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LEGAL SERVICES TRUST FUND COMMISSION V.F.

DATE: August 12, 2022

TO: Members, Legal Services Trust Fund Commission

FROM: Members, Legal Services Trust Fund Commission Rules Committee

SUBJECT: Codifying Grant Administration Practices: Defining Civil Legal Services

EXECUTIVE SUMMARY

This memo is part of the continuing work of the Legal Services Trust Fund Commission to revise the State Bar Rules for the Legal Services Trust Fund Program (rules). The overarching goal of these revisions is to ensure accuracy, clarity, transparency, and consistency in grants administration for applicants, grantees, the Commission, and State Bar staff.

The term “civil legal services” appears throughout the Interest on Lawyers’ Trust Accounts (IOLTA) statute, governing who qualifies for commission awards and on what activities they may spend those funds.¹ This memo presents the Rules Committee’s recommendations for defining that phrase in the rules. Specifically, this memo addresses:

- How to define civil in the rules.
- How to define legal services in the rules.

The Committee sought preliminary advice about these topics through four focus groups composed primarily of current grantees and the Legal Aid Association of California (LAAC). It also circulated proposed definitions to the legal aid community via LAAC for three to four weeks. This memo describes the Committee’s recommendations, after considering the community’s feedback, for the Commission meeting on August 12, 2022.

¹ In this memo, the “IOLTA statute” refers to California Business and Professions Code sections 6210-6228.

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 to revise and/or codify grantmaking decision points for IOLTA, Equal Access Fund (EAF), and other Legal Services Trust Fund Program awards. The intent is to increase transparency about the process and consistency in administering funds.

Commissioners form working groups to investigate and develop preliminary recommendations on the questions in the Committee's work plan. The working groups' preliminary recommendations circulate to the legal aid community for feedback through LAAC. The working group and Committee consider that feedback before making a final recommendation to the Commission and, in turn, the State Bar Board of Trustees. Pursuant to Business and Professions Code section 6210.5, the Board of Trustees shall approve Commission recommendations for rules related to grant administration and to determine applicants' eligibility for awards unless the Board makes a written finding that the recommendation conflicts with a statutory, fiduciary, or legal obligation of the State Bar.

GOVERNING AUTHORITIES

Applicants and grantees must comply with requirements in the IOLTA statute, 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. In particular, the IOLTA statute and rules govern which applicants qualify for funding, on what work grantees may spend their IOLTA/EAF dollars, and how much funding they will receive.

The term "civil legal services" is fundamental in the IOLTA statute. To be eligible for IOLTA and EAF funding as a qualified legal services project (QLSP), an applicant must provide "as its primary purpose and function civil legal services without charge to indigent persons..."² To qualify as a support center, it must have as its "primary purpose and function the provision of legal training, legal technical assistance, or advocacy support for civil legal services without charge..."³

Furthermore, eligible grantees must spend their IOLTA and EAF awards on "the provision of civil legal services to indigent persons."⁴ The size of each QLSP's award depends in part on the amount of funds it spent to provide civil legal services in the previous year. If multiple QLSPs serve the same county, each one's share of that county's IOLTA and EAF funding will increase or

² See Business and Professions Code § 6213(a)(1).

³ See Business and Professions Code § 6213(b).

⁴ Business and Professions Code § 6216.

decrease based on its relative share of spending on “civil legal services without charge for indigent persons” in that county.⁵

Effective January 1, 2022, the IOLTA statute was amended to specify that “[c]ivil legal services’ includes, in addition to matters traditionally considered civil, legal services related to expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, and infractions.”⁶ The rules currently define legal services broadly and in a way that does not provide much more specificity than if the term were undefined. Rule 3.672(A) defines legal services as including “all professional services provided by a licensee of the State Bar and similar or complementary services of a law student or paralegal under the supervision and control of a licensee of the State Bar in accordance with law.”

GUIDANCE

The Legal Services Trust Fund Program Eligibility Guidelines for Legal Services Projects refer to legal services sparingly. Guideline 2.3.1 requires QLSP applicants for IOLTA and EAF funding to demonstrate that they provide civil legal services. And the commentary to that guideline states that grantees “must provide legal services within the definition of Rule 3.672(A).” The commentary also explains that applicants providing non-legal services must describe and specify the percentage of that work. Ultimately, the Commission excludes each applicant’s spending on non-legal services when calculating its “qualified expenditures.” Qualified expenditures in turn affect each applicant’s eligibility for funding and size of award.⁷

While not governing, the American Bar Association (ABA) defines “legal work” as it uses that term in its 2021 *Standards for the Provision of Civil Legal Aid*. The ABA’s definition captures many of the services that the Commission has authorized for IOLTA and EAF funding and serves as a helpful reference:

“Legal work” refers to all of the work that involves the use of legal skills and knowledge that an organization performs on behalf of the low-income

⁵ Business and Professions Code section 6216(b)(1)(A) states:

In any county which is served by more than one [QLSP], 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 civil legal services without charge for indigent persons in that county as compared to the total expended in the prior year for civil legal services without charge for indigent persons by all [QLSPs] applying therefor in the county.

⁶ Business and Professions Code § 6213(l). When adding this definition to the statute, the Legislature also added the word “civil” before “legal services” in several provisions.

⁷ The commentary to guideline 2.7.2 states, e.g.:

The amount of your grant will be based in part on the amount of your expenditures in your previous fiscal year for civil legal services without charge to indigent persons. See Guidelines 2.3.1 through 2.3.4 for the definitions the Commission will use to determine the portion of your expenditures that are qualified to be counted in determining your grant allocation. [B&P Code §6216(b)].

community it serves. It includes legal representation of individuals and groups. It also encompasses nonrepresentational services and forms of assistance, such as community legal education and the provision of legal information, pro se clinics and other forms of self-help assistance, as well as studies and reports on issues of general importance to the low-income communities served by the organization. Finally, it includes advocacy in legislative, administrative, and civic settings, done on behalf of clients and/or their communities.⁸

FOCUS GROUPS

To collect preliminary input from stakeholders about how to update the definition of civil legal services, State Bar staff convened four focus groups of mostly current grantees and LAAC. Each group included six to eight organizations as well as LAAC. Staff aimed for a geographic and substantive law cross-section of providers in each discussion and generally grouped them as follows:

- Providers with significant grassroots policy advocacy or rental assistance programs.
- Providers with education and counseling programs that could be legal or non-legal depending on the context (e.g. financial literacy and health insurance counseling).
- Providers with staff social workers who assist clients.
- Providers with Health Insurance Counseling & Advocacy Program (HICAP) services.

