

**FOURTH ANNUAL REPORT
OF THE
MASSACHUSETTS
ACCESS TO JUSTICE COMMISSION**

JUNE 2009

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The Massachusetts Access to Justice Commission completed its fourth year of operations in June, 2009. It held seven meetings, proposed initiatives to enhance access to justice, supported similar justice efforts of the courts and others, began examinations of the access to justice roles of social service agencies and executive branch administrative agencies and reviewed the results to date of the 2004 reorganization of the civil legal services delivery system instituted by its predecessor, the State Planning Board. The meetings were held at the offices of the American Cancer Society in Framingham. We appreciate the Society's contribution to the Commission's efforts.

During the past year a number of important access-to-justice events occurred in the judicial branch. We set some of them forth in the sections of this report entitled "Positive Steps" and "Responses to Commission Recommendations." Although the decline in funding, both from IOLTA sources and from the Legislature, caused some staff reductions in legal services programs and seriously hindered the programs' ability to deliver civil legal services to people of low income, there continued to be positive steps in the delivery system. In our opinion, interest in access to justice continues to be strong and may even be stronger now than in recent years. At the end of the year the Chief Justices of the Supreme Judicial Court and the Trial Court took the lead in this arena by creating a new position in the Administrative Office of the Trial Court, a Special Advisor for Access to Justice Initiatives.

The Commission submits this report to the Justices of the Supreme Judicial Court, whose order of February 28, 2005, created the Commission. The order provided that, "After five years, the Justices, in consultation with members of the Commission, shall assess whether the Commission continues

to be a helpful way to address” the issues for which it was created. This “sunset” review comes at an appropriate time in the life of the Commission.

In its first year, the Commission concentrated on developing a comprehensive understanding of the civil legal services delivery system, including providers funded by MLAC and LSC as well as those supported by the Massachusetts and Boston bar foundations. In the past year, the Commission focused on access-to-justice issues unrelated to the Judiciary. Acting through committees, we considered two important areas of concern for access to justice: the role of social services agencies in dealing with clients who have legal problems and the processes of state administrative agencies in decision-making in matters involving people of low income. Each of these topics is challenging and becomes increasingly so as we study them. To our knowledge, no other Access to Justice Commission in the country is acting on these subjects. The current status of these explorations is set forth in the section of this report entitled “Access to Justice in Social Service and Administrative Agencies.”

In light of the upcoming “sunset” review, we set forth in Appendix Two a brief history of the Commission.

POSITIVE STEPS

During the year, three particularly significant steps were taken to advance understanding of and improvement in the delivery of needed civil legal services to people of low income in the courts. These steps, each of which the Commission endorsed, are (1) the Report of the Boston Bar Association’s Task Force on Expanding the Civil Right to Counsel, (2) the final report of the court’s Steering Committee on Self-Represented Litigants, and (3) the appointment by Chief Justices Marshall and Mulligan of a Special Advisor for Access to Justice Initiatives.

In September, 2008, the Boston Bar Association Task Force on Expanding the Civil Right to Counsel released a thoughtful, comprehensive report. That report, in many instances, focused on areas of concern that the

Commission had identified. The Task Force developed concrete proposals for dealing with the most serious aspects of the absence of counsel in matters involving basic human needs. The recommendations of the Task Force are the product of extensive deliberations by knowledgeable and concerned people. The report limited its recommendations to situations in which substantial loss of rights was at stake and remedies short of providing counsel had proven ineffective in preserving those rights. In several instances, the Task Force prepared proposals for pilot projects that would test the value of counsel in special situations. Future consideration of the needs and possible solutions to access-to-justice problems should give close attention to the Task Force report.

