



Date: July 29, 2022

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

From: Christian Schreiber, Co-Vice Chair, LSTFC  
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Subject: Update Regarding Proposed Rules Related to Defining and Demonstrating Indigency

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## EXECUTIVE SUMMARY

At its meeting on October 16, 2020, the Rules Committee of the Legal Services Trust Fund Commission (LSTFC) first considered proposed changes to the Rules of the State Bar and Legal Services Trust Fund Program Eligibility Guidelines regarding the definition of indigency and ways for qualified legal services projects (QLSPs) to demonstrate their clients' indigency in grant applications and reporting. After feedback from the civil legal aid community, the committee voted to recommend amending Business and Professions Code section 6213(d) to increase the client income eligibility threshold from 125 percent of the federal poverty level to 200 percent. The committee also discussed other points of clarification or improvement in the rules and guidelines, but no further action was taken pending the recommended statutory change to the income eligibility threshold.<sup>1</sup>

The next time the topic of defining and demonstrating indigency was addressed, in October 2021, the committee approved a recommendation to define "income" for purposes of applying the statute, as well as provide more guidance regarding the various classifications for the definition of "indigent person." At that meeting, the Rules Committee directed staff to draft additional language to address the income eligibility standards used by organizations that receive a pro bono allocation, as well as provide further analysis regarding the effect of proposed language for QLSPs to demonstrate indigency in instances where they engage in impact litigation and/or advocacy work (otherwise known as ILAW reports). This memorandum addresses those specific changes.

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<sup>1</sup> The proposed statutory change was approved and went into effect on January 1, 2022.

## **BACKGROUND**

### **CODIFICATION PROCESS**

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

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

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

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

### **GOVERNING AUTHORITIES<sup>2</sup>**

IOLTA and EAF grants are awarded to approximately 100 nonprofit legal services organizations each year to provide free civil legal aid in California to indigent persons, or legal training, legal technical assistance, or advocacy support without charge to the organizations providing services to indigent persons. Grantees must comply with criteria set forth in Business and Professions Code sections 6210-6228 (otherwise known as the "IOLTA Statute"), State Bar Rules and Appendices, and Legal Services Trust Fund Program Eligibility Guidelines (for Legal Services Projects or Support Centers, as applicable).<sup>3</sup>

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<sup>2</sup> Prior review of the legislative history for any information or references relevant to the interpretation of these governing authorities yielded no additional guidance.

<sup>3</sup> Additional governing authorities include the Legal Services Trust Fund General Grant Provisions, and Standards for Financial Management Systems and Audits. However, they are not pertinent to the issues raised in this discussion.

State Bar Staff (staff) and the indigency working group reviewed these governing authorities for direction regarding the definition of “indigent person” and methods for demonstrating indigency when working on behalf of a group. Specifically, Business and Professions Code section 6213(d), which provides definitions of “indigent person,” and Guidelines 2.3.3 and 2.3.4. of the Eligibility Guidelines for Legal Services Projects, which describes the methods for demonstrating indigency when performing work on behalf of a group, are relevant to the issues raised in this memorandum.

## **DISCUSSION**

### **DEFINING INDIGENCY**

Under Business and Professions Code section 6213(d), an individual may qualify for legal services offered by QLSPs as an “indigent person” in a variety of ways, some means tested, some not. The new recommended State Bar Rule would not change the underlying categories identified in the Business and Professions Code, but rather provide further information to ensure the definitions are applied consistently across all QLSPs.<sup>4</sup>

At the October 2021 meeting, the Rules Committee approved recommendations regarding the definition of “income” (and guidance for applying income exceptions), as well as the definition of “indigent person.”<sup>5</sup> It also discussed the income threshold used by organizations that receive a pro bono allocation.

