



The State Bar of California

OPEN SESSION

AGENDA ITEM 4.1

NOVEMBER 2023

LEGAL SERVICES TRUST FUND COMMISSION RULES COMMITTEE

DATE: November 1, 2023

TO: Rules Committee, Legal Services Trust Fund Commission

FROM: Erica Connolly, Working Group Member
Jason Galkin, Working Group Member
Patience Milrod, Working Group Member

SUBJECT: Codification of Grant Administration Practices: Fiscal Issues – State Bar Grant Expenditure Deductions

EXECUTIVE SUMMARY

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

This memo presents preliminary recommendations of the Rules Committee's working group regarding State Bar grant expenditure deductions.

The working group sought preliminary feedback from the legal aid community on September 22, 2023, and through the Legal Aid Association of California (LAAC) on October 18, 2023. The working group will present its recommendations regarding State Bar grant expenditure deductions and the legal aid community's feedback to the Rules Committee on November 1, 2023.

CODIFICATION PROCESS

In 2019, at the recommendation of the State Bar Board of Trustees, State Bar staff and the Legal Services Trust Fund Commission (LSTFC) agreed to engage in a multi-phase process of revising and/or codifying decision points employed in the grant-making process for Interest on Lawyer Trust Account (IOLTA) grants, Equal Access Fund (EAF) grants, and other Trust Fund

Program grants. The intent was to provide more transparency about the process and to ensure consistency in administering the grants.

LSTFC members form working groups to investigate the questions raised in the Rules Committee's work plan and develop preliminary recommendations. The working groups develop preliminary recommendations, which are typically circulated by the committee to the legal aid community through the Legal Aid Association of California (LAAC) to obtain feedback. The Rules Committee considers the feedback before making a final recommendation to the commission, and in turn, the Board of Trustees. The Board of Trustees must approve any recommendation made by the commission unless it makes a finding in writing that a recommendation conflicts with a statutory, fiduciary, or legal obligation of the State Bar.

FISCAL CODIFICATION/ CODIFICATION ISSUE

Given the complex nature of fiscal issues as it pertains to grants administration, the working group is undergoing its own multi-phase process to review all issues and develop codification recommendations. In efforts to avoid contradictory recommendations, the working group has carefully grouped interrelated issues under general topic categories:

1. Eligibility for Grants, Allocation Methods, and Payment of Grant Funds
2. Grantee Expenditures (including Federal funding-related issues)
3. Grantee Fiscal Oversight (including Federal funding oversight)
4. Miscellaneous

After initial discussion, the working group determined it would be most efficient to take a bifurcated approach that further categorizes fiscal issues as either warranting a rule change or as an administrative process that needs clarification. While this process is ongoing, thus far, issues with potential implications for eligibility and/or grant compliance have been identified as appropriate for the codification process. The working group recommends that administrative processes be captured and documented in a separate grantee handbook. This handbook would be a complementary resource for all State Bar Rules, providing administrative guidance for how the rules would be implemented. Unlike the proposed State Bar Rules, this resource would be flexible and subject to change on a more frequent basis.

The working group intends to share its preliminary recommendations with the legal aid community and Rules Committee on a rolling basis. From August through October 2023, the working group met and discussed various issues under category 1 that relate to the IOLTA allocation. This memo presents preliminary recommendations regarding State Bar grant expenditure deductions.

GOVERNING AUTHORITIES

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

While the existing governing authorities provide helpful insight into some of the fiscal codification issues, the working group has found that referenced definitions and processes are either outdated, not documented, or inconsistent with current office practice. The working group anticipates replacing the General Grant Provisions, Eligibility Guidelines for Legal Services Projects and Support Centers, and Standards for Financial Management Systems and Audits with new State Bar Rules and a grantee handbook over the course of the codification process.

DISCUSSION

Qualified Expenditures and the Allocation Process

Qualified Legal Services Project (QLSP) allocations are determined based upon the organization's share of qualified expenditures (QEs) for a particular county. While not formally defined, QLSP QEs are expenditures for free civil legal services provided without charge to indigent persons. During the IOLTA/EAF application process, QLSPs are required to report on total corporate expenditures from an audited financial statement or financial review. From that amount, various adjustments, such as deductions for nonqualifying expenditures, are made.¹ Once the qualified expenditure amount is confirmed, it is used in the allocation process.

Although State Bar grant expenditure deductions represent just one of several adjustments made in calculating QEs, the working group felt it was important to address this fiscal codification topic first because of its direct impact on funding awards. Current office practice requires all QLSPs to deduct IOLTA and EAF IOLTA Formula grant expenditures from the total corporate expenditures to calculate QEs. Other State Bar grant expenditures, such as Homelessness Prevention, CalHFA, and Partnership Grants, are not currently deducted.