Areas of community consensus and disagreement emerged from the focus groups. The following themes were particularly helpful in crafting the proposal:

- (Consensus) The current definition's focus on the work of licensees, law students, and paralegals is too exclusive. A new definition should be more inclusive of the actual spectrum of professionals that help to provide legal aid.
- (Consensus) A new definition should mention and have at its core the legal rights of low-income people. At a fundamental level, it is the work of legal aid and support centers to create, advance, and defend those rights.
- (Consensus) If the new definition is too broad, then organizations with only a peripheral connection to legal aid might qualify for funding. This risks thinly spreading the very limited funding available to legal services for indigent Californians. Relatedly, any new definition needs to agree with the Legislature's intention for the IOLTA statute.
- (Consensus) As is the current practice, there should continue to be room for complementary services—e.g. social work services and financial literacy education focused on legal rights—at least when that work advances traditional legal aid services.
- (Differing views) Whether/when grassroots lobbying and mobilization is a legal service. At least one organization observed that this work can serve as an important part of community engagement and education in legal aid. Other providers questioned whether

⁸ ABA, *Standards for the Provision of Civil Legal Aid* (August 2021), available at https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/standards-and-policy/updated-standards-for-the-provision-of-civil-legal-aid/. (p. 7). While the 2021 standards are not governing here, the Commission previously adopted the ABA's 2006 standards as its guidelines for evaluating grantees' quality control procedures. Rule 3.661(C).

grassroots advocacy is a legal service since attorneys might be unnecessary for that work, and since many non-legal aid organizations perform grassroots mobilization.

- (Differing views) Recognizing that expansively defining complementary services could open the door to non-legal services agencies receiving funding, participants suggested different views about when “complementary services” are legal services. Some programs would require that the service advance a legal aid case to be a “legal service.” Others would not require an underlying legal aid case so that complementary services can be available whenever clients need them.
- (Differing views) Some programs suggested that one way to address the complementary services issue above might be to write two definitions of legal services. One—narrower—definition would govern who qualifies for IOLTA and EAF funding. The other—broader—definition would govern permissible activities that qualified programs provide. Others believed it could become confusing to future commissioners, State Bar staff, and grantees which definition applies when. It also might be inconsistent with what the Legislature intended when using the term legal services in the statute.

DISCUSSION

HOW TO DEFINE CIVIL IN THE STATE BAR RULES

State Bar rules do not define “civil” as that word appears in the IOLTA statute. Distinguishing between civil and criminal legal issues, however, has generally been straightforward for programs, commissioners, and staff. The statute’s requirement that legal services be civil has, in practice, mostly excluded criminal defense work.⁹ Effective January 1, 2022, the Legislature clarified that civil legal services include, “in addition to matters traditionally considered civil, legal services related to expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, and infractions.”¹⁰

The Committee recommends codifying the Commission’s current approach to distinguishing between civil and criminal matters. This would make the existing practice express for stakeholders. The following proposed definition, therefore, means to keep the line between civil and criminal work as is:

“Civil” refers to legal issues, questions, or processes that arise under any body of civil law. The provision of legal assistance with respect to criminal proceedings is not civil legal services. Proceedings concerning expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, or infractions are not criminal proceedings, and legal services related thereto are civil legal services. Legal services related to collateral civil issues such as public access, disability accommodations, and language access that arise during criminal

⁹ Business and Professions Code section 6223(b) precludes IOLTA funding for “[t]he provision of legal assistance with respect to any criminal proceeding. For purposes of this article, ‘criminal proceeding’ does not include expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, or proceedings concerning infractions.”

¹⁰ Business and Professions Code § 6213(l). This change was made at the urging of the State Bar and LAAC.

proceedings are not legal assistance with respect to criminal proceedings, provided the civil issues do not directly affect determination of guilt, sentencing, or other disposition of the criminal proceeding.¹¹

Some legal services address civil issues facing those charged with a crime. These include, among others, the conditions of confinement in jails, civil commitments of individuals in treatment facilities after an arrest, and parental rights in dependency proceedings regarding minors in correctional settings. The above definition means to continue treating such traditionally civil law matters as civil.

REVISIONS TO THE DEFINITION OF LEGAL SERVICES IN THE STATE BAR RULES

Rule 3.672(A)'s current definition does not describe the array of services and professionals that are necessary to meet legal aid clients' civil legal needs. Additionally, it does not address services that are complementary to legal aid, such as social work services. In short, the current definition could be more helpful.

With the purpose of the IOLTA statute and current practices in mind, the Committee recommends the following, revised definition of legal services:

"Legal services" means work that uses legal knowledge and skills to create, advance, protect, or enforce the legal rights of indigent clients or communities. This encompasses legal representation and non-representational services for individuals and groups. Examples of non-representational services include providing legal information, advice, trainings, and self-help resources. Non-representational services can also include studying legal needs and outcomes to inform legal aid delivery, investigating legal violations, and advocating directly to government bodies on issues of importance to the legal rights of indigent clients or communities. Representation and non-representational services must be performed or supervised by an attorney. "Legal services" may also include complementary services provided they advance a legal outcome, serve as an integral part of an attorney's strategy in a legal matter or case, and the attorney directs the work in that matter or case. Complementary services and other services by non-attorneys must uphold the attorney-client relationship and avoid interfering with the attorney carrying out their obligations to the client.

