

AGENDA ITEM

MARCH 54-166

Legal Services Trust Fund
Program: Title 3, Rules 3.660 –
3.692 of the Rules of the State
Bar – Proposed Approval
following Public Comment Period

DATE: February 10, 2009

TO: Members, Board Committee on Stakeholder Relations
Members, Board of Governors

FROM: Legal Services Trust Fund Commission
Stephanie Choy, Managing Director
Legal Services Trust Fund Program

SUBJECT: Legal Services Trust Fund Program: Title 3, Rules 3.660 - 3.692 of the Rules of
the State Bar – Proposed Approval following Public Comment Period

EXECUTIVE SUMMARY

As a part of the State Bar's continuing rules revision project, proposed revisions for the Legal Services Trust Fund Program (LSTFP) rules came before the Board Committee on Stakeholder Relations on May 16, 2008. The committee authorized a public comment period of 45 days, beginning on May 16, 2008 and expiring on June 30, 2008. Given the scope and extent of initial comment, the LSTFP requested, and the Board of Governors subsequently approved extending the time for public comment by 45 days. The Legal Services Trust Fund Commission considered the many comments from the field, and based on those comments made substantial revisions to the proposed Rules.

In November 2008, the Legal Services Trust Fund Commission submitted those revised Rules to the Board Committee on Stakeholder Relations for re-release for public comment. The revised proposed Rules were released for a new 45-day public comment period beginning no later than November 24, 2008 and ending no earlier than 45 days later. All public comment is now supportive of adopting the proposed Rules. Therefore, the Legal Services Trust Fund Commission proposes that the Board of Governors adopt Title 3, Rules 3.660 – 3.692 of the Rules of the State Bar governing the Legal Services Trust Fund Program.

Board members with questions about the proposal may contact Stephanie Choy at (415) 538-2249 or stephanie.choy@calbar.ca.gov, or contact Mary Yen at (415) 538-2369 or mary.yen@calbar.ca.gov.

I. Background

The ongoing State Bar Rules Revision Project will integrate the State Bar's more than two dozen sets of rules into one comprehensive structure and make the rules simpler, clearer, and more uniform. The Board adopted the organizational scheme for the Rules of the State Bar at its July 20, 2007 meeting. The rules that govern the Legal Services Trust Fund Commission (LSTFC) and the administration of grants funded through the Legal Services

Trust Fund Program (LSTFP) are the subject of this agenda item.

The Board Committee on Stakeholder Relations approved sending a revised version of the proposed LSTFP rules out for 45-day public comment at its May 2008 meeting. To solicit public comment, the LSTFP scheduled a series of five meetings with IOLTA-funded stakeholders as follows: 1) qualified support centers by videoconference between San Francisco and Los Angeles, June 9; 2) San Diego, June 18; 3) Los Angeles, June 19; 4) San Francisco, June 23; and 5) teleconference, June 25.

In order to give the State Bar staff and the Rules Revision Committee of the Legal Services Trust Fund Commission time to consider comments and to revise the rules to reflect public comments, the LSTFP requested and the Committee on Stakeholders Relations granted an extension of the initial public comment period to: 1) allow ample opportunity for the public to comment; and, 2) provide adequate opportunity for the rules drafting committee of the Legal Services Trust Fund Commission, and State Bar staff, to synthesize the comments and propose revisions to the draft rules.

Based on comments received, the Commission revised the proposed rules, and those revised rules were submitted by the LSTFP to the Board in November 2008. (A copy of the rules, redlined to show changes made after initial public comment, is Attachment 1.) The Board Committee on Stakeholders' Relations approved release of the revised rules for a new 45-day public comment period. Because all public comment issues were addressed in the second draft of the Rules, all comments during the most recent public comment period, are supportive of adopting the new Rules as drafted. Therefore, at this time, the LSTFC is pleased to return the attached final set of proposed rules to the Committee on Stakeholders Relations and Board of Governors for adoption. (A copy of Title 3, Rules 3.660 – 3.692 of the Rules of the State Bar, as proposed for adoption, is Attachment 2.)

PUBLIC COMMENT AND REVISIONS

As indicated to the Board in November, the rules revision process has given the legal aid community an opportunity for substantial discussion about the means of ascertaining that there are high standards of quality in the delivery of legal services. That larger goal is achieved by a number of strategies, including ensuring that the Commission is appropriately representative of client and other communities, articulating application and grant review processes, defining standards of measurement, and setting forth appropriate grievance (both third-party and program) procedures. A very lengthy and inclusive comment process between May and November 2008 surfaced many concerns raised by the LSTFP's first draft of the proposed revised rules. Those initial public comments are summarized in Attachment 3. (Comments that were submitted in writing were attached to the November Board Agenda item and are not re-attached here.)

Some of the major revisions to the May 2008 version include the following:

Standards and monitoring for quality in the delivery of legal aid (3.61, renumbered as 3.661): The revised rules have created an opportunity for substantial dialogue about the Commission's role in ensuring the delivery of quality legal services. No single set of standards work for the many contexts in which legal aid programs work. Many revisions to the rules arise out of efforts to define monitoring standards: The legal aid community expressed concern about being held to quality standards in 3.61(C) that were not identified. For that reason, wording has been added here in 3.661(C) to provide that the Legal Service Trust Fund program must provide due notice if it chooses to rely on other standards that are generally accepted in the legal aid community.