State Bar grants currently comprise approximately 24 percent of all QEs. For the 2024 grant year, 90 percent of QLSPs were required to deduct IOLTA and EAF expenditures. The remaining 10 percent were first-time applicants and therefore did not have any IOLTA and EAF expenditures. More than half of QLSPs receive non-IOLTA/EAF IOLTA Formula State Bar grant funds, with 71 percent receiving Homelessness Prevention formula grants and 63 percent receiving competitive discretionary grants.

Grantee Impact and Legislative Intent

The current practice of QLSPs deducting IOLTA and EAF IOLTA formula grant expenditures is not statutorily required, and there is no available historical information explaining the rationale behind this practice. The working group infers that the original intent may have been to avoid future IOLTA grant awards being impacted by prior grant awards. Since the IOLTA statute was implemented, there has been a substantial increase in additional types of State Bar grants distributed. The working group was concerned about the uneven treatment of State Bar grant expenditures in the IOLTA and EAF IOLTA Formula applications.

¹ Because Support Center allocations are based on an equal share of the annual Support Center distribution amount, regardless of qualified expenditures, this fiscal codification topic does not apply to them.

Staff conducted extensive research and analysis to ascertain the potential impact of changing current practice, looking into questions such as how changes could affect rural versus urban programs, larger versus smaller programs, and current grantees versus newer grantees. However, because the factors used to calculate allocations are highly variable, such as the distribution amount and number of applying organizations per county, there were no clear trends upon which to base such a determination (i.e., deducting all or no State Bar grant expenditures did not positively or negatively impact all rural or urban grantees, nor did it positively or negatively impact all organizations with large or small budgets.)

Rather than focusing on impact, the working group felt it would be appropriate to consider the plain language of the IOLTA statute, the legislative intent of IOLTA funds, and principles underlying different deduction options to guide its recommendations regarding codification. Pursuant to Business and Professions code section 6210, "... [i]t 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 funding formula, as defined Business and Professions code 6216², was the selected method to distribute IOLTA funds. This formula was later applied to EAF IOLTA Formula grants and adapted for other formula-based State Bar grants.

The working group developed and considered four potential recommendation options. Given the complex nature and nuance of this topic, the working group also gathered preliminary feedback from the legal aid community through an optional grantee feedback session held on September 22, 2023, and through ThoughtExchange, an online platform that enables participants to anonymously provide feedback. There were 32 grantees who attended the feedback session and 7 who provided feedback on ThoughtExchange. An overarching concern from grantees was how they would be impacted in the long-term and any implications of the IOLTA multiyear budget. Again, due to the high variability of factors in the allocation process, staff was unable to address all individual concerns, and staff therefore encouraged grantees to focus on the legislative intent of State Bar grant funds.

Option 1: Maintain Status Quo

Under option 1, the current practice of deducting IOLTA and EAF IOLTA formula grant expenditures would be codified. The working group does not support this option.

Grantees had several arguments against option 1. First, they argued that the nature of the IOLTA and EAF IOLTA Formula work is inherently qualifying, and therefore related expenditures should count towards QEs. Another argument is the unintended negative impact on smaller counties where QLSPs have recently expanded. Grantees who apply for IOLTA and EAF IOLTA

² Business and Professions Code section 6216(b)(1)(A) provides: "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 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 qualified legal services projects applying therefor in the county."

Formula funding in newer counties are penalized the following year because they have to deduct the IOLTA and EAF expenditures they were granted—and are required to spend—in those respective counties. Without IOLTA and EAF IOLTA Formula funding included in their QEs, grantees either have to find other sources of funding to continue the work or discontinue services. This inconsistent funding makes it difficult to expand availability and improve services, which is inconsistent with legislative intent and with the principles underlying the IOLTA and EAF programs.

Option 2: Only Deduct Formula Grant Expenditures

Under option 2, QLSPs would make additional deductions for other State Bar non-IOLTA and EAF formula grants because all formula grants use QEs as the basis for calculating award amounts. The working group does not support this option.

This option would be inequitable because it would only impact grantees who receive formula grants, whereas grantees who receive competitive grants would still be allowed to count those grants' expenditures towards QEs. This could deter QLSPs from applying for future formula-based grants. Similarly, because the funding landscape is difficult to predict, there is no guarantee that future grants would be formula-based. If future grants end up being competitive, option 2 would be, in effect, a temporary change and then revert back to the current practice of only deducting IOLTA and EAF IOLTA Formula expenditures.