In November, 2008, the Supreme Judicial Court's Steering Committee on Self-Represented Litigants filed its final report. This excellent document, which shows that extraordinary work can be achieved by coordination within the Judiciary, sets forth worthwhile steps that the Judiciary either has already undertaken or should undertake to improve access to justice for those of low and moderate income. The recommendations deserve immediate implementation. The Steering Committee's Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants has become a national model. The Steering Committee recommended the establishment of a senior-level position within the Office of the Trial Court to direct policy and programs relating to access to justice. The Access to Justice Commission has been a strong endorser of the Steering Committee's recommendations, many of which parallel and expand on those of the Commission

In June, 2009, Chief Justices Marshall and Mulligan appointed Commission member the Honorable Dina Fein, First Justice of the Western Division of the Housing Court, to be Special Advisor for Access to Justice Initiatives. She will guide and coordinate resources within the Trial Court to broaden access to civil justice for all litigants. The Commission, the Boston Bar Association Task Force, and the S.J.C.'s Steering Committee have each identified areas that need attention within the Judicial Department. The action of the leaders of the Judiciary is highly significant because it makes explicit the Judiciary's recognition of the very real problems of access to

justice in the courts of the Commonwealth and the need for coordinated action. The Commission acknowledges that current fiscal restraints will inhibit the immediate implementation of certain worthy plans for improving access to justice.

RESPONSES TO COMMISSION RECOMMENDATIONS

During the past year several other actions have been undertaken seeking to deal with problems that the Commission and others have noted.

The Legislature passed the Massachusetts version of the Uniform Probate Code, thereby addressing the Commission’s concern that counsel should be provided in guardianship proceedings involving indigent elderly and allegedly incapacitated persons. See G.L. c. 190B, s. 5-106.

In our June, 2007, report on “Barriers to Access to Justice” we urged that attention be given to the “relationship between the District and Boston Municipal Courts and the Probate and Family Court in the handling of G.L. c. 209A cases . . . to see how the processes and coordination can be improved.” In our Third Annual Report, last year, we noted the existence of an inter-departmental working group that was addressing this subject. We pointed out that this working group was not planning to take comments from interested persons concerning possible solutions to these departmental inter-relationship problems.

In April, 2009, the Chief Justice for Administration and Management issued an order adopting a pilot program applicable in the Norfolk Division of the Probate and Family Court Department. That order authorizes a judge in that court, in his or her discretion, to transfer, after an opportunity for a hearing, any Norfolk County District Court abuse prevention proceeding to the Probate and Family Court. The Family Law Task Force, a group whose attorneys represent low-income victims in domestic violence cases, expressed strong opposition to the pilot program, asserting that it will interfere with victims’ easy access to a local District Court for protection from abuse. The Chief Justices of the Probate and Family Court and the Chief Justice of the District Court responded in careful

detail to the Task Force's concerns, declining to terminate the pilot program and citing the Commission's concerns as a reason for instituting the pilot program. Only time will tell whether there will be adverse consequences for victims of domestic violence in the operation of this one-year pilot program or whether hoped-for benefits will result.

In 2006, the Trial Court formed a Small Claims Working Group to consider amending the Uniform Small Claims Rules. The Working Group wisely included not only judicial department personnel but also consumer, creditor and other interested parties. In August, 2007, the Working Group issued a comprehensive report proposing many modifications of the Rules, and the Trial Court invited comments on those modifications. When the administrative office of the Trial Court produced the proposed rules, once again they were put out for public comment. The final rules have now been adopted and become effective October 1, 2009. These rules are the product of the sort of cooperation that the Commission endorses. Although the delay in the adoption of these rules was unfortunate (we noted that the problems were not new in our June, 2007, report), the over-all quality of the ultimate work product is excellent. The proposed new rules are a vast improvement over the existing rules. When these have been in operation for a while, further adjustments may be warranted.

In 2006, the Justices of the Supreme Judicial Court issued an order establishing an unbundling pilot project. The Commission subsequently supported expansion of unbundling and specifically supported "ghostwriting." In April, 2009, the Justices promulgated a Standing Order permitting implementation of Limited Assistance Representation (LAR) in any Department of the Trial Court that wants it. Ghostwriting is included in the practices permitted as part of LAR.

On February 12, 2009, the Commission proposed a rule change to the Justices of the Supreme Judicial Court that would establish a new revenue source for providing civil legal services to people of low income. The rule, if adopted, would set forth in each lawyer's annual registration statement a provision for payment of \$50 (or some other sum fixed by the Justices) that would be payable unless the lawyer affirmatively opted out of the payment.