Commission membership (3.62, renumbered as 3.662): The programs expressed

concern that the proposed rules allowed persons who had been but were no longer indigent to serve as client members of the Commission. Recognizing that having been indigent at one time does not mean that the Commission member is representative or understanding of the client class, the Commission revised the rules to establish that the client member must have been recently client-eligible. While other criteria could have been attached, the Commission with agreement from the legal aid community opted not to define client criteria too narrowly.

Limitations on the application process (3.80 and 3.81, renumbered as 3.680 and 3.681): The existing rules had limited the scope of information that could be requested in the application process to information about eligibility and allocation of funds. The proposed rules deleted this limitation in recognition of the need for information on program quality. Some in the legal aid community commented that although the application can provide information about quality, the written application cannot demonstrate quality (3.80). The revisions presented here are responsive to such concerns. Additionally, 3.681(D) has been revised to acknowledge that information about maintenance of standards and compliance with program requirements is more appropriately submitted in a separate report rather than as part of the grant application.

Noncompliance Fees (3.81, renumbered as 3.681): Programs agreed that noncompliance fees and even termination of funding is appropriate in extreme circumstances. However, programs requested the addition of language indicating that the LSTFP have discretion with respect to the assessment of fees and exercise the discretion only in the event of substantial noncompliance. Wording to that effect has been added to the 3.681(G).

Complaint Process (3.92, renumbered as 3.692): The complaint process has been revised to give the Commission broad authority not just to dismiss a complaint or terminate funding, but also to require intermediate steps, such as corrective action. Additionally, the procedure has been clarified to provide that the LSTFP advise the grantee of a formal complaint.

Derivative Income (3.81, renumbered as 3.681): The rules were revised to articulate that all income earned by a grant recipient from grant-supported activities, must be used for qualified purposes. While the LAAC working group noted that the wording expanded the prior rule of derivative income beyond the previously articulated attorney fees, they agreed with the concept and suggested only that the wording be made more explicit to spell out the sources of derivative income, such as income from fees for services, training, sales and rentals of real or personal property, and interest earned on grant amounts.

The rules that are now before the Committee have been carefully vetted within the legal aid community. As a result of the thorough vetting process and careful revisions balancing the needs of the Legal Services Trust Fund Commission to ensure program compliance and quality, and the needs of the legal aid organizations to be sure they have control over their own priority setting and operational decisions, all public comment received since re-release of revised rules for public comment, fully support adoption of the Rules of the State Bar, Title 3, rules 3.660- 2.692 as drafted. A summary of public comment received since November 2008 is in Attachment 4, followed by hard copies of the actual letters.

RECOMMENDATION

The Legal Services Trust Fund Commission and staff recommend the attached revised rules be adopted as the new rules for the Legal Services Trust Fund program in Title 3, Rules 3.660 – 3.692 of the Rules of the State Bar.

FISCAL AND PERSONNEL IMPACT

No fiscal or personnel impact is anticipated.

RULE AMENDMENTS IMPACT

This proposal would result in new rules for the Legal Services Trust Fund Program in Title 3, Rules 3.660 – 3.692 of the Rules of the State Bar and repeal of the Rules Regulating Interest-Bearing Trust Fund Accounts for the Provision of Legal Services to Indigent Persons.

BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

Upon approval, this item may impact Tab 15, Article 7, in Section 1: make appropriate changes in the text to reflect that “at least two members must be or have been within five years of appointment indigent persons as defined by statute”; in Section 3 delete the second sentence and replace it with “Under the Legal Services Trust Fund Program rules, the commission shall administer the legal requirements and program rules for revenue from IOLTA (Interest on Lawyers’ Trust Accounts) funds and other funds remitted to the program.”

PROPOSED BOARD COMMITTEE ACTION

Should the Board Committee on Stakeholder Relations agree with the proposed recommendation, adoption of the following resolution would be appropriate:

RESOLVED, following publication for comment and 14 comments having been received, that the Board Committee on Stakeholder Relations recommends the Board of Governors adopt new Rules 3.360-3.692 for the Legal Services Trust Fund Program in Title 3 of the Rules of the State Bar in the form attached at Attachment 2 and made a part hereof, and repeals the Rules Regulating Interest-Bearing Trust Fund Accounts for the Provision of Legal Services to Indigent Persons.

PROPOSED BOARD ACTION

Should the Board of Governors agree with the recommendation of the Board Committee on Stakeholder Relations, adoption of the following resolution would be appropriate:

RESOLVED, following publication for comment and 14 comments having been received, and upon recommendation of the Board Committee on Stakeholder Relations, that the Board of Governors hereby adopts new Rules 3.360-3.692 for the Legal Services Trust Fund Program in Title 3 of the Rules of the State Bar in the form attached at Attachment 2 to these minutes and made a part hereof, and repeals the Rules Regulating Interest-Bearing Trust Fund Accounts for the Provision of Legal Services to Indigent Persons.

ATTACHMENTS:

Attachment 1: Title 3, Rules 3.660 – 3.692 of the Rules of the State Bar (redlined to show revisions made after public comment received between March and November 2008)

Attachment 2: Title 3, Rules 3.660 – 3.692 of the Rules of the State Bar, proposed for adoption

Attachment 3: Summary of Public Comment on March 2008 version of proposed rules

Attachment 4: Summary of Public Comment on November 2008 version of proposed rules and the actual comments