Grant recipients that meet certain criteria may receive additional funding (a “pro bono allocation”), and are permitted to use different income thresholds, when their principal means of service delivery is through pro bono attorneys. Eligibility for the pro bono allocation is determined on a yearly basis through the IOLTA/EAF application process. If a program receives this allocation, it may use the additional income threshold cited in Business and Professions Code section 6213(d) (“75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code”).<sup>6</sup>

Prior feedback from the legal aid community detailed three main points: (1) Concern about fairness when a QLSP receiving a pro bono allocation might use the (historically) higher income threshold, even when no pro bono attorney is actively involved in the case, compared with another QLSP needing to deduct such services from its qualifying expenditures; (2) difficulty

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<sup>4</sup> Support Centers generally provide services to QLSPs rather than to direct service clients, unless co-counseling or taking a case at a QLSP’s request, so the focus of this discussion is QLSP income-screening practices.

<sup>5</sup> The approved recommendations are part of the proposed rule in Attachment A in black font. Underlined entries are new additions since the last meeting.

<sup>6</sup> This threshold varies from county to county as it is based, in part, on a calculation of area median income.

tracking qualified expenditures when organizations that use different income thresholds partner with each other; and (3) a desire to expand the historical interpretation of the phrase “a project that provides free services of attorneys in private practice without compensation” under Business and Professions Code section 6213(d) to include projects within a grantee organization that utilize pro bonos, rather than applying it only to QLSPs that qualify for the pro bono allocation.

The committee discussed this feedback and its counterpoints, including the plain language of the statute and the way it has been interpreted and applied historically, at its October 2021 meeting. Moreover, there was acknowledgement that the increase of the standard income eligibility threshold from 125 to 200 percent of the federal poverty threshold would effectively eliminate the distinction between the standard income threshold and the pro bono income threshold in some counties and reduce the disparity in others, thus addressing most concerns about fairness.

After discussion the committee approved a resolution instructing staff to draft language to clarify and codify the current practice that the alternate income threshold is only applicable to QLSPs that receive a pro bono allocation. The proposed language appears in Attachment A.

### **Response from the Legal Aid Community and Relevant Considerations**

In its most recent response regarding these updates and a draft version of this memorandum, LAAC reiterated that there is still some opposition in the legal aid community regarding the Rules Committee’s prior recommendation to limit the pro bono income threshold only to organizations eligible for the pro bono allocation. (See page 2 of Attachment E.)

Given that this topic was discussed previously, and no new considerations have arisen, the working group recommends proceeding to approve the language in the proposed rule.

### **DEMONSTRATING INDIGENCY**

Business and Professions Code section 6213(d) provides guidance to QLSPs on identifying individual clients who are eligible for services as “indigent persons,” but the statute and the State Bar Rules are silent regarding services provided for the benefit of indigent persons generally, or as a group. The impact litigation and advocacy work (ILAW) process is intended to allow grant recipients to engage in broad, impactful work while ensuring that these services primarily benefit indigent persons.<sup>7</sup> QLSPs must have a primary purpose and function of providing free civil legal services to indigent persons;<sup>8</sup> the ILAW activities are reviewed to

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<sup>7</sup> Legal Services Trust Fund Program Eligibility Guidelines for Legal Services Projects, Guideline 2.3.4.

<sup>8</sup> Business and Professions Code section 6213(a)

determine whether expenditures on such activities should be considered qualifying—and thus count towards the organization’s primary purpose—in its annual IOLTA/EAF application.

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

For each of the matters so identified in your application, describe who would benefit from the services, state whether the matter is primarily for the benefit of indigent persons and, if so, explain the reasons you reached that conclusion. For any such matter that is primarily for the benefit of indigent persons, your description should include the information listed as items (1) through (7) in the preceding paragraph; **you must quantify** the percentage of your clients who are indigent persons (or organizations qualifying under Commentary 2.3.3 above) and **the percentage of the persons who would benefit from the services who are indigent persons. Explain the basis of this information.** (Emphasis added.)