This definition would better describe the current reality of legal aid. Furthermore, it would provide clarity to applicants, grantees, commissioners, and staff. This in turn would promote consistency when evaluating grant applications and funding criteria. The elements in the proposed definition seek to maximize flexibility for programs while upholding the IOLTA statute's overarching goal of increasing access to civil justice through the funding of civil legal aid.¹²

¹¹ To achieve consistency with the IOLTA statute, this definition incorporates the prohibition in section 6223(b). See footnote 9, *supra*.

¹² The statute's legislative findings, in section 6210, speak to purpose:

This memo now discusses various aspects of the proposed definition:

“‘Legal services’ means work that uses legal knowledge and skills to create, advance, protect, or enforce the legal rights of indigent clients or communities. This encompasses legal representation and non-representational services for individuals and groups. Examples of non-representational services include providing legal information, advice, trainings, and self-help resources. Non-representational services can also include studying legal needs and outcomes to inform legal aid delivery, investigating legal violations...”

Rule 3.672(A)’s unqualified use of “all professional services provided by a licensee” is detached from the specific interventions of legal aid and by extension the Legislature’s goals in the IOLTA statute. The current phrasing, for instance, declines to describe the particular work that legal aid programs perform. Furthermore, it makes no mention of the unique and essential role of QLSPs and support centers in our legal system, which the IOLTA statute seeks to fund.¹³

The entire statute, with its legislative findings, eligibility requirements, and activity restrictions, funds legal aid to increase access to civil justice for people who are very low-income.¹⁴ As multiple focus groups noted, it is fundamentally through creating, advancing, defending, and enforcing low-income people’s rights that legal aid and support centers provide that access. In referring to the societal role and spectrum of legal aid interventions, rather than to “all professional services provided by a licensee,” the proposed definition follows the ABA’s approach in defining “legal work.”¹⁵

The refinement also removes the current definition’s emphasis on work by a State Bar “licensee,” “law student,” or “paralegal.” Legal aid programs rely on a diversity of professionals to deliver help effectively, sensitively, and efficiently. These professionals sometimes include law school graduates awaiting bar results, community educators, outreach staff, pro bono professionals, translators, social workers, and others—none of whom must be an attorney, law

[D]ue 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 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.

¹³ See the definitions of QLSP and support center in the “Governing Authorities” section, *supra*.

¹⁴ See footnote 12, *supra*, on the Legislature’s findings.

¹⁵ Please see the section “Guidance,” *supra*, for the ABA’s definition.

student, or paralegal. Finally, this change is in line with ABA Standard 4.9, which encourages legal aid to integrate the services of other professionals.¹⁶

“and advocating directly to government bodies on issues of importance to the legal rights of indigent clients or communities.”

The Commission has long found that direct public policy advocacy can be a legal service under the IOLTA statute. With direct policy advocacy, grantees apply their legal knowledge and skills to advocate directly to government policymakers in support of their client community’s rights. They do this by researching, evaluating, and making persuasive legal arguments about the law and government practices. Examples of direct policy advocacy are a grantee drafting legislation and commenting during administrative rulemaking. As such, direct policy advocacy would continue to be legal services under the first sentence of the proposed definition.

Direct policy advocacy is different than grassroots policy advocacy, which the Commission has found to be a non-legal service. Unlike direct policy advocacy where the grantees apply their own legal knowledge and skills to engage with policymakers themselves, grassroots advocacy involves motivating or mobilizing members of the community to act.¹⁷ Examples of grassroots advocacy are asking voters to call their legislators, sign government petitions, protest, or take some other action to influence government.

Mobilizing the community to engage policymakers, such as gathering signatures for a letter or organizing a phone campaign, is not itself a legal service. Rather than using legal knowledge or skills, this work uses community organizing skills, a different strategy to persuade community members to take action. If grassroots advocacy includes elements that by themselves would be legal services, such as training indigent communities about their legal rights, those elements would still be legal services even if part of a grassroots campaign. The same would be true for

¹⁶ ABA standard 4.9 states, “A legal aid organization should consider using paraprofessionals, tribal advocates, lay advocates, law students, social workers, and other professionals when authorized by state, federal, or tribal law, and appropriate court rules, rules of professional conduct, and professional regulatory rules.” ABA, *Standards for the Provision of Civil Legal Aid* (August 2021), available at https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/standards-and-policy/updated-standards-for-the-provision-of-civil-legal-aid/. (p. 151.).

¹⁷ See, e.g., the definition of “grassroots lobbying” in 45 CFR section 1612.2(a)(1). That example applies to the work of Legal Services Corporation basic field grantees:

Grassroots lobbying means any oral, written or electronically transmitted communication or any advertisement, telegram, letter, article, newsletter, or other printed or written matter or device which contains a direct suggestion to the public to contact public officials in support of or in opposition to pending or proposed legislation, regulations, executive decisions, or any decision by the electorate on a measure submitted to it for a vote...

The distinction between direct and grassroots lobbying is familiar and navigable to most nonprofits. This is in part because the Internal Revenue Service (IRS) requires 501(c)(3) nonprofits to itemize their spending on direct versus grassroots lobbying when filing their annual informational return, the Form 990. For more information, see the IRS’s “Instructions for Schedule C (Form 990)” available at https://www.irs.gov/instructions/i990sc#en_US_2021_publink20374ld0e367.

using legal knowledge and skills to advise or consult with other organizations to create, advance, protect, or enforce the rights of indigent communities.

The IOLTA statute's legislative findings, with their emphases on funding legal aid to individuals who cannot afford a lawyer, support continuing to exclude grassroots policy advocacy.¹⁸ Broadening the definition of legal services to include grassroots advocacy would also open the door for IOLTA and EAF funding to nonprofits that focus mostly or exclusively on grassroots work. Those organizations might not offer traditional legal aid at all.

“Representation and non-representational services must be performed or supervised by an attorney.”

