

BSRC III D

Title 3, Rules 3.60 – 3.92 of the Rules of the State Bar, re Legal Services Trust Fund Program Request Release of Revised Rules for 45-day Public Comment

ATTACHMENT 3

## **SUMMARY OF PUBLIC COMMENT MEETINGS**

### **REVISIONS TO RULES REGULATING INTEREST BEARING TRUST FUND ACCOUNTS FOR THE PROVISION OF LEGAL SERVICES TO INDIGENT PERSONS**

#### **BACKGROUND**

In May 2008, the Board of Governors approved sending the revised State Bar rules governing the Legal Services Trust Fund Program (LSTFP) out for public comment. While the notice was published broadly, outreach efforts focused on the approximately 100 qualified legal service projects and support centers (collectively “programs”) that are directly affected by the rules. The LSTFP staff sent notice to these programs of a series of meetings tailored to obtain maximum feedback from programs and to facilitate open dialogue about the impact of the rules on accomplishing the legislative purpose of Business and Professions Code Sec. 6210 to expand the availability and improve the quality of free legal services in civil matters.

Five meetings were held: On June 9, 2008 by videoconference between San Francisco and Los Angeles for all the support centers; on June 18, 2008 in San Diego; on June 19, 2008 in Los Angeles, on June 23, 2008 in San Francisco; and finally, by teleconference on June 25, 2008. Written comments were also solicited. These meetings (scheduled for three hours each, but which ran almost 5 hours for the support center meeting and just over an hour for the Los Angeles and San Francisco meetings) were set up to obtain comments on specific components of the rules, including strategic handling of applications, monitoring, and compliance issues. In total 48 people (mostly executive directors) representing 43 programs attended one or more of the meetings. The attendees at each of the meetings are identified below.

Because the informal meetings allowed meaningful dialogue but were not conducive to creating a written record, staff advised they would make best efforts to capture broad general concepts in a document that would be circulated, but that participants should submit written comments on points of particular concern. The attached comments were circulated to all participants of the focus group meetings, as well as the directors of all programs – there has only been positive feedback about the quality of efforts to capture the content of the meetings.

Two legal aid organizations submitted written public comment to supplement the comments made at the meetings: Affordable Housing Advocates on June 23, 2008 and Insight, Center for Community Economic Development on June 26, 2008. The Legal Aid Association of California (LAAC) provided analysis and other information to legal aid programs throughout

the process and fifty-eight programs submitted joint comments through LAAC, under cover letter dated August 14, 2008. LAAC also convened a select working group to make recommendations with respect to the rule revisions, and the thoughtful comments of that working group are also attached to the LAAC August 14, 2008 letter. All written comments are attached as exhibits.

## **DATES, LOCATIONS AND ATTENDEES AT PUBLIC COMMENT MEETINGS**

### **Support Centers**

**June 9, 2009- 10:00am – 2:20 pm**

O'Melveny & Myers (by Video Conference)

400 S Hope Street, Los Angeles

LSTFP staff: Lorna Choy

Randy Boyle, National Health Law Program  
Linton Joaquin, National Immigration Law Center  
Gerry McIntyre, National Senior Citizens Law Center  
Lois Thompson, California Women's Law Center  
Angela Miramontes, Center for Human Rights Constitutional Law  
Syd Whalley, Western Center for Law and Poverty

O'Melveny & Myers

Embarcaadero Center West, San Francisco

LSTFP staff: Stephanie Choy, Denise Teraoka

Kevin Aslanian, Coalition of California Welfare Rights Organization  
Gideon Anders, National Housing Law Project  
Rachel Leff-Kich, Legal Aid Association of California  
Deborah Escobedo, Youth Law Center  
Krista Glaser, Public Interest Clearinghouse and LAAC  
Katherine Hsiao, National Senior Citizens Law Center  
Linda Kilb, Disability Rights Education and Defense Fund  
Suzanne Murphy, Worksafe, Inc.  
Amagda Perez, California Rural Legal Assistance Foundation  
Mike Rawson, Public Interest Law Project  
Karen Shain, Legal Services for Prisoners with Children  
Nancy Strohl, Child Care Law Center  
Julia Wilson, Public Interest Clearinghouse and LAAC

**June 18, 2008**

### **Protection and Advocacy**

111 Sixth Avenue, Suite 200, San Diego, CA

LSTFP staff: Stephanie Choy, Lorna Choy

Margaret Dalton, USD School of Law Legal Clinics  
Amy Fitzpatrick, San Diego Volunteer Lawyer Program  
Dennis Holz, Legal Aid Society of San Diego  
Andy Mudryk, Protection & Advocacy Inc.  
Catherine Rodman, Affordable Housing Advocates