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

The ILAW reporting requirements can be onerous, both from a reporting and administrative perspective, with over 900 individual activities from 2021 reported and reviewed. Nonetheless, it is an important part of the annual application process; if these activities are found to be nonqualifying, the expenses would need to be deducted from an organization’s qualified expenditures in its IOLTA/EAF application. This would impact the organization’s grant award and could impact the organization’s eligibility.<sup>9</sup>

The commentary to Eligibility Guideline 2.3.4. states that if ten percent or more of an organization’s legal services are devoted to ILAW activities, the report must be completed with

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<sup>9</sup> QLSP grant awards are calculated based on a formula that, in part, depends on an organization’s qualified expenditures (i.e., funds spent to provide free civil legal services to indigent persons).

the organization's top 10 activities. However, current office practice is to have all organizations complete the report with their top 15 impact litigation cases, top 10 advocacy activities, and a summary of any additional ILAW activities.<sup>10</sup> This practice was adopted to ensure that significant nonqualifying expenditures are not overlooked, as that might result in a larger IOLTA/EAF grant award for an organization than is warranted.

With these issues in the mind, the working group recommended creating a State Bar Rule that is consistent with the intent of the IOLTA statute to ensure that funding is limited to those providing civil legal services to indigent persons, while at the same time promoting efficient and accurate reporting.

The working group previously made the following suggestions to address some of the challenges with ILAW:

1. Only requiring completion of the ILAW report if the amount of time devoted to these activities exceeds the lesser of the following: 10 percent of the organization's legal services in a given year, or 100 hours (cumulatively), as determined by the organization; and
2. Allowing the use of internal data, or data from other direct legal services providers or community-based organizations, to provide justification that the activity will primarily benefit indigent persons if independent data is not available; and/or<sup>11</sup>
3. Demonstrating disproportionate impact to indigent persons based on the nature of the activity and the specific anticipated outcomes for indigent persons if the activity succeeds.<sup>12</sup>

Both LAAC and one of the IOLTA/EAF grantees, Public Advocates, provided separate comments on these questions. Their comments reiterated how difficult the reporting process can be, which may have the effect of impeding rather than enabling this type of work. Feedback regarding the second and third points above was largely supportive, though there was some discussion of whether certain types of work, such as homelessness prevention and intimate partner violence prevention/intervention, should be presumptively qualifying. (For reference, the prior feedback from LAAC and Public Advocates are included as Attachments C and D.)

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<sup>10</sup> There is a discrepancy between the guideline and office practice in that the guideline provides for the top activities to be determined by the largest amount of funds spent, whereas office practice requires determining the top activities based on staff hours devoted to the work. In many instances, these figures may correlate, but for organizations that also supervise volunteers participating in these activities, for example, there may be a difference.

<sup>11</sup> We received a request for clarification around the "and/or" language between these options. Number 1 above relates to the reporting process itself; it is intended to alleviate some of the burden of the current reporting requirements by setting a threshold. The second and third options relate to demonstrating indigency and are under consideration either as exclusive options or, more likely, as two alternatives.

<sup>12</sup> The LSTFC Eligibility & Budget Review Committee, which is responsible for approving ILAW reports, has approved the disproportionate impact approach on a case-by-case basis in recent years.

Most prior discussion of this topic centered on the first point above, regarding the appropriate means of limiting the need for reporting while still capturing significant nonqualifying work. Feedback from LAAC and the legal aid community on that point requested that the committee consider using the *greater* of the two options rather than the *lesser*, partially out of concern that using the lesser of the two could disproportionately impact smaller programs, while the committee questioned whether using the *greater* amount would be problematic. Staff noted that 10 percent of a very large organization's qualified expenditures could amount to hundreds of thousands of dollars in work that would potentially go unreported. This is relevant to both the determination of primary purpose and grant allocation amounts.<sup>13</sup>

At the October 2021 meeting, the committee requested that staff provide further analysis of the impact of the proposed change to require reporting in instances where the ILAW activities exceeded 10 percent of legal services or 100 hours, from the standpoint of both the greater and lesser options.

