



# The State Bar of California

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## **OPEN SESSION**

### **AGENDA ITEM 5.1**

**AUGUST 2023**

### **LEGAL SERVICES TRUST FUND COMMISSION**

**DATE:** August 10, 2023

**TO:** Members, Legal Services Trust Fund Commission

**FROM:** Members, Loan Repayment Assistance Program Working Group

**SUBJECT:** Approve Guidelines for the Use of a Loan Repayment Assistance Program (LRAP) and Other Activities to Strengthen Organizational Health

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## **EXECUTIVE SUMMARY**

At its July 13, 2023, meeting, the Legal Services Trust Fund Commission (LSTFC) approved the development of guidelines regarding the use of Interest on Lawyers' Trust Accounts (IOLTA), Equal Access Fund (EAF), and, if applicable, any other State Bar-administered funds as part of a loan repayment assistance program (LRAP). State Bar staff convened a working group for this purpose and solicited feedback directly from grantee organizations regarding draft guidelines. The proposed guidelines provide two options based on general budgeting requirements under the IOLTA statute (Business and Professions Code section 6210–6228, generally), as well as requirements specific to use of funds for an LRAP under Business and Professions Code section 6219(b). The working group urges approval of these guidelines to allow State Bar staff and grantee organizations to prepare for implementation beginning with the 2024 grant year.

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## **BACKGROUND**

In recent years, legal aid organizations have experienced increased staff turnover rates and challenges filling vacant positions.<sup>1</sup> Financial pressure has been identified as contributing to this phenomenon. In response to at least one survey, assistance with student loans was identified as a protective factor against turnover.<sup>2</sup> LRAPs help with this effort by covering all or part of a

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<sup>1</sup> Legal Aid Association of California: *Justice at Risk: More Support Needed for Legal Aid Attorneys in California* (January 2020), p. 2.

<sup>2</sup> *Ibid.*, p. 37.

person's monthly loan payments, thus providing more financial stability to individuals. As such, LRAPs are seen as a possible means to increase long-term recruitment and retention in legal aid.

## **EXISTING PRACTICE**

Historically, State Bar grantees have been permitted to use IOLTA and EAF monies to provide loan repayment assistance for their employees. Most often this has been through employer-initiated and administered LRAPs. Another option would be to budget for an employee's loan repayment through a third-party administrator. In that case, funds are provided by the grantee organization to help cover its employees' loan payments while generally paying an additional administrative fee for the third party to make and monitor the payments.<sup>3</sup>

As with any other budgeting requirements, State Bar staff has adhered to existing law when providing guidance for the use of IOLTA and/or EAF funds as part of an LRAP.<sup>4</sup> Under Business and Professions Code section 6223, IOLTA funds cannot be used for fee-generating work (unless it meets an exception); criminal legal services; or for civil legal services to non-indigent persons (in the case of qualified legal services projects, or QLSPs) or for support services to any entity besides QLSPs (in the case of support centers). This is what is generally referred to as "qualifying" work for the use of IOLTA and EAF funds.<sup>5</sup> (See Attachment A for all referenced code sections.)

Section 6218 reiterates the requirement that State Bar funds only be used for qualifying work, "or for such other purposes as set forth" in the statute. Until the recent statutory change discussed in the next section, the only exception to the use of IOLTA and EAF funds for qualifying work was identified in section 6219(a), allowing grantee organizations to provide paid work opportunities or scholarships to law students without the added requirement of performing qualifying work. Thus, grantee organizations were previously instructed by staff that LRAP payments could only be budgeted for employees with educational loans who are engaged in qualifying work.

## **NEW CODE SECTION**

Effective June 30, 2023, Business and Professions Code section 6219(b) was added to the IOLTA statute. This created a new provision that would allow IOLTA funds to be used "for the purposes of recruiting and retaining staff attorneys in accordance with a loan repayment

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<sup>3</sup> State Bar staff is unaware of grantees directing these funds through a third-party administrator to date, but they could have.

<sup>4</sup> The State Budget Act provides for EAF to be administered on the same basis as IOLTA. However, to use EAF funds, employers have the added responsibility of demonstrating that the person receiving LRAP benefits is also working on EAF activities, and the amount of loan repayment assistance the person receives should be tied to their proportion of EAF-related work.