This language is consistent with the current definition's focus on licensee-provided or supervised work. It also aligns with the policies and norms that guard against the unauthorized practice of law in the California Business and Professions Code, California Rules of Professional Conduct, and ABA standards.¹⁹ The comment to Rule of Professional Conduct 5.3 states, for instance, that “Lawyers often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals...A lawyer must give such assistants appropriate instruction and supervision concerning all ethical aspects of their employment.”²⁰

Whether and how closely an attorney must supervise the work of a non-lawyer in a particular instance depends on many factors. These considerations include, *inter alia*, whether the activity is the practice of law, the client's legal needs, and the non-attorney's abilities. Since the analysis depends so much on the facts of the service in question, this memo refrains from discussing how often and in what way an attorney must supervise any particular activity. All programs, however, must comply with Rule of Professional Conduct 5.3's requirement that, “a lawyer having direct supervisory authority over [a] nonlawyer...shall make reasonable* efforts to ensure that the person's* conduct is compatible with the professional obligations of the lawyer.”²¹ To understand how programs fulfill this ethical responsibility and to screen for potential gaps in meeting it, those seeking IOLTA and EAF funding must describe on their annual application how they supervise legal services.

“‘Legal services’ may also include complementary services provided they advance a legal outcome, serve as an integral part of an attorney's strategy in a legal matter or case, and the attorney directs the work in that matter or case. Complementary services and other services by non-attorneys must uphold the attorney-client relationship and avoid interfering with the attorney carrying out their obligations to the client.”

Effective legal aid often combines traditional legal strategies—e.g. legal advice, negotiation, and litigation—with complementary interventions such as social work. These complementary

¹⁸ See footnote 12, *supra*, on the Legislature's findings.

¹⁹ See, e.g., Business and Professions Code section 6125: “No person shall practice law in California unless the person is an active licensee of the State Bar.”

²⁰ Cal. Rules of Professional Conduct, comment to rule 5.3.

²¹ Cal. Rules of Professional Conduct, rule 5.3. (original asterisks).

services are ones that by themselves do not require legal knowledge or skills to perform. The proposed rule seeks to continue the practice of counting such other services when they significantly promote a legal outcome in ongoing legal aid representation. To fund such complementary services more generally, however, risks conflicting with the IOLTA statute's intentions and diverting limited funding away from traditional legal aid and support center work.

Complementary services can be legal services to the extent that they form part of an attorney's strategy in a legal aid case. While the attorney need not supervise the individual providing a complementary service, the attorney must still authorize/direct that work. If these services come into conflict with the attorney's representation of the client, they cease to be legal services. In other words, complementary services may not undermine the legal aid case from which they derive their legal services nature and still maintain that nature. This could happen, for instance, if a social worker advises a client to act against the attorney's directions in a case or breaks the attorney-client privilege.

A "legal outcome" generally refers to the client's rights, obligations, options, relief, etc. under the law. It is different than a health, educational, or other outcome even if the outcomes are interconnected. Improving a client's health or English language skills, for instance, might tangentially benefit their ability to participate in a case. That tangential benefit alone, however, would not convert the non-legal (e.g. health) outcome to a legal one. The proposed definition means to continue excluding services that are not focused primarily on advancing a legal—as opposed to health, educational, or other—outcome for the client.

"[I]ntegral part of an attorney's strategy" does not mean strictly necessary, but rather so helpful that it comprises a core component of the strategy. If the complementary service ceases to help the underlying legal aid case, or when that underlying case ends, the complementary service would thereby lose its legal nature.²² It is the existence of the underlying legal case or matter and the complementary service's importance to advancing it that justifies the expenditure of legal aid dollars on what might otherwise be non-legal work. The proposed definition endeavors to maintain this requirement.

"[T]he attorney directs the work in that matter or case" refers to authorizing the use of the complementary service in the underlying legal aid case. Here, directing the service is different than providing or supervising it. Directing the service entails the authority to integrate the complementary service with more traditional legal strategies towards an end goal in the case. Providing or supervising the complementary service, by contrast, entails professional expertise in the complementary service's delivery strategy and standards. So an attorney might authorize the integration of social work services, including identifying outcomes that would be helpful, in a specific legal case while deferring to the social worker about what strategies to deploy.

²² The current practice of looking for an underlying case yields a secondary benefit: It is easy to apply. Grantees and staff know that once the underlying case has ended, whether it has resolved, the client withdrew, or for any other reason, the complementary service ceases to count. While not dispositive of the end of legal services, sending a closing letter is often an observable sign that a case has ended.

To illustrate: A client who experienced significant trauma in a domestic violence case might have difficulty testifying about the abuse. A social worker could help the client talk about the abuse and identify ways to describe it in a judicial proceeding while minimizing additional trauma. The social worker might also accompany the client to court to support them during the proceedings. Here, the client's attorney must authorize the social worker's role and activities in the legal case but may defer to the social worker on how to perform that role responsibly.

Applying the definition

This memo now illustrates how the proposed definition would apply in scenarios common to legal aid:

Social work services

Social work services are a service that many legal aid providers offer. According to a 2021 report by LAAC and OneJustice, at least 20—about 26 percent—of the QLSPs in 2020 incorporated social workers into their delivery model.²³ It is well-accepted by the Commission, State Bar, and legal services community that social workers can directly improve legal aid outcomes. According to the LAAC and OneJustice report, for example:

Social workers also support clients with advocacy in proceedings with social services/other agencies (80% [of respondents]) and accompaniment to court and other settings (73% [of respondents]). In some instances, the advocacy/accompaniment may be directly related to their legal case, and in other instances it may be related to an adjacent need in the client's life. Social workers stress that these settings can be both traumatizing and/or retraumatizing for clients and their role is to provide clients with support and techniques for handling these situations. Examples include immigration clients who are required to describe traumatic experiences in declarations supporting their immigration petitions or clients in family law/domestic violence who are required to come face-to-face with their abusers in court.²⁴

²³ OneJustice and LAAC, *Social Work Practices in California Legal Aid Organizations* (2021), available at https://www.dropbox.com/s/1x6b5zn0uk9v1mm/Social%20Work%20Practices%20in%20California%20Legal%20Aid%20Organizations_LAAC%20and%20OneJustice_April%202021.pdf?dl=0. (p. 6).