Staff's review of the most recent ILAW reports revealed the following:

- 448 impact litigation activities and 453 advocacy activities were reported; of those, 29 impact litigation and 11 advocacy activities were considered nonqualifying. (The vast majority of nonqualifying activities were voluntarily reported as such either at the outset by the grantee or after discussion with State Bar staff. Two required committee action.)
- Approximately 30 percent of current grantees reported no ILAW activities in the prior evaluation year.
- Another 30 percent reported 10 or fewer activities in the prior year.
- The average number of reported activities (for those organizations with any to report) was 12.5.
- The median number of grant recipient staff hours reported per impact litigation case was 100, and the average number was 308 hours.
- The median number of grant recipient staff hours reported per advocacy activity was 60, and the average number was 495 hours.
- Some cases and activities reported as few as one or two hours, and others amounted to thousands of hours.<sup>14</sup> There is high variability among organizations as to how much of

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<sup>13</sup> To be clear, whether or not they are submitting reports related to the work, grant recipients are always under an obligation to report and deduct expenditures that would be considered nonqualifying; many grant recipients submit ILAW reports each year in which they already recognize and agree to deduct expenditures related to nonqualifying work on their IOLTA/EAF applications. Only a handful of activities—usually fewer than five—each year require committee review because the grant recipient believes the work is qualifying and staff disagrees or believes that the qualifying nature of the work is not sufficiently supported by the evidence provided.

<sup>14</sup> This is inclusive of support center activities, for which advocacy support may comprise a significant amount of their services.

their services are comprised of these ILAW activities, yet the reporting requirement is currently the same for all.

Some conclusions/considerations in light of the above:

- For organizations required to report, asking them to report their top 10 ILAW activities (instead of the current 25), would still capture most, if the average is 12.5 activities.
- Under the original proposal of requiring QLSPs to submit ILAW reports if those activities comprise 10 percent of their services or 100 hours cumulatively, whichever is *lesser* (and it will almost always be the case that 100 hours is less than 10 percent of total legal services), it seems clear most current grantees would still need to report. Only a handful of organizations that engage in this work (fewer than 10) fell below 100 hours total.
- It is difficult to estimate how many organizations would need to report if the alternative suggestion to report when the ILAW activities comprise 10 percent of services or 100 hours cumulatively, whichever is *greater*, were adopted. Current QLSP grantees have qualified expenditures ranging from approximately \$30 million to \$30,000 (after deducting nonqualifying work, such as serving over-income individual clients).
  - Assuming an organization values its work at \$100/hour, the largest organization could complete 30,000 hours of ILAW activities before needing to report. Using that same valuation, only organizations that spend \$100,000 or less on legal services would likely correspond to the 100-hour threshold being the greater of the two.
- Another approach might be to require reporting if an *individual activity* exceeds 50 or 100 hours, up to 10 activities. Based on 2021 numbers, this would reduce the number of required reports by approximately 40-60 percent, depending on the cutoff point.
- Staff has also suggested the possibility of keeping the practice the same as it is now, reporting up to 25 activities, but only requiring reporting every three years as part of the organization's regular monitoring visit schedule, and for first-time applicant eligibility determinations. As many of these activities are ongoing from year to year, this would hopefully capture most, if not all ILAW activities, but would break up the work for both staff and the grantees.
- Given that there is an intention to reduce the overall need for reporting, creating presumptively qualifying categories may not be necessary.

### **Response from the Legal Aid Community and Relevant Considerations**

In its most recent response to these updated suggestions, LAAC supported and recommended the approach of having grantees report every three years on their ILAW activities from the prior year. (See Attachment E.) This would coincide with the year the grantee has its triennial monitoring visit. Such an approach would break up the work for staff, as only approximately one third of grantees would report in a given year, and it would break up the work for the grantees preparing the activity reports once every three years instead of every year.



The legal aid community also seemed in favor of the other alternative: Reducing the number of required reports to 10, instead of 25, and setting a threshold or floor of 50 hours on a given activity before triggering a reporting requirement for the individual activity. The response reiterated that some grantees still support the establishment of presumptively qualifying categories.