<sup>5</sup> Note that this definition is narrower than that of "qualified expenditures" for purposes of obtaining eligibility for State Bar grants. For example, support centers are not required to exclusively serve QLSPs to establish eligibility, but their use of State Bar funds should be dedicated to QLSPs, and other services should be covered by different funding sources.

assistance program administered by the California Access to Justice Commission.”<sup>6</sup> Given the placement of this new provision in a statutory section that contains an existing exception to the requirement that funds be used only for qualifying work (work opportunities for pay and scholarships for disadvantaged law students), and that states that IOLTA funds may be used for the stated purposes without limitation, section 6219(b) constitutes another exception to the qualifying work requirement (i.e., grantees may use IOLTA funds towards LRAP that would benefit staff attorneys who are not required to perform qualifying work.)<sup>7</sup>

On July 13, 2023, the LSTFC approved the development of LRAP guidelines in light of the new statute as well as the large, planned increase to the IOLTA distribution in 2024, understanding that more grantee organizations may wish to take advantage of such budgeting options. Staff convened a working group the next week and held a webinar on July 28 to share proposed guidelines with the legal aid community. Feedback from that webinar was shared with the working group and taken into consideration in the final draft of these proposed guidelines.

On August 10, 2023, at the same meeting where these guidelines will be considered, the LSTFC will make eligibility determinations for 2024 IOLTA and EAF grants. Shortly thereafter, State Bar staff will run the funding formula and anticipates releasing tentative allocation amounts and budget forms on or around August 23. It is important to provide guidance to grantees on this topic prior to the submission of 2024 budgets in September.

## **DISCUSSION**

### **WORKING GROUP PROCESS**

Given the recent statutory change, it became apparent that additional guidance would be necessary for grantees navigating the budgeting requirements. More guidance would also be beneficial for the LSTFC to exercise sufficient oversight regarding the use of the funds. This working group engaged with staff to draft guidelines that preserved the flexibility of existing office practice under the IOLTA statute generally, while ensuring compliance with the new and different requirements under code section 6219(b).

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<sup>6</sup> This is equally applicable to EAF funds, as the State Budget Act makes clear that EAF is administered on the same basis as IOLTA.

<sup>7</sup> Additional canons of statutory interpretation compel this result. If Business and Professions Code section 6219(b) were not interpreted as creating an exception to the rule that IOLTA funds may be used only for qualifying work, it would be unnecessary and meaningless, as IOLTA funds may be used for LRAPs for employees performing qualifying work under existing law. Statutes should be interpreted to give them effect. *See Aleman v. AirTouch Cellular*, 209 Cal. App. 4th 556, 568 (2012) (“We seek to avoid any interpretation that renders part of the statute ‘meaningless or inoperative’ ” or that makes any language mere surplusage.”) (internal citations omitted). Further, while Business & Professions Code section 6223 generally bars spending of IOLTA funds on fee-generating work, criminal proceedings, or legal assistance for the non-indigent (i.e., “non-qualifying work”), the specific exception in Business & Professions Code section 6219(b) takes precedence over the earlier-enacted and more general prohibition in section 6223. *See Lopez v. Sony Elecs., Inc.*, 5 Cal. 5th 627, 634–35 (2018) (“If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation].”) (internal citations omitted).

The proposed guidelines outline minimum criteria for budgeting IOLTA and EAF funds for an LRAP generally, as well additional details for what is permissible (e.g., staffing classifications, types of loans, amount of loan repayment). There is a separate section for guidance relative to code section 6219(b). Under that new provision, grantee organizations can use IOLTA and EAF funds for their staff attorneys only, but the attorneys are not necessarily restricted to performing qualifying work.

The guidelines further impose requirements for verification of the use of funds. These verification requirements will provide the LSTFC with the necessary information to ensure sufficient oversight of the funds as well as the ability to evaluate the benefits of this particular use of the funds over time.

This includes ensuring employees' loans are educational loans and that funded employees maintained sufficient employment status during the relevant period. If the LRAP is administered by the employer, the responsibility falls to the grantee organization to verify its compliance. If using a third-party administrator—whether the California Access to Justice Commission's 6219(b) program or another third party—grantee organizations must have an agreement with the administrator to collect and report the necessary information. The third-party administrator must be willing to submit to an independent program and fiscal audit, and for employer-administered LRAPs, grantee organizations may need to provide documentation upon request or as part of a planned monitoring visit. (In all circumstances, grantee organizations remain ultimately responsible for ensuring that grant funds are spent only as permitted by the terms of each grant.) Finally, the guidelines explain the changes to expect with the budgeting process under this new framework and the steps to be taken when funds are not spent.