**June 19, 2008**

**Asian Pacific American Legal Center**

1145 Wilshire Boulevard, Los Angeles, CA  
LSTFP staff: Stephanie Choy, Lorna Choy

Tracy Quach, Asian Pacific American Legal Center  
Patricia Buske, Asian Pacific American Legal Center  
Laura Holtzman, Alliance for Children's Rights  
Anthony Roh, Asian Pacific American Legal Center

**June 23, 2008**

**Public Advocates**

131 Steuart Street, Suite 300, San Francisco, CA  
LSTFP staff: Stephanie Choy

Jamienne Studley, Public Advocates  
Rachel Leff-Kich, Legal Aid Association of California  
Julia Wilson, Public Interest Clearinghouse and LAAC

**June 25, 2008 – Teleconference**

LSTFP staff: Stephanie Choy, Lorna Choy

Ken Babcock, Public Law Center  
Nancy Bigelow, Inland Counties Legal Services  
Catherine Blakemore, Protection & Advocacy Inc.  
Bob Cohen, Legal Aid Society of Orange County  
Mary Lou Czerner, Legal Aid Society of Orange County  
Diana Dormae, Legal Aid of Napa Valley  
Neal Dudovitz, Neighborhood Legal Services  
Deborah Escobedo, Youth Law Center  
Paul Freese, Public Counsel  
Krista Glaser, Public Interest Clearinghouse  
Matt Goldberg, Legal Aid Society Employment Law Center  
Betsy Handler, Inner City Law Center (signed on and off; gave her proxy to Julia)  
Stacey Hawver, Legal Aid Society of San Mateo  
Mitch Kamin, Bet Tzedek Legal Services  
Linda Kilb, Disability Rights Education and Defense Fund  
Jocelyn Larkin, Impact Fund  
Rachel Leff-Kich, Public Interest Clearinghouse  
Gabrielle Lessard, Insight Center  
Devon Lomayesva, California Indian Legal Services  
Cassie Pierson, Legal Services for Prisoners with Children  
Toby Rothschild, Legal Aid Foundation of Los Angeles  
Dara Schur, Protection and Advocacy Inc.  
Gary Smith, Legal Services of Northern California  
Syd Whalley, Western Center of Law and Poverty

Comment	Staff Response/Recommendation
General comments applicable to all the rules. Comments about process.	
<ul style="list-style-type: none"> <li>Why wasn't a redlined version of the revisions provided? Is the State Bar governed by the Administrative Procedures Act – if so, failure to redline could be grounds for challenge by detractors.</li> </ul>	<ul style="list-style-type: none"> <li>The State Bar is <u>not</u> governed by the Administrative Procedures Act. Although a redlined version of rule revisions is often presented to the BOG and the public, State Bar staff felt that in this case, the rules were so significantly different in organization, format and wording that the resulting redlined rules would be incomprehensible.</li> </ul>
<ul style="list-style-type: none"> <li>While the State Bar may consider many of the changes to be minor and stylistic, without explanation for the changes and assurance that there was no intent to effect substantive changes, reviewers at a later date might infer intent to change the meaning through revisions based on rules of statutory construction.</li> <li>Sample language: "The legislature finds and declares that 'x' as added, is declaratory of, and does not constitute a change in, existing law."</li> </ul>	<ul style="list-style-type: none"> <li>Concerns about statutory construction in some cases may be allayed by express statement in Agenda item or elsewhere that no intent to change meaning should be inferred with respect to that particular provision.</li> <li>Principles of statutory construction only apply if there is ambiguity in the wording.</li> </ul>
<ul style="list-style-type: none"> <li>Changing "including but not limited to" to "including" throughout changes the meaning; particular concern re omission of "but not limited to" at Rule 3.72(B).</li> </ul>	<ul style="list-style-type: none"> <li>Consider usage of "but not limited to" as appropriate.</li> </ul>
<ul style="list-style-type: none"> <li>Is there a way to create a rule that establishes protocols for defining "indigency" in context of court-based services.</li> </ul>	<ul style="list-style-type: none"> <li>Invite separate written comment on this important issue, which needs a framed dialogue; concerned about addressing important issues piecemeal.</li> </ul>
<ul style="list-style-type: none"> <li>What is the difference between "tentative grant amount" and "provisional grant amount" -- used inconsistently in document.</li> </ul>	<ul style="list-style-type: none"> <li>A grant is provisional until all the application information is complete; notice of grant amount is always tentative because the exact amount of the grant is contingent on a number of factors that are not known at the time of the grant award – consider wording to clarify this.</li> </ul>
<ul style="list-style-type: none"> <li>Rules need to be drafted such that they can be fairly applied regardless of who is making decisions; rules need to preserve</li> </ul>	<ul style="list-style-type: none"> <li>Agreed.</li> </ul>