The working group recognizes that neither alternative is perfect: Maintaining annual reporting requirements while reducing the number of required reports is helpful but may still require significant time from grantees and staff. (Based on staff's estimate, it could reduce reporting by approximately 40 percent.) On the other hand, reporting every three years on activities from only the prior year leaves open the possibility of nonqualifying work going unreported, and thus being included in qualified expenditures and contributing to a QLSP's primary purpose determination and allocation amount. What does seem clear is that the proposal in prior memoranda to use the lesser/greater of 10 percent or 100 hours is perhaps not the most efficient basis for establishing reporting requirements, and the working group recommends eliminating those options from consideration.

Moreover, regarding the question of presumptively qualifying categories: LAAC's letter summarizing legal aid community feedback had a comment from an organization that drew a distinction between the reporting requirement and work that is qualifying. Staff notes that the ILAW reports serve an additional purpose beyond simply making qualifying/nonqualifying determinations (of which very few activities are found nonqualifying that the organization did not already recognize as such). ILAW reports also serve to provide context for, and examples of, the systemic advocacy in which grantees engage. These reports are used in both evaluation and application processes. Thus, if presumptively qualifying categories were established, it would not reduce the reporting requirement, given these other considerations, though perhaps it would reduce the need to support the activity with objective evidence of indigency. If the issue stems more from concern over lack of guidance to determine what is qualifying and what is not, the working group encourages sharing more details on that point but is not sure of the basis on which to draw distinctions to create presumptively qualifying categories at this juncture. (The organization that submitted this feedback is also invited to clarify if there is a misunderstanding of the comment.)

Finally, there was a comment in the feedback from the legal aid community regarding the examples provided in subsections (F)(2) and (F)(3) of the proposed rule in Attachment A that list possible sources of information for demonstrating that the group benefited is primarily indigent or that those who are indigent are disproportionately impacted. The list was initially provided because there had been prior feedback from both the community and staff indicating confusion about appropriate sources of data to use to demonstrate indigency when working on behalf of a group; the list was further expanded based on earlier requests to broaden the scope of

possible sources of information. The working group believes that the current list would cover most formal and informal ways of demonstrating indigency or disproportionate impact on indigent persons. Leaving it completely open-ended would perpetuate the prior confusion and possibly contribute to a lack of transparency about what types of evidence/justification are deemed acceptable or sufficient from one organization to another.

The proposed rule in Attachment A removes the language of the original proposal and replaces it with the two alternatives above (reporting fewer activities every year or reporting every three years. and as a first-time applicant, on the prior year's activities). The updated rule in Attachment A also includes suggested language for defining when an organizational client may meet the definition of indigency, which is not currently addressed in the statute or State Bar Rules but is permitted based on the commentary to Eligibility Guideline 2.3.3. (Attachment B.) This has not been addressed in a prior memorandum or meeting but largely follows the commentary to Guideline 2.3.3., which requires the services to primarily benefit indigent persons.

## **RECOMMENDATIONS**

Summary of the recommendations for defining indigency:

1. Adopt the proposed language in Attachment A to codify the historical interpretation of the income threshold for pro bono programs (i.e., only QLSPs that receive the pro bono allocation will be permitted to use a higher income threshold).

Summary of recommendations for demonstrating indigency:

1. Adopt the proposed language in Attachment A regarding legal services to organizational clients.
2. Determine viable options to ease reporting requirements and prove benefit to indigent persons as part of impact litigation and advocacy work reports, using the proposed language in Attachment A as a starting point while considering the alternatives discussed above.

## **ATTACHMENTS**

- A. Proposed State Bar Rule Clarifying the Definition of "Indigent Person" and Demonstrating Indigency (updated with track changes since October 2021 meeting)
- B. Other Governing Authorities
  - a. Business and Professions Code sections 6210-6228
  - b. Eligibility Guidelines for Legal Services Projects, Guidelines 2.3.3. and 2.3.4.