During guideline development, questions were raised about the narrowness of the requirement that section 6219(b) program only be used for staff attorneys. The working group shares those concerns, as it raises equity considerations for other staff with educational loans who may be excluded from receiving LRAP payments under this program. Nonetheless, given the clear wording of the statute, the working group does not have discretion to provide additional or different guidance to allow LRAP benefits under Business & Professions section 6219(b) to be extended to non-attorney staff. Also of concern, one grantee pointed out that it may disincentivize attorneys from promoting into supervisory or management roles if they stand to lose LRAP benefits due to their job title or work duties.

The working group notes that the various LRAP options are not mutually exclusive. Though the 6219(b) program may only be available to staff attorneys, if an employer administers its own program or wishes to utilize a third-party administrator to fund an LRAP for its other employees, this is possible. Grantee organizations can budget funds for both. Moreover, these are initial guidelines. The LSTFC may wish to update the guidelines or undertake a more extensive codification process regarding the use of funds for LRAP purposes after obtaining preliminary data for evaluation purposes over the next year or two.

## **FISCAL/PERSONNEL IMPACT**

None

## **RECOMMENDATIONS**

**RESOLVED**, that the **Legal Services Trust Fund Commission** approves the proposed loan repayment assistance program guidelines for the use of State Bar-administered funds as reflected in attachment B.

## **ATTACHMENT(S) LIST**

- A.** Business and Professions Code sections 6218, 6219, and 6223
- B.** Proposed LRAP Guidelines

Text of Business and Professions Code Section 6218, 6219, and 6223

**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 for the following:

(a) To provide work opportunities with pay, and where feasible, scholarships for disadvantaged law students to help defray their law school expenses.

(b) To provide loan repayment assistance for the purposes of recruiting and retaining staff attorneys in accordance with a loan repayment assistance program administered by the California Access to Justice Commission.

*(Amended by Stats. 2023, Ch. 34, Sec. 2. (SB 133) Effective June 30, 2023.)*

**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. 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.

(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.

*(Amended by Stats. 2021, Ch. 723, Sec. 14. (SB 211) Effective January 1, 2022.)*

### **Guidelines for the Use of LSTFC-Administered Funds as Loan Repayment Assistance**

The Legal Services Trust Fund Commission (LSTFC) supports all efforts to improve recruitment and retention of qualified professionals in legal aid. Providing financial support to legal aid professionals providing free civil legal services to the indigent through loan repayment assistance programs (LRAP) has been identified as a meaningful strategy in these efforts. The LSTFC has historically allowed grantee organizations to use Interest on Lawyers' Trust Accounts (IOLTA) funds for this purpose as part of an employer's self-administered LRAP or through a third-party administered LRAP. Similarly, Equal Access Fund (EAF) grants could also be used for self-administered or third-party administered LRAP for staff supporting EAF activities. Using IOLTA and EAF funds to compensate employees for qualifying work (i.e., providing free civil legal services to the indigent) through self-administered and third-party LRAPs will continue to be permissible under these guidelines. In addition, Business and Professions Code section 6219 was recently amended to include use of IOLTA funds for legal aid staff attorneys through an LRAP administered by the California Access to Justice Commission (CalATJ) without regard to whether it is compensating employees only for qualifying work, and the State Budget Act allows use of EAF funds in accordance with the amended code section.

To provide appropriate guidance to State Bar grantees, the LSTFC has approved the following guidelines regarding grantee organizations' contributions of LSTFC-administered funds toward an employer's self-administered or a third-party administered loan repayment program. The guidelines apply to the use of IOLTA and EAF grants. There are additional restrictions to CalATJ's LRAP program as required by statute and described below. Other LSTFC-administered grants, such as consumer debt and homelessness prevention funds, may be used for this purpose depending on relevant grant requirements.

The use of LSTFC-administered funds as part of an LRAP must meet the following criteria:

- Employee(s) must be permanent/regular employees of an IOLTA-funded organization (i.e., a temporary employee or contractor would not qualify; however, a legal fellow or attorney funded by a time-limited grant could qualify);
- Employee(s) must be a full-time or part-time (at least 0.50 FTE) employee of the organization. Each organization may determine what constitutes full-time employment;
- Funds must be used to help repay educational loans only;
- Loan repayment assistance from a self-administered LRAP or third-party administrator funded by IOLTA or EAF IOLTA Formula Grant funds must be used for qualifying work. (See exception for loan repayment assistance under Business and Professions Code section 6219(b) below.) Loan repayment assistance from other LSTFC-administered grants may be used to fund LRAPs only if it is compensating employees for work that is permissible under the relevant terms of each grant.
- If an employee participating in an LRAP does not satisfy the LRAP's terms for loan forgiveness and is required to return loan funds, the funds must be returned to the IOLTA-funded organization and used for other purposes permitted under the grant terms or returned to the State Bar if required by the grant terms.