Another consideration are the administrative challenges in implementing this option. Grantees are currently not required to report on county-specific expenditures for non-IOLTA and EAF IOLTA Formula grants, and expenditure reporting may not match the grantee's fiscal year. Therefore, it would be very difficult to calculate and verify the correct expenditure amounts to be deducted. Because of its complexity and administrative implications, option 2 was not further explored when soliciting preliminary grantee feedback.

Option 3: Deduct All State Bar Grant Expenditures

Under option 3, QLSPs would deduct all State Bar grant expenditures, including all other non-IOLTA and EAF IOLTA Formula grants. The working group considered this option as a way to incentivize programs to diversify their funding sources and not rely entirely or primarily on State Bar funding. Although diversification of funding is an important issue for programs, the working group ultimately does not support this option.

Option 3 does not alleviate the concerns listed above in Option 1 that some grantees identified regarding current office practice. While current office practice requires grantees to deduct IOLTA and EAF IOLTA formula expenditures, they are still allowed to count other non-IOLTA and EAF State Bar grant expenditures towards QEs. Under Option 3, all State Bar grant expenditures including non-IOLTA and EAF IOLTA Formula grants would be deducted. Therefore, in order to receive an IOLTA and EAF allocation in a county, grantees would need to have additional non-State Bar grant funding to count towards QEs. If a grantee is unable secure non-State Bar grant funding and solely relied on State Bar grants to provide services in a county, under Option 3, they would not receive an allocation because they would have zero QEs.

A broader implication is that grantees may be disincentivized to apply for all additional State Bar grants. This lack of interest and demand could result in smaller grant distributions and an overall decrease in services for client populations. Option 3 would also face the same administrative challenges to implement as option 2. Because of these reasons, the working group believes that option 3 would be inconsistent and counter to legislative intent.

Option 4: Deduct No State Bar Grant Expenditures

Under option 4, QLSPs would no longer deduct IOLTA and EAF IOLTA Formula expenditures, which means all State Bar grant expenditures would be counted towards QEs. Grantees who commented during the feedback session expressed the most support for option 4. The working group supports and recommends this option because it is most aligned with legislative intent and felt it was most consistent with the funding formula.

While the working group appreciates the apparent original intent of preventing future IOLTA grant awards from being impacted by prior grant awards, in adopting this practice, the significant increase in additional State Bar grants over the years was likely not contemplated. Having the ability to include IOLTA and EAF IOLTA Formula grant expenditures as QEs would remain consistent with the intent of the formula. Option 4 would also be the most equitable of the four options because it would treat all current and future State Bar grant expenditures the same.

This option would also provide continuity in services, especially for grantees who rely heavily on IOLTA and EAF IOLTA Formula funding in a particular county. By allowing grantees to receive county allocations based on IOLTA and EAF IOLTA Formula expenditures, it would allow for more grantees to provide consistent State Bar grant-funded services in that county year over year. Individual grantees may also be encouraged to expand services, improve existing programs, and potentially create new programs in a given county.

Another benefit is that implementation would be least burdensome for grantees and staff. Under option 4, grantees would no longer have to report their IOLTA and EAF IOLTA Formula expenditures by county, therefore decreasing the time and efforts needed to complete the IOLTA/EAF application.

However, the working group acknowledges one drawback of option 4 is its potential impact on new grantees. Under that option, new grantees will have a lower percentage of a county's total QEs because existing grantees' IOLTA and EAF expenditures will be included as QEs (and new grantees do not have prior year IOLTA and EAF expenditures to include.) This impact though would be short-term because new grantees would be able to include their IOLTA and EAF IOLTA Formula grant expenditures in future applications. In addition, they would be eligible to apply for, and include additional State Bar grant expenditures in subsequent grant years.

FEEDBACK FROM THE LEGAL AID COMMUNITY

In addition to gathering preliminary community feedback on September 22, 2023, and using ThoughtExchange, the working group sought community feedback through LAAC regarding the proposed rule on October 18, 2023. On October 20, 2023, LAAC reported that grantees were overwhelmingly in support of the working group's recommendations. However, some grantees expressed concerns regarding the potential impact in counties where there are both small and large organizations. With all State Bar grant expenditures counting towards QEs, the community anticipates that there is a likelihood that programs with smaller expenditures would be disproportionately impacted. Another concern is that not all grantees are able to apply for additional State Bar grants because those funding opportunities are restricted to specific substantive areas or geographies. Therefore, including all State Bar grants towards QEs could potentially disadvantage organizations who do not receive additional non-IOLTA and EAF IOLTA Formula grants.