<p>protections for the most disenfranchised clients.</p>	
<ul style="list-style-type: none"> <li>• How do the proposed rules differentiate between pre- and post-1980? Are the programs that do not need to be deemed held to the same standards as deemed programs?</li> </ul>	<ul style="list-style-type: none"> <li>• In current practice, yes. The rules do not change that.</li> </ul>
<ul style="list-style-type: none"> <li>• There is a continuing problem meeting the 90-day audit requirement which is beyond program control. The rules should be revised to allow a draft document as a placeholder or allow an extension.</li> </ul>	<ul style="list-style-type: none"> <li>• Unfortunately, the audited financial is necessary to confirm accurate allocation between programs. For those programs with late calendar audits, there is not sufficient time to grant an extension and still distribute grants funds to all programs on time.</li> </ul>

**Rule 3.61 Duties of Legal Services Trust Fund Commission.**

- (A) The Commission must determine an applicant's eligibility for grants and notify each grant applicant that its application has been approved or denied. If the Commission tentatively approves an application, it specifies a provisional grant amount and any additional requirements, such as a site visit, for a final determination.
- (B) The Commission **must** monitor and evaluate a recipient's compliance with Trust Fund Requirements and grant terms. The assessment **may** be based on
  - (1) application information, grant reports, and additional information reasonably necessary to determine compliance with Trust Fund Requirements;
  - (2) reasonable site visits scheduled upon adequate notice;
  - (3) **an independent evaluation of a recipient provided at the request of the Commission, or**
  - (4) information from other sources, for example, an evaluation provided by the Legal Services Corporation or other funding entity
- (C) The Standards for the Provision of Civil Legal Services to the Poor adopted by the ABA House of Delegates on August 7, 2006, **or amended versions of these standards**, as limited by the general introduction to the standards, are the guidelines **normally used** by the Commission in reviewing and **approving the maintenance of quality service and professional standards**, and **evaluating the quality control and other practices** of applicant and recipient programs.

(D) The Commission may terminate a grant for noncompliance in accordance with Article 4 of this chapter.

<p><b>Rule 3.61 Generally:</b></p> <ul style="list-style-type: none"><li>• Why is information about the grant application under “3.60 Duties of the Legal Services Trust Fund Commission”? Suggested reorganization to move Commission monitoring responsibilities to same place as grantee monitoring responsibilities.</li><li>• Make sure concept of “reasonable” applies to everything.</li><li>• Prior Rule 4.1 provided that “Applications should not require information other than that reasonably needed to determine eligibility and the amount of funds to be allocated” – concern that the requirements are now more extensive.</li></ul>	<ul style="list-style-type: none"><li>• This section collects in one place the roles of the Commission: (1) find eligibility and approve budgets; (2) monitor programs; and (3) terminate grants if appropriate. Because the Commission’s role is regulatory (as distinct for example from a legal aid Board’s role setting priorities), this section outlines the basis upon which the Commission makes its decisions in the exercise of its judgment. In contrast, details about the grant application process are in Rule 3.80.</li><li>• B&amp;P 6225 provides that the BOG “shall adopt regulations and procedures necessary to implement this article and to ensure that the funds allocated herein are utilized to provide civil legal services to indigent persons.</li><li>• Programs uniformly were against separate reports and applications. Therefore applications are currently broader than eligibility and amount of allocation, and the rules capture this practice.</li></ul>
<p><b>Rule 3.61(B)(3) “assessment may be based on an independent evaluation of a recipient . . .”</b></p> <ul style="list-style-type: none"><li>• Objection to the idea of an independent evaluation.</li><li>• Concern that this could be read to mean that the Commission can require a program to retain an independent evaluator at its own cost.</li><li>• Need some mechanism so that appropriate unbiased reviewers are selected.</li></ul>	<ul style="list-style-type: none"><li>• Consider rephrasing to add concept of a neutral evaluation that is arranged by the LSTFP to alleviate fear that programs would be required to incur cost of an independent evaluation.</li><li>• This requirement is from existing Rule 5.3, which actually is stated more strongly. “The Commission shall monitor and evaluate and provide for independent evaluations . . .”</li></ul>
<p><b>Rule 3.61(C) regarding the ABA Standards.</b></p> <ul style="list-style-type: none"><li>• Concern that this expands the State Bar’s role to include reviewing and approving the maintenance of quality service and professional standards and evaluating a program’s quality control and other practices.</li><li>• How do you assess quality? It is very challenging. If you put this language in, is a program going to get dinged because somebody decided a program did not have a sufficient level of quality?</li><li>• Evaluating “other practices” is too broad; “normally used” is too</li></ul>	<ul style="list-style-type: none"><li>• This language comes directly from B&amp;P 6217 which states that “recipients shall ensure all of the following (a) the maintenance of quality service and professional standards; (b) the expenditure of funds received in accordance with the provisions of this article. . .” B&amp;P 6210 states the purpose of the statute to expand and improve quality of legal services. B&amp;P 6224 provides that the State Bar shall have the power to make funding decisions and B&amp;P 6225 provides that the State Bar shall adopt regulations and procedures necessary to implement the legislation.</li></ul>

broad.