Additionally, the use of LSTFC-administered funds as part of an LRAP may include:

- Use of grant funds towards LRAP for employees, including attorneys, non-attorneys, and law school graduates who are not licensed to practice law, for qualifying work;

- Payments for any education related loans, including law school and undergraduate student loans;
- Standard and income-driven repayment plans as well as fixed amounts determined by the employer.

### **Special Guidance for LRAP under Business and Professions Code section 6219(b)**

Employee(s) receiving loan repayment assistance authorized by Business and Professions Code section 6219(b) must:

- Be a staff attorney who is licensed to practice law in the State of California or a registered legal aid attorney admitted to multijurisdictional practice in California;
- Receive LRAP assistance from CalATJ's administered program.

Only if those requirements are met, may LRAP payments funded by IOLTA or EAF IOLTA Formula Grant funds be used to compensate employees for services that would not be considered "qualifying" work under the IOLTA statute and State Bar Rules.<sup>1</sup>

CalATJ will issue its own instructions and guidelines regarding its program under section 6219(b). Grantees participating in this program are advised to familiarize themselves with CalATJ's guidelines and to consult directly with CalATJ regarding adherence to its program requirements.

### **Budgeting requirements**

- A benefitted employee must work for the employer for the entire calendar year to receive a full year's loan repayment assistance payments. Otherwise, the amount contributed should be apportioned on a monthly basis for the number of months worked. This may require a budget revision should an employee leave the organization during the grant year.
- If the LRAP is **administered by the employer**, the LRAP contributions should be reported as a personnel expense. Administrative costs must be separately reported. Starting with 2024 IOLTA and EAF budgets, line items have been added for this purpose.
- If the LRAP is **administered by a third party**, beginning with 2024 IOLTA and EAF budgets, the LRAP contributions should be reported on the newly added LRAP line under non-personnel expenses. Any fees paid to the third-party administrator must be separately reported as administrative costs and are subject to LSTFC review and approval. To be considered a qualifying expenditure, fees paid must be reasonable in relation to the amount of funds administered.

### **Verification and evaluation**

- For any employee receiving loan repayment assistance with LSTFC-administered funds, documentation of the employee's anticipated monthly payments must be maintained and may be subject to monitoring. Even if the loan payments are verified by a third-party administrator, it is incumbent upon the employer to confirm this information.

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<sup>1</sup> Business and Professions Code section 6213, State Bar Rule 3.672.



- Grantee organizations budgeting IOLTA and/or EAF funds for a third-party LRAP administrator must submit a letter from the administrator within six months after the close of the grant period confirming the following:
  - That the funds remitted to the third-party administrator, other than disclosed fees, will only be used for loan repayment assistance;
  - That the third-party administrator has verified that the loans repaid through the LRAP are the employee's educational loans; and
  - That the third-party administrator has verified that the loan recipient has maintained sufficient employment status.
- Grantee organizations must have a contract or memorandum of understanding with each third-party LRAP administrator that includes a provision for the administrator(s) to submit to an independent fiscal and program audit to confirm funds are spent in accordance with all applicable laws and requirements, including these guidelines. In the event the grantee organization administers its own LRAP, it must self-certify the information in the preceding paragraphs. Additional information may be requested as needed, including but not limited to, during periodic monitoring visits.
- Grantee organizations remain responsible for ensuring that all LSTFC-administered grant funds are expended only as permitted by the terms of each grant and the grant agreements entered between the State Bar and grantee organizations. If LSTFC-administered grant funds are transferred to an LRAP administrator and are not used for purposes permitted by the terms of the relevant grant, the grantee organization may be required to reimburse the State Bar for funds used in violation of the grant terms.
- Grantee organizations that budget IOLTA and/or EAF funds for employee loan repayment assistance will be expected to collect data related to this use, including number of employees supported by the loan repayment assistance, names and email addresses of benefitted employees, employee demographic data, and information regarding recruitment and retention of employees supported by this specific use of funds.

**Unspent funds:**

- In the event all funds budgeted for employee loan repayment assistance cannot be spent for this purpose, grantee organizations are encouraged to revise their budgets to direct the funds to another use.
- Any amount unspent by the end of the grant year would either need to be included in a carryover request or returned to the State Bar after the conclusion of the grant year.