The working group appreciates the community's concerns regarding individual impact on grantees. However, after discussions related to modeling of the various options, the working group could not identify consistent trends that either benefited or disadvantaged grantees with large or small expenditures, or urban or rural programs, with the exception of new grantees, because of the variability of factors (e.g., increase or decrease in QEs for existing grantees, new grantees) in play when calculating formula grant awards in each county. With these factors in mind and with acknowledgement and appreciation of the challenges grantees face in the landscape of nonprofit fundraising and program development in general, the working group maintains that it is more appropriate to focus on legislative intent rather than individual impact when developing its recommendation for this topic.

FISCAL/PERSONNEL IMPACT

None.

WORKING GROUP RECOMMENDATIONS

Should the Rules Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Rules Committee of the Legal Services Trust Fund Commission approves the working group recommendations related to State Bar grant expenditure deductions as referenced in Attachment A.

ATTACHMENT(S) LIST

- A. Proposed State Bar Rule re: State Bar Grant Expenditures
- B. LAAC Feedback to the Preliminary Working Group Recommendations regarding State Bar Grant Expenditure Deductions as of October 20, 2023

Attachment A

Proposed Rule

Rule XX.XX Sources of Expenditures in Calculating Qualified Expenditures

Unless otherwise provided in these rules, when calculating their total qualified expenditures for the purpose of determining IOLTA grant awards, Qualified Legal Services Projects shall include qualifying expenditures that were made with funds from all sources, including all State Bar grants.

Legal Aid Fights for Justice. We Fight for Them.



October 20, 2023

Office of Access and Inclusion staff
[The State Bar of California](#)
845 South Figueroa Street
Los Angeles, CA 90017

Re: IOLTA codification issues

Dear Erica Connolly (and other staff),

Thank you so much for the opportunity to respond to the proposal to make changes to the existing rule to deduct only IOLTA and EAF grants from Qualified Expenditures (QEs), while not deducting other State Bar grants. We reached out to members through emails, phone calls, and a community-wide zoom, and heard overwhelming support for Option 4 in the memo.

LAAC supports Option 4: Deduct No State Bar Grant Expenditures. This makes sense given multiple concerns we heard from the community.

One of the biggest challenges we heard from our community was regarding when they have expenditures in counties funded almost exclusively with State Bar and EAF grants. These expenses are backed out, showing very little expenses in a county, meaning a small award the following year. This necessitates an organization funding the work through unrestricted funding sources, which they can then report the following year as qualifying expenditures to get funding by IOLTA and EAF in a later year. This creates a confusing on/off cycle of funding for the exact same work and creates instability for staffing positions.

We did hear some concerns from small programs in counties where there are much larger organizations. We understand that modeling showed that the change didn't disproportionately impact large vs small programs or urban vs rural, but there was concern that it would negatively impact individual small programs. We would love to see modeling, at the rules revision committee meeting, if possible, showing the impact in an urban county with a mix of small and large programs (names redacted is fine). Our hypothesis is that there are some small organizations with large competitive grants (i.e. the HP grants) that have protected their IOLTA and EAF awards from shrinking too much, but if the larger programs are allowed to count all their IOLTA and EAF-funded work, it might shrink those small organizations' share even more.

We also heard some concerns, which we share, about the current practice of including grants that are so limited in scope that not all organizations would be eligible to apply. The example given several times was that the HP grants were so large that in some counties, the organizations not receiving an HP grant knew they were getting smaller IOLTA and EAF awards in subsequent years because they could not include similar work that their neighbor organizations were able to do. This is a concern because of the upcoming CARE Court roll-out statewide. As some legal aid organizations decide to opt-in or out to the program, one unfortunate factor for them to consider is if they are awarded a CARE Court grant, it might help them increase their share of a future IOLTA and EAF award in their county. The cat is out of the bag, so to speak, with all existing grants, but if the State Bar continues to administer limited subject matter grants based on legislator priorities, this challenge will continue.

We request for clarity in the rules on what this means for grant awards that can be spent over multiple years. As discussed with Doan Nguyen when she joined our community-wide zoom, we are concerned that the flexibility of 2024 IOLTA grant spending (programs can choose to take as much as four years to spend down) will create an unintended consequence in many counties. The organizations that choose to spend all or most of the grant in 2024 will then report those expenses in May of 2025 for their 2026 IOLTA and EAF grants. Organizations that choose to spread the funding over four years will receive a smaller grant in 2026 than if they had spent it all in 2024. This is highly county-specific, and we know there are many factors at play, but this could have a large impact on small programs that must be discussed.

Hope this is helpful - happy to hop on a zoom to discuss, too. Again, the support was overwhelming for option 4, but some concerns remain that may not be able to be addressed through any of these solutions.

Sincerely,



Salena Copeland
Executive Director
Legal Aid Association of California