- Programs cannot predict what “amended” versions might entail, and yet are being asked to agree in advance to being evaluated against future versions and amendments.
  - Language was suggested: drop “as amended” and instead add language such as “*To the extent the ABA Standards are consistent with the statute and prevailing access to justice principles*” should be incorporated.
  - Tension arises when using the ABA Standards which provide for aspirational goals (technical assistance for recipients) as a measure for compliance.
  - There should be quality control but not allow the LSTFP to evaluate practices. If there are different ways of achieving the same goal, the LSTFC should not be able to dictate which way is right.
  - Should acknowledge the difference between the ABA standards which can be “wishy washy” and statutory requirements.
  - If the criteria for qualified support center eligibility is statutory . . . 6213(b) and 6215, why is the regulatory basis leaping to the ABA Standards?
  - Are there other standards that can also be considered? Using the ABA Standards to evaluate individual program's practice decisions is problematic and intrusive.
  - Doesn't the ABA obtain a lot of comment from legal aid programs before it adopts standards? We need to trust the drafters of the ABA Standards and the process through which those Standards are adopted.
  - LSTFP should consider providing sample quality control standards from programs that have good standards in place.
- Consider deleting “quality control and *other practices*,” so that 3.61(C) reads “. . . and evaluating the applicants and recipient programs.”
  - Take out “amendments” language; take out “normally” used; consider language “consistent with statute and with prevailing principles governing the access to justice community. This flexibility will allow the Commission to look to new relevant standards as they are adopted and accepted by the community and still allay fears that programs cannot be held to unknown future standards.
  - Rules already reiterate the limits stated in the general introduction to the ABA Standards which provide the standards are inspirational only.
  - The LSTFP does not want to second guess any program's decisions regarding service delivery. That's one reason why standards are so important – it articulates a carefully vetted, well-accepted set of principles against which the Commission can evaluate programs. The ABA Standards specifically acknowledge that programs necessarily have different missions, budgets, and priorities.

Rule 3.62 Legal Services Trust Fund Commission membership and terms.

The Commission consists of twenty-one voting members and three nonvoting judicial advisors. At least two members **must be or have been indigent persons as defined by statute** . . .

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| <ul style="list-style-type: none"><li>• Why is commission structure being modified to allow for people who “have been” indigent to fill client member seats?</li><li>• If you can’t find clients that meet eligibility guidelines, move threshold higher. Saying someone “used to be poor” is ridiculous.</li><li>• The change makes sense given that it must be difficult to find client members who care about grants administration when the commission has no discretion over grants.</li><li>• The change makes sense but is too open – there should be some limits on how long the client was indigent – e.g., within the last five years, or the level of indigency, i.e., being a “starving student” during college should not be considered “or have been indigent.” (duration and recency of poverty.)</li><li>• Consider giving a preference for “clients” as defined by statute, but subordinate preference for former clients.</li><li>• Also recognize that it is easier to engage client board members when clients make up a larger portion of the board (1/3 in the case of LSC programs) and when the work of the organization is more closely tied to the clients’ experiences.</li><li>• Programs acknowledged that LSTFP has called to seek help with finding commission members and program has not been able to help – maybe should adopt client representation as aspirational.</li><li>• Agree with the underlying goal of client representation, recognize problem within own program in finding engaged client board members; mixed feelings.</li></ul> | <ul style="list-style-type: none"><li>• Consider some restrictive language re. duration or recency of indigency.</li><li>• At various times, it has been difficult for the Commission to find a commission member that is representative of the client community and who has the time, interest and ability to engage in Commission work, which is significantly more removed from services than serving on a legal aid board. Also, because unlike the boards which often have several client members, client members do not always feel comfortable even when they have important information to share because the commission does not meet very frequently. The additional language merely gives flexibility to consider people who bring a client perspective, but possibly no longer meet eligibility guidelines.</li></ul> |
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Rule 3.71 Primary purpose and function.