²⁴ *Id.* (p. 30). See also the commentary to ABA Standard 4.9, on the use of other practitioners:

There are many ways in which social workers can effectively assist in the delivery of legal services. Among the most basic of those is that social workers can be useful with interviews, evaluation, crisis intervention, short-term casework, negotiation, and referrals. As a result of social workers' training and education, they are better equipped than lawyers are to provide services such as crisis intervention, the evaluation of clients' needs, referrals to appropriate agencies, and direct casework. With respect to evaluation, a social worker's training in assessing personality and mental status contributes significantly to the lawyer's appraisal of the facts...

ABA, *Standards for the Provision of Civil Legal Aid* (August 2021), available at https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/standards-and-policy/updated-standards-for-the-provision-of-civil-legal-aid/. (pp. 152-53).

Social work services are not always legal in nature, however. Many organizations provide these services without ever practicing law. What makes some social work services legal services is that an attorney incorporates them as a core aspect of their case strategy—such that they advance a legal outcome in that case.

So, for instance, when a family or youth law provider uses social work services to navigate their legal aid client’s potential trauma and/or gather facts about their legal case, those would be legal services. If the underlying case ends, the social work services infringe on the attorney-client relationship, or they simply stop serving as an integral part of the attorney’s legal strategy, then the social work services would cease to be legal services.

Rental assistance programs

Some grantees have rental assistance programs that provide cash assistance, landlord negotiation, and other support to tenants facing evictions. While cash assistance cannot be a legal service, some of the project’s other support for renters might be. The provider’s rental assistance and litigation teams might consult, train, and partner with one another in the organization’s provision of legal representation, for example.

The Commission has found that where rental assistance and litigation teams collaborate on a specific case, the rental assistance team’s work might be legal services. Specifically, it found that “activities related to consultations with attorneys and assisting the legal clinic with intakes, as well as cross-trainings between [the rental assistance project] and legal staff to be qualifying legal service.”²⁵ The proposed definition leads to a similar outcome: To the extent that an attorney supervised the rental assistance team’s use of legal knowledge and skills to advance indigent tenants’ rights, the rental assistance team’s work was legal services. As with all projects where some work qualifies as legal services but other work disqualifies, the program must track its qualifying and non-qualifying costs separately to calculate its qualified expenditures.²⁶

Health Insurance Counseling & Advocacy Program (HICAP) services

The California Department of Aging (CDA) administers HICAP via local providers including some legal aid organizations. HICAP provides information and advice about Medicare to help clients navigate their health insurance options. HICAP counselors advise clients on whether/how to enroll in Medicare Parts A and B, Medicare supplemental insurance plans, Medicare Health Plan, and Medicare Savings Programs, among other decisions. The program also provides legal advice “to assist individuals with legal questions related to their Medicare benefits.”²⁷

²⁵ See the Commission Eligibility and Budget Review Committee’s August 13, 2021, meeting minutes, available at <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000028235.pdf>.

²⁶ See the “Guidance” section’s description of the commentary to Guideline 2.3.1, *supra*.

²⁷ For more information about HICAP, see CDA’s website at https://aging.ca.gov/Providers_and_Partners/Health_Insurance_Counseling_and_Advocacy_Program/Program_Narrative_and_Fact_Sheets/.

The Commission’s practice has been to find that HICAP work to advise and exercise consumer choice—e.g. to help consumers select the insurance coverage that meets their health care goals and complete their application for insurance—are non-legal services. This type of counseling does not use “legal knowledge and skills.” If, on the other hand, a HICAP provider were to advise a client about their legal rights (e.g. to appeal a denial) and/or represent them in a Medicare appeal, that would be a legal service. This work would apply legal knowledge and skills. One factor to consider in assessing whether particular HICAP services are legal services is whether an attorney supervises or should supervise the work. If a lawyer need never participate in the work, then that suggests that the services are not using legal knowledge and skills. Indeed, most of CDA’s HICAP providers are not current IOLTA/EAF grantees and it is unclear when—if ever—an attorney must oversee their work.

Housing counseling

Housing counselors help clients locate and access affordable housing, among other services. The U.S. Department of Housing and Urban Development’s (HUD) housing counseling program, for instance, helps individuals decide where to rent and how much to budget for housing costs. It also helps renters understand their leases and whether they have experienced discrimination.²⁸

Similar to HICAP counseling, housing counseling could be a legal or non-legal service. The test is whether the service “uses legal knowledge and skills...to create, advance, protect, or enforce the legal rights of indigent clients or communities.” Helping a client decide where to rent or to create a budget does not use legal knowledge and skills. Helping a client to understand their lease or rights to be free from housing discrimination would use legal knowledge and skills and therefore could be a legal service.

Financial literacy and education services

The U.S. Financial Literacy and Education Commission defines “financial literacy” as “the skills, knowledge and tools that equip people to make individual financial decisions and actions to attain their goals...”²⁹ Examples are trainings on how to create budgets and increase credit scores. Unlike HICAP and housing counseling which can use legal knowledge and skills depending on the client’s facts, these types of financial education are unlikely to use “legal knowledge and skills” by themselves. On the other hand, when financial literacy and education directly supports a training about consumers’ legal rights (e.g. the right to discharge debt or live free from creditor harassment), that part of the training would be legal services.

Grassroots mobilization

Like grassroots lobbying, the Commission has found that other work to spur community action—such as organizing a march or encouraging participation in censuses—are not legal

²⁸ For more information about HUD housing counseling for renters, see HUD’s website at https://www.hud.gov/program_offices/housing/sfh/hcc/rental.

²⁹ U.S. Financial Literacy and Education Commission, “U.S. National Strategy for Financial Literacy 2020” (2020) available at <https://home.treasury.gov/system/files/136/US-National-Strategy-Financial-Literacy-2020.pdf>. (p. 2).

services.³⁰ Although they might aim to change the law, the mobilizing activities themselves do not use “legal knowledge and skills” as contemplated by the proposed definition.³¹ Rather, they entail knocking on doors, collecting signatures, handing out government forms, etc. Additionally, such work—directed at the community—would not serve to advance a legal outcome in a particular case under the proposed definition’s complementary services prong.