The Commission estimated that this rule could generate as much as \$1,000,000 annually. The Commission’s proposal had the full support of the Massachusetts Bar Association and the Boston Bar Association. The Commission urged the Justices to adopt the rule without seeking further comment because the Board of Bar Overseers was agreeable to implementing it and Commonwealth’s two largest bar associations favored it. At this writing the Justices have taken no action on this recommendation.

ACCESS TO JUSTICE IN SOCIAL SERVICE AND ADMINISTRATIVE AGENCIES

Social Service Agencies: At its May, 2007, hearing in Springfield, the Commission learned that “front line” social service agency workers often provide “legal” information and even advice to their clients. While most witnesses felt the information they shared was important to their clients, many worried that what they told their client could or was either dated or even inaccurate.

The number of such workers in the Commonwealth is unknown. A rough count for the City of Worcester found more than 500. It became apparent that these workers are an important part of the state’s justice community.

A subcommittee of the Commission’s Delivery of Legal Services Committee designed and administered a survey both to assess the extent of these practices and to elicit information on agency practices regarding legal training, including curriculum, cost and frequency. The subcommittee then met with several executives representing social service networks and then with network members themselves. Participants identified a wide range of issues with legal components (not limited to their own agency’s specialty) that they discuss with clients, and identified time and resources as the two main barriers to their obtaining and staying current with relevant “legal”

information. All expressed interest in obtaining correct and current information.

The subcommittee is considering a variety of action steps in response to its findings. These include:

Support the work of the Massachusetts Law Reform Institute (MLRI) in maintaining and updating www.masslegalhelp.org, a unique and established website containing self-help information for low-income individuals to which MRLI has already devoted substantial resources to create and improve. This website should become the standard reference source for all social service agencies seeking current legal information.

Add a “training calendar” on the www.masslegalhelp.org home page to broaden notice of available training and encourage trainers to make existing training available to additional agencies.

Develop ways to increase worker awareness of the website.

Support creation of a “list serve”, staffed by legal services advocates that would allow social services workers to receive answers to “legal” questions on a timely basis. The burden of staffing the list serve may require new funding.

Add representatives of social services agencies to the Commission subcommittee and charge the subcommittee to become a coordinating body responsible for implementing the action steps.

Administrative Agencies: At its January, 2009, meeting, the Commission discussed the fact that low-income people are greatly affected by a vast number of informal and formal decisions of administrative agencies which may never reach the courts. Accordingly, the Commission appointed a Committee on Outreach to Administrative Agencies to examine a broad set of issues pertaining to access to justice in the context of the various

administrative agencies which interact with low-income people in the Commonwealth.

The Committee made an initial judgment that, in order to make this project manageable, the scope of its inquiry should not include federal administrative agencies or local agencies. Instead, the Committee should focus its energies solely on the administrative agencies within the Commonwealth’s Executive Branch. The Committee held several meetings during the spring in which it began to understand how the formal hearing processes as well as the informal adjudication processes are actually working in the Executive Branch agencies.

The Committee is considering making this inquiry collaborative with the agencies and involving agency heads and general counsel in the discussion. In that regard, the Committee recently asked two individuals from the legal services community and one individual from a state agency to discuss with the Commission as a whole the degree to which there are access to justice problems and opportunities in the manner in which the agencies’ formal hearing and informal adjudication processes work. The Committee anticipates input from further such discussions over the summer.

The Commission expects this Committee to continue its “fact-finding” process this fall. The Commission does not currently have any particular conclusions regarding this subject and views it as premature to formulate any recommendations of any kind.

CIVIL LEGAL SERVICES DELIVERY SYSTEM ACTIVITIES

Regionalization Review: The State Planning Board recommended that civil legal services delivery be reorganized into four regional systems. Evaluation of the success or limits of that change was one of the purposes for creating the Commission. The members of the regionalization sub-committee of the Delivery of Legal Services Committee met with the Executive Directors, and in some instances, Board Members, of the Commonwealth’s field service

programs to discuss the impact regionalization has had in each of four geographic areas - West/Central, Southeast, East and Northeast.