- (A) A qualified legal services project . . . applying for Trust Fund Program funds is presumed to have such a purpose and function if
- (1) **more than 75% of the budget** for the fiscal year for which it is seeking funds is designated to provide free legal services to indigents, and **more than 75%** of its expenditures for the most recent reporting year were incurred for such services; the **calculation of 75% of expenditures** may include a reasonable share of the administrative and overhead expenses as authorized by these rules . . .
- (B) A qualified legal services project that does not meet the **75% test** may nevertheless apply, provided that the project can satisfactorily demonstrate that it meets the primary purpose and function requirement by other means . . .

- The current rules allow for 75% of expenditures as opposed to “more than” 75%. Suggest that language be “75% or more.”

- Consider re-wording to establish the presumption that 75% of expenditures or more establish primary purpose.
- The 75% number establishes a presumption only, it is not a fixed number – the change has minor impact but was not deliberate.

Rule 3.72 Delivery of legal services.

- (A) **“Legal services” include professional services provided by a member of the State Bar and similar or complementary services of a law student or paralegal under the supervision and control of a member of the State Bar in accordance with law.**
- (B) **Legal support services required by statute include professional services to qualified legal services projects and the direct provision of legal services to an indigent client of a qualified legal services project, provided the services are provided directly to the client.**
- (1) as co-counsel with an attorney employed or recruited by a qualified legal services project; or
- (2) at the request of an attorney employed or recruited by a qualified legal services project that is unable to assist the client.

<ul style="list-style-type: none"> <li>• Rule 3.72(A) Current rules provide that Legal Services include “all professional services.” Why is the word “all” removed?</li> <li>• Uniform agreement that “professional services” does not include lawyers providing non-legal professional services, e.g., accounting, medical, social services or similar services by partners in a holistic delivery model (those services may be part of an organization’s work but still not be covered as qualified expenditures).</li> <li>• “All” encompasses professional services that may include non-legal work but which is intrinsically necessary to pursue legal recourse, e.g., financial accounting to determine predatory lending practices.</li> </ul>	<ul style="list-style-type: none"> <li>• Consider leaving “all” in to allay fears about statutory constriction and based on the point that the rule applies to non-legal work that is intrinsically necessary to pursue legal recourse.</li> <li>• The Commission interprets the current rule to mean that “legal services” include professional legal services, not any professional services – e.g., accounting, healthcare, etc. By keeping the word “all,” the Commission is not changing its current interpretation of what is “legal services.”</li> </ul>
<ul style="list-style-type: none"> <li>• Rules 3.72(A) and 3.72(B) Because the subparts do not have parallel structure, it is difficult to read, and subject to misinterpretation. Suggest putting “Legal Support Services” in quotes, and punctuating to add colon after “include” and itemize “1) professional services to qualified legal services projects,” and “2) the direct provision of legal services . . .”</li> </ul>	<ul style="list-style-type: none"> <li>• Consider wording to create parallel structure and resolve confusion.</li> </ul>

**Rule 3.80 Application for Trust Fund Program grants.**

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

(A) A qualified support center must agree to offer support services in two or more of the following ways: consultation, representation, information services, and training. A support center may apply for funding on the basis of special need, provided that its application demonstrates that it meets State Bar quality control requirements and the support center is deemed to be of special need by a majority of qualified legal services projects in accordance with Trust Fund Program procedures . . .

(B) An application must include:

- (1) an audited financial statement by an independent certified public accountant for the latest fiscal year; if the fiscal year is not a calendar year, the application must also include an income and expense statement for the time between the closing date of the statement and December 31. A financial review in lieu of an audited financial statement may be submitted by an applicant whose gross corporate expenditures were less than the amount specified in the Schedule of Charges and Deadlines;
- (2) a budget and budget narrative, which must be submitted within thirty days of receipt of the Notice of Tentative Allocation, explaining how funds will be used to provide civil legal services to indigent persons, especially underserved client groups such as, but not limited to, the elderly, the disabled, juveniles, and non-English-speaking persons within their service area; and
- (3) **information to demonstrate the maintenance of quality service and professional standards, including internal quality control and review procedures and standards**, experience and educational requirements of attorneys and paralegals; supervisory structure,

procedures, and responsibilities; job descriptions and current salaries for all filled and unfilled professional, and management positions; and fiscal controls and procedures.