Furthermore, there are many organizations that specialize in mobilizing communities to vote, march, sign letters, or otherwise engage policymakers and the public. These organizations need not employ attorneys or even see themselves as legal aid providers or support centers. Broadening the definition of legal services to include this work would open the door to these nonprofits qualifying for California’s limited funding for legal aid at the expense of traditional legal aid providers and support centers.

Research/Studies

The proposed definition specifies that “[n]on-representational services can also include studying legal needs and outcomes to inform legal aid delivery.” The proposed definition intends to cover data gathering to identify a provider’s client community—such as its size, locations, languages, and civil legal needs—and services results. This research can be a critical part of identifying and refining the representation, non-representational, and complementary services that are most important to provide. To become part of the organization’s legal services, it must conduct the research for the purpose of identifying, enabling, or improving those in-house services.

While potentially supportive of legal aid’s goals, social science research is generally not a legal service. Rather than using “legal knowledge and skills...to create, advance, protect, or enforce the legal rights,” that work likely calls for academic research skills to ensure representative data sets with which to perform statistical analyses. Unlike gathering data to target or refine services, a research study on the impact of certain laws, for instance, would not be a legal service as much as an academic one.

Summary chart

The following chart summarizes some of the above conclusions. This reference table is non-exhaustive and subject to the explanations above:

Activity	Included in legal services	Excluded from legal services
Social work services	When services advance a legal outcome, serve as an integral part of an attorney’s case strategy, and	When services advance non-legal outcomes, are separate from case strategy (e.g. continue after a case

³⁰ For a discussion of grassroots policy advocacy, see the section “...and advocating directly to government bodies on issues of importance to the legal rights of indigent clients or communities,” *infra*.

³¹ The same caveat applies here as in the discussion of grassroots policy advocacy, above. To the extent that grassroots mobilization incorporates other work that by itself would be a legal service, such as training indigent communities about their legal rights, that other work would still be a legal service even if part of a grassroots campaign.

Activity	Included in legal services	Excluded from legal services
	are at the direction of the attorney.	ends), or conflict with the attorney-client relationship or attorney's responsibilities to the client.
Rental assistance programs	When services use legal knowledge and skills—subject to attorney supervision—to create, advance, protect, or enforce legal rights. E.g. Staffing legal aid clinics or assisting with legal representation.	When services do not use legal knowledge and skills and are not otherwise complementary services that an attorney has directed as part of a particular legal aid case.
HICAP services	When services use legal knowledge and skills—subject to attorney supervision—to create, advance, protect, or enforce legal rights. E.g. Assessing whether to appeal a Medicare denial.	Work to advise and exercise consumer choice (e.g. to help consumers select the insurance coverage that meets their health care goals and complete an application for insurance).
Housing counseling	When services use legal knowledge and skills—subject to attorney supervision—to create, advance, protect, or enforce legal rights. E.g. Explaining a lease or right to be free from discrimination.	Help deciding where to live, budgeting for living costs, and other services not requiring legal knowledge or skills.
Financial literacy and education	Financial literacy and education that supports legal rights trainings for consumers.	Information that does not support know-your-rights trainings (e.g. information about how to create budgets and increase credit scores).
Grassroots mobilization and grassroots lobbying	Educating indigent communities about their legal rights; advising or consulting with other organizations to create, advance, protect, or enforce the rights of indigent communities.	Work to mobilize/recruit communities to lobby, vote, march, participate in censuses, etc.
Research/Studies	Collecting data to inform in-house legal aid delivery.	All other social science research, such as academic studies and publications.

FEEDBACK FROM THE LEGAL AID COMMUNITY

The Committee sought the legal services community's feedback on the proposed definitions during June 2-28, 2022. The Committee is thankful to LAAC for its time and care in circulating a draft of this memo, meeting with its members, and writing a letter to the Committee (Attachment B). LAAC's letter expresses overall support for the Committee's grantee-inclusive process and proposed definitions:

In sum, our community appears to have reached consensus that this proposed definition will sufficiently allow for the legal aid community to engage in this kind of thoughtful, client-centered approaches to achieving outcomes, while ensuring that this core funding remains dedicated to organizations whose primary purpose and mission is to provide legal aid.

(Attachment B, p. 2). Please see Attachment B for LAAC’s full comments.

The Committee also received a letter by Disability Rights Education and Defense Fund (DREDF) (Attachment C). DREDF observed that a conservative reading of the circulated definition of civil might exclude some civil rights work that can arise in the course of a criminal case. This includes, for example, seeking reasonable accommodations in criminal proceedings. Please see Attachment C for DREDF’s full comments.

RESPONSE TO THE COMMUNITY’S FEEDBACK

The Committee agrees with DREDF that the previously circulated definition of civil could be clearer. That definition did mean to categorize as civil—rather than criminal—collateral civil issues such as public access, disability accommodations, and language access that might arise during a criminal proceeding. That civil rights/access work can be separate from the criminal defense legal services in the underlying case. The revised definition clarifies this.³²

CONCLUSION

Attachment A shows the proposed revision to the rules. Adding “civil” before “legal services” reflects 2022 updates to the IOLTA statute. Adding a definition for civil would fill a gap in the rules. Redefining legal services would bring rule 3.672 in line with the reality of effective legal aid and the spirit of the IOLTA statute. The latter definition would provide welcome clarity to programs, commissioners, and State Bar staff, promoting interpretive consistency and statutory compliance. The elements and delicate word choices in the proposed definition seek to maximize flexibility for programs while upholding the IOLTA statute’s intentions—to increase access to civil justice through the funding of civil legal aid.

FISCAL/PERSONNEL IMPACT

None

RECOMMENDATIONS

Should the Commission agree with the Committee’s proposal, passage of the following resolution is recommended:

³² When LAAC circulated the Committee working group’s memo, the proposed definition of civil read:

“Civil” refers to legal issues, questions, or processes that arise under any body of civil law and includes legal services related to expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, and infractions. A general feature of civil matters is that courts typically handle them outside of their criminal dockets. “Civil” excludes legal services related to criminal proceedings except as described in this paragraph.