- C. Prior Comments from Legal Aid Association of California
- D. Prior Comments from Public Advocates
- E. Most Recent Comments from LAAC (dated July 26, 2022)

## Proposed State Bar Rule

Rule 3.XX Qualified legal services projects; income classifications and exceptions

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

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

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

(1) Persons whose income is 200 percent or less of the current poverty threshold established by the United States Office of Management and Budget;

(2) Persons eligible for Supplemental Security Income;

(3) Persons who are 60 years or older; or

(4) Persons who identify as having a developmental disability as defined in section 15002 of Title 42 of the United States Code;

(C) All legal services projects may use the definition of indigent persons as described in 3.XX(B) to establish eligibility as a qualified legal services project and to calculate their expenditures on free civil legal services for indigent persons. Only qualified legal services projects that the Legal Services Trust Fund Commission has deemed eligible for a pro bono allocation under Business and Professions Code section 6216(b)(1)(B) may use the definition of “indigent person” available “to a project that provides free services of attorneys in private practice without compensation” under Business and Professions Code section 6213(d);

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

(E) Civil legal services provided by legal services projects to organizational clients will be considered services to “indigent persons” if the services provided to the organizational client will primarily benefit persons who are indigent under Business and Professions Code section

6213(d). The following factors will be considered in determining whether the organizational client provides services primarily to indigent persons:

- (1) Whether the organization is a tax-exempt nonprofit corporation;
- (2) The organization's primary purpose as stated in its articles of incorporation or by-laws;
- (3) The number and percentage of indigent persons on the board of directors or principal advisory body of the organization; and
- (4) The percentage of the organizational client's members who are indigent;

(F) A legal services project providing civil legal services for the benefit of a group or class of persons beyond the legal services project's individual or organizational clients may consider the services as "civil legal services provided to indigent persons" only if the legal matter is primarily for the benefit of indigent persons or disproportionately impacts indigent persons;

- (1) If a legal services project provided services to a group or class of persons in the prior year, the legal services project must complete a report describing the 10 activities that received the most support, as determined by the staff hours spent on each activity, limited to activities that met or exceeded 50 hours. This report will be submitted for Legal Services Trust Fund Commission review as part of the application process under State Bar Rule 3.680;

OR

- (1) Prior to being deemed eligible for funding as a qualified legal services project and then every three years thereafter, if a legal services project provided services to a group or class of persons, it must report on its activities from the prior year. The legal services project must complete a report describing the 25 activities that received the most support, as determined by the staff hours spent on each activity. The timing of the reporting requirement for each legal services project will coincide with the year of its scheduled monitoring visit;
- (2) If a legal services project must complete a report under Rule 3.XX(F)(1), it should demonstrate through objective information that a majority of persons impacted by the activity are indigent. A legal services project may meet this requirement by providing quantitative data based on independent research, internal organizational data, or data provided by other legal service providers or community-based organizations in the area where the legal services project operates, to demonstrate that a majority of those impacted by the activity are indigent;

(3) If a legal services project cannot demonstrate that a majority of those impacted by the activity are indigent, it must demonstrate that the activity has a disproportionate impact on indigent persons based on the nature of the activity and the specific anticipated outcomes for indigent persons if the activity succeeds. It must use independent research, its own internal data, or data from other legal service providers or community-based organizations to demonstrate a nexus between the legal issue addressed through the activity and the identified needs of the legal services project's client constituency.

DRAFT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

6213. As used in this article:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6223. No funds allocated by the State Bar pursuant to this article shall be used for any of the following purposes:

- (a) The provision of legal assistance with respect to any fee generating case, except in accordance with guidelines which shall be promulgated by the State Bar.
  - (b) The provision of legal assistance with respect to any criminal proceeding.
  - (c) The provision of legal assistance, except to indigent persons or except to provide support services to qualified legal services projects as defined by this article.
- (Added by Stats. 1981, Ch. 789, Sec. 1.)