**(4) information pertaining to program activities for both evaluative purposes and to enable statewide assessment of gaps in the delivery system and to collect data and statistics to increase funding for legal services, for example level and areas of service, the litigation docket, and populations served.**

<p><b>3.80 Generally:</b></p> <ul style="list-style-type: none"> <li>• "Applicant" v. "Recipient": The Statute does not specifically define an "applicant." Applicants and Recipients should be treated differently.             <ul style="list-style-type: none"> <li>○ Recipients should be scrutinized less carefully because they already have established eligibility</li> <li>○ Applicants should not be scrutinized as closely because as a new fundee, they don't have the same prior-year reporting requirements of a prior recipient</li> </ul> </li> <li>• The rule is fine as drafted re. applicant and recipient and treatment of recipient and applicant in the same way is appropriate.</li> <li>• Most people agreed that "applicants" and "recipients" should be held to the same standard. However, many suggested that the LSTFP should consider creating a "Part A/Part B" format that distinguishes between applicant and reporting information. Nobody wanted a separate application and grant reporting requirement.</li> <li>• LSTFP should consider something like the LSC model where an extensive application is only required once every three years.</li> </ul>	<ul style="list-style-type: none"> <li>• With minor differences in documentation intended to reduce unnecessary administrative requirements, a "recipient" becomes an "applicant" for funding each new grant year, and the standards are the same for both.</li> <li>• Eligibility criteria should be across the board. Applicants should be held to the same requirements of a recipient because: 1) it would be wrong to fund even for a year a new applicant that doesn't meet standards that existing grantees meet; and 2) it creates substantial administrative time and costs to terminate funding after it is bestowed.</li> </ul>
<p><b>Rule 3.80(B) sets forth Support Center requirements of "quality control" and requires that support centers offer two or more of: consultation, representation, information services and training.</b></p> <ul style="list-style-type: none"> <li>• Concern that these are new requirements, or new reporting requirements.</li> </ul>	<ul style="list-style-type: none"> <li>• The requirement of quality control and areas of Support Center services mirror statute, including B&amp;P 6213(b), 6215 and statutes governing quality control for legal service providers generally.</li> </ul>
<p><b>Rule 3.80(E)(3) The current rules state that "applications shall describe the applicant's quality control procedures and standards." Revised rules change "describe" to "demonstrate" and add "quality service and professional standards" to "quality control procedures."</b></p> <ul style="list-style-type: none"> <li>• Concern that "quality" does not result in a mandate to evaluate (or</li> </ul>	<ul style="list-style-type: none"> <li>• Consider adopting notion of "describing" for application process but incorporating idea of "demonstrating quality service and professional standards" elsewhere.</li> <li>• Recognize the tension and concern of programs, but the State Bar is a regulatory agency. It is the Bar's responsibility to ensure that programs comply with statute by actually doing what they say, not just</li> </ul>

<p>second-guess) case-handling decisions or priority-setting decisions.</p> <ul style="list-style-type: none"> <li>• Rule 3.80(B) and (E)(3): object to the word “demonstrate” – how can you demonstrate in an application? How can programs state proactively how they will ensure quality? How do you assess quality?</li> <li>• Understand others’ concerns about the word “demonstrate” but it really is a distinction without a difference; demonstrate means that you walk the talk that you talk and that is a fair requirement.</li> <li>• How do you distinguish between quality assurance and a program’s mission? Once the State Bar tries to say that service is inadequate it risks replacing its judgment on appropriate pursuit of justice for that of the program. Program has the right to set its own priorities (assuming there’s a legitimate priorities-setting process) within a very broad array of substantive advocacy activities. Funder should not have discretion to direct the mission or to review a specific case and disagree with the lawyering by advocates. That would be micro-management in the extreme.</li> <li>• Not concerned that the State Bar wants language that says they want to evaluate quality.</li> <li>• The devil is in the details. How do you word it in a way that allows for an assessment of quality but not substitute State Bar’s judgment for program’s regarding the means to accomplish mission.</li> </ul>	<p>saying it. Moreover, it is in the best interest of clients to ensure that programs are using money to provide quality legal services. Money that one program is wasting is money that is not available to its neighboring program to serve clients.</p> <ul style="list-style-type: none"> <li>• Practically, the old rules and new rules will operate the same way. The LSTFC may assert that a program is not meeting statutory requirements but it will only want to do so in clear cases because the program can still challenge that finding under the complaint procedures. Protections for programs under the complaint procedures were strengthened under the new rules.</li> </ul>
<p><b>Rule 3.80(E)(4) Information pertaining to program activities for both evaluative purposes and to enable statewide assessment.</b></p> <ul style="list-style-type: none"> <li>• Current Rule 4.1 states that “Applications should not require information other than that reasonably needed to determine eligibility and the amount of funds to be allocated.” Comments varied: <ul style="list-style-type: none"> <li>○ The proposed Rule would create a regulatory requirement that programs provide information not required in the current rules or Statute.</li> <li>○ Information requested could be contorted against LSTFP and its constituencies</li> <li>○ Would programs have to provide this information as a condition for eligibility for funding? Or to avoid assessment of</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider reviewing the structure of the application itself: While programs do not want to have to file separate documents (which would be an administrative burden to both programs and the LSTFP staff), given that the applications include reports on prior year activities, it may be that the application can contain two parts, one with mandatory application information, and one for reports on prior year activities and statistics for reviewing the delivery system.</li> <li>• Consider revising to eliminate broader concept of benchmarking statewide gaps but keep concept of statewide data and program activities.</li> <li>• Consider changing “litigation docket” to “litigation report” or “litigation summary.”</li> <li>• People who are around the table now are the people who always</li> </ul>

fees?