RESOLVED, that the **Legal Services Trust Fund Commission** adopts the definitions of “civil” and “legal services,” amending State Bar Rule 3.672 as set forth in the Commission Rules Committee’s August 12, 2022, memo, including Attachment A.

ATTACHMENT(S) LIST

- A. Proposed Revision to State Bar Rule 3.672.
- B. Letter from LAAC.
- C. Letter from DREDF.

ATTACHMENT A

Article 2. Construction of certain statutory provisions

...

Rule 3.672 Delivery of civil legal services

(A) “Civil” refers to legal issues, questions, or processes that arise under any body of civil law. The provision of legal assistance with respect to criminal proceedings is not civil legal services. Proceedings concerning expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, or infractions are not criminal proceedings, and legal services related thereto are civil legal services. Legal services related to collateral civil issues such as public access, disability accommodations, and language access that arise during criminal proceedings are not legal assistance with respect to criminal proceedings, provided the civil issues do not directly affect determination of guilt, sentencing, or other disposition of the criminal proceeding.

~~(A)~~(B) “Legal services” means work that uses legal knowledge and skills to create, advance, protect, or enforce the legal rights of indigent clients or communities. This encompasses legal representation and non-representational services for individuals and groups. Examples of non-representational services include providing legal information, advice, trainings, and self-help resources. Non-representational services can also include studying legal needs and outcomes to inform legal aid delivery, investigating legal violations, and advocating directly to government bodies on issues of importance to the legal rights of indigent clients or communities. Representation and non-representational services must be performed or supervised by an attorney. “Legal services” may also include complementary services provided they advance a legal outcome, serve as an integral part of an attorney’s strategy in a legal matter or case, and the attorney directs the work in that matter or case. Complementary services and other services by non-attorneys must uphold the attorney-client relationship and avoid interfering with the attorney carrying out their obligations to the client.~~“Legal services” include all professional services provided by a licensee of the State Bar and similar or complementary services of a law student or paralegal under the supervision and control of a licensee of the State Bar in accordance with law.~~

~~(B)~~(C) “Legal support services” required by statute to be provided by a qualified support center include but are not limited to

- (1) professional services to qualified legal services projects; and
- (2) the direct provision of civil legal services to an indigent client of a qualified legal services project, provided the services are provided directly to the client

- (a) as co-counsel with an attorney employed or recruited by a qualified legal services project; or
- (b) at the request of an attorney employed or recruited by a qualified legal services project that is unable to assist the client.

Legal Aid Fights for Justice. We Fight for Them.



June 28, 2022

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

Re: Codifying Grant Administration Practices: Defining Civil Legal Services

Dear Legal Services Trust Fund Commission Rules Committee:

We are writing on behalf of the Legal Aid Association of California regarding the Legal Services Trust Fund Commission's (LSTFC) rules revision process pertaining to the definition of "legal services." 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.**

LAAC has gathered comments on the memo and the redlined rule provided to us by the Bar via email as well as at two meetings with around 20 total participants. We emailed all Executive Directors of IOLTA funded organizations and our "Director of Litigation and Advocacy" email list, which includes Executive Directors, Directors of Litigation, Directors of Advocacy, and managing attorneys. **To start, we want to convey our impression that the Bar's focus group strategy was highly successful.** It worked both in terms of ensuring maximum engagement from the legal aid community as well as the receipt of as much feedback and information upfront as possible. This meant that, prior to releasing the official memo for us to circulate, the Bar already had an informed decision-making process in regard to how the definition would likely be received.

Specifically, we found that staff successfully channeled that preliminary engagement into the memo. We believe this process fostered transparency, procedural legitimacy, and a more fine-tuned memo that we could share with the community. Of course, while we understand this likely took resources and time, it was worth it, in our opinion, due to the fact that, as we will describe, there was largely consensus around the proposed definition after having gone through this process.

In the two meetings we convened, we largely heard much of what was discussed at the focus group meetings and what is expressed in the memo. The singular overarching concern we heard is—as we all are aware—around diluting Bar-distributed legal aid funding to non-legal aid organizations. As discussed in our meetings with organizations, the balance, within this, is between enabling the important, legal outcome-connected, holistic services that the IOLTA-funded legal aid community currently provides while also ensuring that this funding goes to organizations that actually, as their primary purpose, provide legal aid. Providing funding for complementary aspects of a legal case, such as social work or other advocate help, inspires innovation, efficiency, and whole-person, outcomes-based approaches that drives our community to engage in transformative legal assistance.

With that, this funding is solely for organizations that provide legal services, and it is critical that these complementary aspects be tied to the legal rights, matter, or case at hand. This was the singularly major theme in our discussions. Of course, the Bar has conveyed, repeatedly, that this is their concern as well. However, we wanted to make sure to relay this sentiment that IOLTA-funded legal aid organizations are also concerned about other organizations that do not primarily provide legal services taking a portion of this funding from organizations that generally experience under-funding to begin with. The funding was created by the legislature specifically to meet the unmet *legal* needs of indigent Californians.

Overall, it appears the Bar’s concerns and the legal aid community’s concerns are one and the same, and the participants from the community did not have any major issues with the definition of civil legal services as presented. Meeting participants found that this definition, in tandem with Business and Professions Code § 6213(a)(1), should sufficiently exclude organizations that should not be included. Additionally, we wanted to note appreciation for the “create, advance, protect, or enforce the legal rights” grounding was well-received, and appears to function, within the rule, to successfully allow for but also sufficiently delimit this dynamic between legal work and other services that are connected to that legal work that help the client.

One concern raised was a desire to have clarification that current work qualifies. We heard several examples of projects that were currently funded by IOLTA grants, that, with the limited definition of civil vs. criminal, some organizations were worried might be interpreted to no longer count. (For an example, see the letter from Disability Rights Education and Defense Fund.) Other examples included advocacy with local governments to change practices and the use of advocates who are not lawyers, which was addressed in the memo.

