-day variety, should not be something that makes an organization lose this critical funding.

(4) Request: In the list of factors in evaluating the lateness of materials, we would like one of those factors to articulate mitigating factors, such as a problem with SmartSimple or communications challenges between the applicant and the Bar. Essentially, what reasonable steps did Bar staff take, potentially as described in (2)'s request for codified communication steps by the Bar?

- **Current Proposal:** “When evaluating whether to accept the submission, State Bar staff and the committee should consider how late after the deadline the submission was received, the completeness of the submitted application, the reasonableness of the applicant’s explanation for the delay, the number of late submissions—of both application and reporting materials—made by the applicant in the last three years, and other similar factors State Bar staff and the committee determine are relevant to their decision.”

- **Rationale:** While it gives space for the applicant to explain the delay, we would request more specific articulation, perhaps within that clause, of whether or not the discussion could involve communication challenges.
- **Other issues with this rule:** This pertains specifically to audits. In the past, organizations articulated problems with getting their audit to the Bar on time because the auditors have been late, which is somewhat out of the organization's control. Perhaps this could be a factor as well, involving automatic extensions (to the extent the rule allows) when a third party (auditor) is contributing to the lateness, as well as being part of the Bar's calculus regarding this set of factors.

(5) Request: This pertains to the issue of the Bar staff having authority to reject “particularly” late submissions. Part of the issue here is that, generally, organizations have not run up against this kind of lateness timeline, as they're most frequently just a day or two late. Nonetheless, organizations were not immediately opposed to this, but did request that it be reframed in the positive, in the sense that it could be seen as an extension of up to the 15 days described in the proposal.

- **Current Proposal:** “The working group is considering recommending State Bar staff have authority to reject particularly late submissions – for example, those submitted over 15 business days (3 weeks) after the posted deadline. Organizations whose materials are rejected by staff would be able to appeal the rejection to the relevant committee for reconsideration.”
- **Rationale:** Again, organizations were not opposed to this per se, but this proposal could be read in concert with our recommendations above, which describe more codified communication guidelines (e.g., working with organizations that are repeatedly late, ensuring more communication of deadlines to multiple organization representatives).

Thank you again for this opportunity to comment. Please do not hesitate to reach out to us with questions or comments.

Sincerely,



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