- The State Bar should be collecting data to measure service delivery and to make the case for increased funding but consider making the application in two parts, one part might even be submitted “x” number days later so it isn’t confused with application requirements, or maybe just separate parts.
- The LSTFP should be able to collect information but should collaborate with programs to find out what is feasible and reasonable.
- Maybe the LSTFP could convene annual small meetings to talk about data needed to enhance statewide vision.
- Data should enable mapping of who is served.
- Fine to ask for additional information but do not ask for “docket” which is term of art, change to “summary” or “report” to capture the age, type of case and level of service.

cooperate. The difficulty is in getting information when it is not mandatory from those not participating in these meetings.

### Article 3 Applications and distributions

#### Rule 3.81 Duties of Trust Fund Program grant recipient.

The recipient of a Trust Fund Program grant must:

- (A) use the grant in accordance with the terms of the application agreement and Trust Fund Requirements;
- (B) maintain complete financial records, including budgets, to account for the receipt and expenditure of all Trust Funds;
- (C) maintain records for five years after completion of services to a client regarding the eligibility of the client and promptly provide such records to the Commission for inspection upon demand;
- (D) **cooperate regarding any site visit** to determine whether the grant is being used in compliance with Trust Fund Requirements;
- (E) submit timely quarterly financial reports and any other information required by the Commission; and
- (F) **pay any noncompliance fees set forth in the Schedule of Charges and Deadlines to defray administrative costs for handling documents that are late or that do not comply with Trust Fund Requirements.**

<p><b>Rule 3.81(D).</b></p> <ul style="list-style-type: none"> <li>Proposed Rule 3.61 refers to “reasonable” site visits which should be reiterated here.</li> <li>Not an issue; reasonableness is implied.</li> </ul>	<ul style="list-style-type: none"> <li>Consider adding “reasonable” before “site visits.”</li> </ul>
<p><b>Rule 3.81(F) Fees and charges.</b></p> <ul style="list-style-type: none"> <li>The concept of fees and charges was initially met with alarm at all meetings, but when explained, was universally accepted provided there was some flexibility for programs facing extenuating circumstances. Ideas included: <ul style="list-style-type: none"> <li>Treat the application like dues bill. Member dues increased if not paid by the date stated, but there is another deadline at which point the application is late.</li> <li>The following language was suggested: <i>Affirmative obligation to turn in on time unless extenuating circumstances and extension. Failure to comply may result in fines or termination. Chronic and persistent failure may result in administrative sanctions up to and including termination.</i></li> <li>Soften the language, e.g., “absent good cause” or “in the event of extenuating circumstances” failure to turn in trust fund documents can result in fines.</li> <li>Fines should be accelerating, “up to and including termination of grant funds”; stay away from words like “chronic.”</li> <li>“Unless an extension is granted by LSTFP staff.”</li> </ul> </li> <li>Some programs felt strongly that lateness of the audited financial statement, which they felt was often outside of their control, should not count.</li> <li>Programs raised concerns that fines not be applied where staff had follow-up questions -- only where the packet was incomplete.</li> <li>Virtually all programs were disturbed to hear that other programs were consistently late with paperwork and some thought those programs should receive heavier sanctions such as grant denial or termination; others quickly pointed out that would harm clients served in that county.</li> <li>Programs recognized the conundrum of progressive fines creating the inadvertent result of perhaps giving programs permission to be late up to the point at which fines attach.</li> <li>Suggested adopting a policy that is implemented consistently, but</li> </ul>	<ul style="list-style-type: none"> <li>Need to address the problem that the more we spell out protections for programs, the more we give programs permission to push the limits, i.e., we give permission to be late on a cost/benefit analysis.</li> <li>Recognize need for adequate notice to programs before assessing a fee. Consider a practice of copying the Board chair with any notices of delinquencies.</li> <li>Consider putting “fees and charges” into grant agreement so that there is adequate notice to programs.</li> <li>Consider adopting language that allows staff some latitude to grant extensions before assessing fines.</li> </ul>