In sum, our community appears to have reached consensus that this proposed definition will sufficiently allow for the legal aid community to engage in this kind of thoughtful, client-centered approaches to achieving outcomes, while ensuring that this core funding remains dedicated to organizations whose primary purpose and mission is to provide legal aid. We appreciate the work of the working group and Bar staff to bring such a thorough and consensus-based definition to our members.

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**

July 1, 2022

Via Email amin.alsarraf@lockelord.com

Amin Al-Sarraf

Legal Services Trust Fund Commission Rules Committee

Via Email catherine.blakemore@gmail.com

Catherine Blakemore

Legal Services Trust Fund Commission Rules Committee

Dear Colleagues:

I am writing to share a concern about the draft language that is being proposed to the Members of Legal Services Trust Fund Commission Rules Committee to define the word “civil” in “civil legal services.”

In its role as a support center, Disability Rights Education and Defense Fund (DREDF) has a mission to enforce state and federal disability rights laws such as Section 504, the Americans with Disabilities Act, and Government Code section 11135 in the California state courts on behalf of court users with disabilities. These civil rights laws are “civil,” and their enforcement through various forms of advocacy has been “traditionally considered civil.” See Cal. Bus. & Prof. Code § 6213(l) (“‘Civil legal services’ includes, in addition to matters traditionally considered civil, legal services related to expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, and infractions.”).

Such disability rights are afforded to state court users who are the subjects of criminal proceedings. These rights, including the right to reasonable modifications, effective communication (such as through sign language interpreting), and other forms of nondiscrimination, are civil rather than criminal. This is so even if the underlying proceeding is criminal. See, e.g., *Updike v. Multnomah Cty.*, 870 F.3d 939 (9th Cir. 2017) (litigation brought by deaf criminal defendant who was denied sign language interpreting at arraignment on criminal charges and while in pretrial detainment and under pretrial supervision); *Lacy v. Cook Cty.*, 897 F.3d 847, 854 (7th Cir. 2018) (litigation brought by criminal detainees who used wheelchairs and who contended that defendants failed to provide reasonable modifications or to remove structural barriers at the courthouses); *Prakel v. Indiana*, 100 F. Supp. 3d 661, 666 (S.D. Ind. 2015) (litigation brought by deaf spectator who interpreting services to attend various court proceedings in which his mother was a criminal defendant).¹

Caselaw shows the efforts of disabled courts users who were in criminal proceedings to seek any available remedies after the fact. But it is far more consistent with the purposes of the ADA and related laws for disabled individuals to enjoy their disability civil rights during their criminal proceeding. Communication access, wheelchair access, reasonable modifications, and other

¹ There may be other, analogous civil laws that apply to court users who are the subject of criminal proceedings, such as the rights of immigrant defendants under Title VI or California state laws to language interpreters.

forms of disability nondiscrimination are disability civil rights that allow criminal defendants an equal opportunity to communicate with their lawyers, the judge, and court staff, and participate equally in the activities of state court.

The language proposed to the Legal Services Trust Fund Commission Rules Committee for defining the word “civil” in the State Bar Rules may cause unintentional problems that disrupt the longstanding understanding that legal services to help enforce rights under the ADA and similar disability access laws in state court proceedings (including criminal proceedings) is a form of civil legal services.

Proposed Rule 3.672(A) provides as follows:

“Civil” refers to legal issues, questions, or processes that arise under any body of civil law and includes legal services related to expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, and infractions. A general feature of civil matters is that courts typically handle them outside of their criminal dockets. “Civil” excludes legal services related to criminal proceedings except as described in this paragraph.

The first sentence, by itself, would include the civil legal services described in this letter, as disability civil rights within state court proceedings are “legal issues, questions, or processes that arise under any body of civil law.” However, the next two sentences – focusing on “civil matters” versus “criminal proceedings” as opposed to the source of the law – create ambivalence.

Regarding the second sentence, the association of “civil” with matters “outside” of criminal dockets may cause confusion. For disabled individuals with criminal law matters, implementing civil disability rights – such as effective communication (e.g. sign language interpreting, real-time captioning, assistive listening device), wheelchair access, and other affirmative access requirements – are necessarily implemented “inside” the criminal case or docket. Contrary to our understanding of the Legislature’s intent, the second sentence suggests that the civil legal services that are the topic of this letter are excluded.

Regarding the third sentence: The first phrase of the third sentence, stating that the word “civil” “excludes legal services related to criminal proceedings” would eliminate the civil legal services described in this letter. The second phrase of the third sentence, “except as described in this paragraph,” could and should reserve the civil legal services about which DREDF is concerned; that is the proper and best reading. But the last phrase could also be read or misread to mean except as to criminal proceedings such as those set out in the first sentence, that is, expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, and infractions.

Given the unintentional ambiguity created by the second and third sentences, DREDF recommends that the proposal be changed to include only the first sentence. This would be the simplest solution:

“Civil” refers to legal issues, questions, or processes that arise under any body of civil law and includes legal services related to expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, and infractions.

Another alternative would be to edit the language to address the concerns raised herein. One option is as follows:

“Civil” refers to legal issues, questions, or processes that arise under any body of civil law and includes legal services related to expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, and infractions. **Civil law and civil legal services include those associated with** ~~A general feature of~~ civil matters ~~is~~ that courts typically handle them outside of their criminal dockets. “Civil” excludes legal services related to criminal proceedings **unless the services involve legal issues, questions, or processes that arise under civil law or are related to expungements, record sealing or clearance proceedings not requiring a finding of factual innocence, and infractions** ~~except as described in this paragraph.~~

Civil legal services should include legal services focus on legal issues, questions, or processes that arise under any body of civil law. Such civil legal services can apply in various contexts and do not depend upon whether there is a court proceeding at all, or whether any proceeding is civil or criminal.

Thank you for your consideration and attention to this matter. I am available to speak about this letter and can be reached at ccenter@dredf.org or 415-531-2874 (cell).

Sincerely,



Claudia Center

Via Email Christopher.McConkey@calbar.ca.gov
 Christopher McConkey
 California State Bar