In all four regions, the state and federally funded field service programs are working together, albeit to different degrees and in different manners, using their own preferred methodologies. The Northeast and Southeast have recently engaged in joint strategic planning and needs assessments. The East, West/Central and Northeast have sought new funding in regional proposals. The consensus of the reviewing members is that the field programs are satisfied with their present structures and protocols.

Region-wide practice groups are strong in the East and West/Central and are developing in the Northeast and Southeast. All four regions have engaged, at least to some extent, in regional training efforts as well participating in training and information-sharing generated by state-wide programs across regional lines. Adoption of new technologies now tends to be a regional undertaking. The role of the LSC grantees in the Southeast and West/Central (and, by sub-grant, of LARC in the East) revolves around provision of intake services, while VLP and Merrimack Valley continue to engage in a broader range of traditional legal functions.

Perhaps the most striking finding was that some four years post-regionalization, while the partnered groups appear to work well with each other, only two have formally combined any part of their corporate structure. The Northeast has combined its boards (while retaining two corporations) and the Southeast has three board members on both boards but the East and West/Central have retained multiple boards and independent structures. All do have some form of conflict resolution/collaboration groups composed of board members from each entity.

Possible Change in LSC Restrictions: The State Planning Board recommended the regionalized delivery system in significant part because of an LSC regulation that applies LSC restrictions to all the money received by an LSC grantee. There is a substantial likelihood that Congress and President Obama will eliminate that regulation, which will lead Massachusetts to a

rethinking of parts of the regionalized delivery system. The Commission's role in this re-examination has yet to be determined.

CONCLUSION

During the next year the Commission will pursue the matters set forth in this report. The Commission looks forward to supporting the work of Judge Fein in her role as Special Advisor on Access to Justice Initiatives in the Trial Court and to the sunset review of the Commission's future structure and purposes.

The Commission welcomes the comments of the Justices on this report and any suggestions for areas that the Commission should study.

The Commission members in June, 2009, are listed in Appendix One. During the year ended June 30, 2009, three Commissioners completed their service. We acknowledge P. Keyburn Hollister, Janet Kenton-Walker and Treana Walker for their many contributions to our work. The Commission also appreciates greatly the continued advice and counsel of its consultant Gerry Singen and the assistance of the Massachusetts Legal Assistance Corporation, the Massachusetts Bar Foundation and the Boston Bar Foundation.

APPENDIX ONE

THE MASSACHUSETTS ACCESS TO JUSTICE COMMISSION

JUNE 2009

Hon. Herbert P. Wilkins, Chair

Hon. Peter W. Agnes, Jr.

Jacquelynne J. Bowman

Anthony M. Doniger

Hon. Dina E. Fein

Robert B. Foster

Marla Gale

Lee J. Gartenberg

P. Keyeburn Hollister

Bettina M. Holton

Young Soo Jo

Robert W. Lavoie

Richard McMahon

Sue Marsh

David W. Rosenberg

Leonard Spinner

James T. Van Buren

Jamie R. Williamson

Toni G. Wolfman

Gerry Singsen, Consultant

APPENDIX TWO

A BRIEF REVIEW OF COMMISSION HISTORY

Origins

The Massachusetts Access to Justice Commission was created by an Order of the Supreme Judicial Court in February, 2005.¹ The Order implemented a proposal based on the work of the Massachusetts State Planning Board for Civil Legal Services; the proposal was endorsed by the Massachusetts Bar Association, the Massachusetts Bar Foundation, the Boston Bar Association and the Boston Bar Foundation. Appointments to the Commission were made during the spring and the Commission held its inaugural meeting in June.