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

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

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

- (a) The board shall publish a preliminary draft of the regulations and procedures, which shall be distributed, together with notice of the hearings required by subdivision (b), to commercial banking institutions, to licensees of the State Bar, and to potential recipients of funds.
  - (b) The board shall hold at least two public hearings, one in southern California and one in northern California where affected and interested parties shall be afforded an opportunity to present oral and written testimony regarding the proposed regulations and procedures.
- (Amended by Stats. 2018, Ch. 659, Sec. 141. (AB 3249) Effective January 1, 2019.)

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

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

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

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

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

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



## Legal Services Trust Fund Program Eligibility Guidelines for Legal Services Projects, Guidelines 2.3.3., 2.3.4., and Commentary

### 2.3.3. to persons

#### *Commentary:*

You may consider legal services provided to an organization (e.g., an unincorporated association, partnership, or corporation) as services to indigent persons if the organization provides benefits primarily to persons who are indigent as described below in the Commentary on Guideline 2.3.4. In determining whether an organization so qualifies, the Commission will consider at least the following factors: (a) whether the organization is tax exempt under I.R.C. §501(c)(3); (b) the organization's primary purpose as stated in its bylaws or articles; (c) the number and percentage of indigent persons on the board of directors or principal advisory body of the organization; and (d) the percentage of its members who are indigent persons. 7 If you provide more than ten percent of your services to organizations (whether qualifying or non-qualifying), your application must identify the five organizations that received the most legal services during the prior calendar year and, for each such organization, supply the information identified above. You need not disclose information protected by the attorney-client privilege. If you provide some portion of your legal services to organizations that do not so qualify, identify the percentage of overall services provided to such nonqualifying organizations, and explain the basis of your computation.

### 2.3.4. who are indigent

#### *Commentary:*

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

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

Your application must state the percentage of your organization's services that were provided during the previous calendar year to clients who did not fall within this definition. You must adopt written financial eligibility guidelines and submit them with your application. If your eligibility criteria include persons who are not indigent within the definition of §6213(d) above, explain how you determined the percentage of clients served that falls outside the definition. If you did not have written financial eligibility guidelines in the prior year, your application must explain the basis of your computation of percentage and supply objective support for the

computation. [B&P Code §§6213(d) and 6218.] 8 If you provide legal services for the benefit of a group or class of persons beyond the specific individuals or organizations who are your clients, you may consider the services as “legal services provided to indigent persons” only if the legal matter is primarily for the benefit of indigent persons.

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

If legal services for the benefit of a group or class of persons beyond the specific individuals or organizations who are your clients constitute more than 10% of your legal services, your application must identify the ten such legal matters on which you expended the largest amount of funds in the prior calendar year. For each of the matters so identified in your application, describe who would benefit from the services, state whether the matter is primarily for the benefit of indigent persons and, if so, explain the reasons you reached that conclusion. For any such matter that is primarily for the benefit of indigent persons, your description should include the information listed as items (1) through (7) in the preceding paragraph; you must quantify the percentage of your clients who are indigent persons (or organizations qualifying under Commentary 2.3.3 above) and the percentage of the persons who would benefit from the services who are indigent persons. Explain the basis of this information. You need not disclose information protected by the attorney-client privilege.

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

DATE: October 4, 2020

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

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

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

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

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

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

### **Definition of Income and Indigency**

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

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

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

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

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

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

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

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

### **Indigency and Children**

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

### **Definition of Project for the Purposes of Pro Bono Work**

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

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

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

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

### **ILAW recommendations**

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

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

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

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

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

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

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

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

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

October 2, 2020

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

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

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

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

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

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

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

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



*Legal Aid Fights for Justice. We Fight for Them.*



**July 26, 2022**

Legal Services Trust Fund Commission (LSTFC) Rules Committee  
The State Bar of California, San Francisco Office  
180 Howard Street  
San Francisco, CA 94105

**Re: Codifying Grant Administration Practices: Definition of Indigency**

Dear Legal Services Trust Fund Commission Rules Committee:

We are writing on behalf of the Legal Aid Association of California regarding the LSTFC rules revision process pertaining to amending the definition of indigency. We thank the Bar for engaging LAAC in the ongoing revision and codification process.