<p>which is not made public – contrary view, don't want to play “hide the ball.”</p> <ul style="list-style-type: none"> <li>• Even small fines are a big compliance problem for LSC programs. All programs need adequate notice to avoid imposition of fines.</li> <li>• Notice to the board will make any level of fines extremely effective.</li> <li>• Need softer language and allowance of more wiggle room; stay away from words like “chronic” which are hard to define.</li> <li>• Can we look at fulfilling LSTFP requirements with other funder report, e.g., LSC or housing development.</li> </ul>	
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**Rule 3.82 No abrogation of legal or professional responsibilities.**

**Nothing in these rules shall limit or impair in any way the professional responsibility of any attorney to his or her client to provide such client with legal services appropriate to the client's needs. Nothing in these rules may be interpreted to require an applicant or recipient to violate the law.**

<ul style="list-style-type: none"> <li>• Concern about perceived elimination of previous rule 5.3 “Subject to common law, statutory and constitutional privileges, and subject to professional responsibilities of members of the State Bar . . . , the applicant or recipient may be required by the Commission . . .”</li> <li>• Proposed Rule 3.82 includes protections against any overreaching demands of the State Bar, but does not affirmatively state programs rights, e.g., under the First Amendment. This is particularly significant because of the potential statutory construction from removal of the prior protections.</li> </ul>	<ul style="list-style-type: none"> <li>• Protections were moved from this section on monitoring to provide programs with the same assurances throughout grantmaking process, not just during monitoring process.</li> <li>• Since a rule cannot abrogate a constitutional, statutory or common law right, counsel considered it unnecessary to state that affirmative fact. Notwithstanding, consider adding sentence in 3.82 that affirms applicants and recipients are entitled to rights and privileges under statute, common law or the constitution” to allay concerns.</li> </ul>
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#### Article 4 Complaints and requests for review

##### Rule 3.90 Definition.

For purposes of this article, receipt of a document mailed by staff or the Commission is deemed to be five days after the date of mailing or is the actual time of receipt when staff or the Commission delivers a document physically by personal service, courier, or otherwise.

##### Rule 3.91 Commission decisions to deny or terminate funding.

- (A) The Commission has the authority to deny an application for initial funding, deny an application for renewal of funding, or terminate existing funding in accordance with law and these rules. The applicant or recipient is entitled to written notice of the denial or termination of funding.
- (B) An applicant or recipient whose funding is being denied or terminated may request reconsideration by the Commission. The request must be made in writing within 30 days of receipt of notice of the denial or termination of funding and must include all information that the recipient wishes to submit to support the request for reconsideration . . .
- (C) Within 30 days of receipt of the written response to the request for reconsideration, the applicant or recipient may file a request for review by the State Bar Court. The request must be submitted to the State Bar Court in accordance with the Rules of Procedure of the State Bar on Legal Services Trust Fund Proceedings. Pending a final decision by the State Bar Court, a grant recipient must continue to receive funding. A grant applicant is not entitled to funding pending review.

##### Rule 3.92 Third-Party complaints against recipients.

- (A) Any person or entity may file a written complaint that a grant recipient fails to meet Trust Fund Requirements.
- (B) **Staff must evaluate and attempt to resolve written complaints regarding a grant recipient. If the complaint is not resolved within ninety days after staff receives the complaint, staff must provide the Commission, complainant, and grant recipient with a written report of its efforts to resolve the complaint and recommendation of what action, if any, is appropriate.**
- (C) Within 30 days of receipt of the staff report, the complainant and grant recipient may provide the Commission with a written response that may include additional evidence and may request review by the Commission.
- (D) Within a reasonable time, the Commission or a committee of its members appointed by the Commission must consider the staff report and any response. The Commission or committee must then dismiss the complaint or schedule an informal conference. The complainant and grant recipient are entitled to written notice of the dismissal or the date, time and place of the conference.
- (E) At the informal conference, the staff member who conducted the investigation must be present barring extenuating circumstances. The complainant and grant recipient must have an opportunity to present evidence. The Commission must issue a written notice dismissing the complaint or terminating funds. The complainant and grant recipient are entitled to written notice of the decision of the Commission.

(G) If the Commission or committee decides to dismiss the complaint, its decision is final.

(H) If the Commission or committee decides to terminate funding, the grant recipient may petition the State Bar Court for review of the decision as provided in Rule 3.91. If the grant recipient fails to file a timely petition, the decision to terminate funding is final.

- Generally agreed that the new rules provide good procedural protections to programs.
- Gives programs a deadline, time to do things informally, then moves to a formal process.
- Consider specifying alternatives to defunding, especially when the program is otherwise operating well, such as to put management in other hands.
- The new rules provide that staff will report to complainant and the recipient, but there is no provision that the program be notified of the written complaint at the time it is received.

- Consider adding provision that formal written complaints be forwarded to the program at the time of receipt.