The Commission has 21 members, all appointed by the Supreme Judicial Court on nomination by organizations named in the proposal. The MBA, BBA, MBF, BBF and MLAC each appoint a member; the MBF representative is Commission Vice-Chairman James Van Buren. The Judicial Department nominates two judges. The Board Chairs of the MLAC and LSC-funded programs serving each of the four regions of the state civil legal services delivery system nominate one client representative and one attorney from their region. The Executive Directors of the MLAC and LSC-funded programs nominate one member. Finally, the Commission members nominate five at-large members, two of whom are to be representatives of social service agencies, probably not lawyers.²

The Commission proposal, incorporated into the SJC's Order, sets forth a broad range of purposes:

“To encourage achievement of the vision, mission, core values and core capacities adopted in September 2003 by the Massachusetts State Planning Board for Civil Legal Services;

¹ The SJC Order of February 28, 2005, together with the proposal, can be found at www.massacesstojustice.org.

² A current membership list is at www.massacesstojustice.org.

To convene periodic Access to Justice Conferences and encourage participation in the conferences by members of a broadly-defined equal justice network so that better coordination of all parts of the effort to produce equal justice for all are more effective, more efficient and more successful;

To develop and maintain a comprehensive understanding of the civil legal services provided to low-income people in the Commonwealth, to promote widespread understanding of civil equal justice, to address laws and regulations that affect meaningful access to justice and to report periodically to the Supreme Judicial Court on the status of access to justice in the Commonwealth;

To provide a neutral forum in which important policy issues affecting access to civil justice for low-income people in the Commonwealth can be discussed and brought to agreement among a broad cross-section of providers, funders, clients, bar leaders and other interested parties;

To consider important issues concerning the delivery of civil legal services, including controversial issues that are not being resolved by consensus, and to make recommendations for reforms, new initiatives and appropriate resolutions.”

Activities to Date

During its four years of existence the Commission has pursued these purposes in a wide variety of ways. It adopted as its own the State Planning Board’s statement as to the mission, vision, core values and core capacities of the civil delivery system. It studied the civil delivery system, obtaining reports from service providers about current practices and challenges. This learning process included not only the large organizations that receive MLAC and LSC grants but also the extended state justice community of more than 100 additional organizations receiving MBF and BBF grants. It offered advice, urged the community to collaborate more effectively, participated in various planning processes (e.g., state support resource allocation study, MLAC examination of roles of leading agencies in the access to justice community,

reconfiguration implementation) and encouraged innovation and leadership by others. During this period the Commission has been dependent upon, and grateful to MLAC for financial support of its expenses, primarily the cost of its part-time consultant.

As one of its endeavors, the Commission explored gaps in the delivery system – problems no legal aid program was addressing. The gap study brought to light the very large body of social service agencies that are part of the state justice community. Until now these agencies have played a relatively unobserved but crucial role in the delivery of help to low income residents of Massachusetts facing legal problems. Literally thousands, perhaps more than ten thousand workers for these agencies are providing low-income individuals with legal information, legal advice and often legal advocacy. Sometimes the workers help their clients find a lawyer, but usually the legal aid delivery system is too busy and the workers explain the rules, help clients fill in forms and often accompany their clients into administrative agency offices, administrative hearings, and even into courthouses and courtrooms.

During 2006 and early 2007 the Commission convened hearings in each region of the state and received testimony from almost 90 witnesses regarding barriers to access to justice in their communities and what might be done to remove the barriers.³ Witnesses included low-income individuals who had sought services, lawyers and administrators from provider organizations, judges, workers from community-based agencies, private attorneys, board members from some of the organizations and governmental administrators. The Commission took stock of what it heard and prepared a report on “Barriers to Access to Justice in Massachusetts: A Report, With Recommendations, to the Supreme Judicial Court.”⁴

During the winter of 2007-08, the Commission met with the Chief Justices of each division of the Trial Court and explored what the witnesses had reported, what the Chief Justices perceived to be the situation, and what

³ Hearings were held in Springfield, New Bedford, Lawrence and Boston.

⁴ The Report was presented to the SJC in June, 2007, and is available at the Commission’s website.

might improve access to justice.⁵ Many of the Chief Justices reported efforts within the courts that were already addressing some of the barriers. Some embraced the Commission’s findings while some others criticized the methodology used to gather data. The Commission subsequently appointed a committee to take the lead on issues of access to justice in the court system, including implementation of the Report’s recommendations.

⁵ More information on these meetings can be found in the Commission’s Third Annual Report, available at the Commission’s website.