For the benefit of new members of this committee, **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. We were founded to serve, coordinate, and advocate for the IOLTA community.**

In regard to our process, LAAC utilized our Director of Litigation and Advocacy ("DOLA") email list to gather comments, which includes Executive Directors, Directors of Litigation, Directors of Advocacy, and managing attorneys. Additionally, though the majority represent IOLTA-funded organizations, a small number come from non-IOLTA-funded nonprofits. We also emailed all EDs of 2022 IOLTA-funded nonprofits. As usual, we provided our initial take on the proposed changes. We receive a few comments in response to our email. We generally understand that, when we receive no or only a few comments back, this tends to mean our community finds LAAC's position acceptable as stated. This position is articulated below.

First, regarding ILAW reporting, we understand that the Bar staff is recommending either (a) trying to figure out a way to have programs report fewer items in their ILAW report every year or (b) reporting only in years in which there is a monitoring visit (every three years). **LAAC's recommendation is that the latter is more ideal because it will be a lower burden**, not only on legal aid organizations, but also on State Bar staff who have to read through the hundreds of reports and ask follow-up questions. It can be challenging for organizations to succinctly describe all of their advocacy work each year, and answer so many questions about each activity. Because of this, organizations were wholeheartedly in favor of lowering the burden of ILAW reporting. Less reporting may be better in this case, especially given that the new EAF mid-year reports due in July. For these reasons, we believe that the best process would be for organizations to only report in years in which there is a monitoring

visit—every three years—and only for activities in the prior year, not for the prior three years.

Second, a few additional points about the ILAW report recommendations from the memo. Those we heard from were in favor of the 50-hour floor for the number of hours worked on a matter before triggering the need for an ILAW report. Specifically, there could be significant time savings by allowing for this because it would mean they would not need to independently report on separate advocacy activities where they do not spend more than 50 staff hours on a given bill. Additionally, we heard agreement regarding capping at top ten activities, not 25.

Third, there were other issues that came up in responses to our request for comment. Other perspectives we heard included:

- A disagreement with the idea stated on Page 8 that, “[g]iven that there is an intention to reduce the overall need for reporting, creating presumptively qualifying categories may not be necessary.” The uncomfortableness with this statement centered on the ways in which the reporting burden is separate from whether the work they are doing is qualifying. We heard that intimate partner violence could be presumptively qualifying.
- Opposition to the idea in (3) on Page 4 that the alternate income threshold should only apply to QLSPs that receive the pro bono allocation. The contention is that it should cover any program (QLSP or Support Center) that uses pro bono services because, as stated in (3), this rule would undercut encouraging more pro bono work from the private sector to provide legal services to low-income Californians.
- Regarding (F): We heard that the list of sources of information that can be used to show primarily indigent benefit or disproportionate impact may be unnecessary; they could be able to show one or the other in a way that they determine themselves to prove it. Specifically, for domestic violence service providers, it may be difficult, or impossible, to prove (F)(2) and, even if able to do so, it may counter their policy goals around ending domestic violence, which impacts all regardless of class. For (F)(3), it may be possible but challenging for domestic violence services providers to comply, given that they may have to locate social science studies demonstrating that economic status is a risk factor for domestic violence and/or that domestic violence disproportionately impacts low-income communities. They acknowledge they could use internal data to show disproportionate impact, but are concerned around exactly how to do this in their case.

Thank you for giving us the opportunity to review this memo and please contact us with any questions.

Sincerely,

Salena Copeland, *Executive Director*, **Legal Aid Association of California**

Zach Newman, *Senior Attorney*, **Legal Aid Association of California**