THIRD ANNUAL REPORT

OF THE

MASSACHUSETTS

ACCESS TO JUSTICE COMMISSION

JUNE 2008
The Commission held eight meetings during its third year of existence. All these meetings were held at the American Cancer Society in Framingham. The Commission continues to be grateful to the Society for its contribution to access to justice.

During the year the Commission considered a variety of access-to-justice matters, but centered its attention on the activities of the several trial court departments regarding the problems identified in our June, 2007 report to the Justices of the Supreme Judicial Court on Barriers to Access to Justice in this Commonwealth.

We welcomed the comments of each trial court Chief Justice. Their responses to our report have been impressive. During the past year each Chief Justice either attended and spoke at a meeting of the Commission or met with members of the Commission at his or her office. Most also submitted written comments.

It is clear that the Chief Justices were aware of substantially all the problems identified in our report and that the Trial Court Department had been alert to them long before our report was made.
We appreciate the opportunity, however, to intensify attention on access-to-justice issues and emphasize the importance of, and the difficulty in providing, adequate legal assistance to people of low income.\(^1\) From another perspective, acknowledgement that the problems highlighted in our report persist, despite the best efforts of the courts, suggests reexamination of the priority given to solving these access-to-justice problems in our current legal system.

From our June, 2007 report and our work this year, it is clear that the intensity of problems arising from the lack of legal services for people of low income varies from trial court department to trial court department. For example, in most trial court departments there are substantial numbers of matters in which adequate legal representation is unavailable. On the other hand, although there may be other access-to-justice issues in the Juvenile Court, the lack of legal representation is not a significant problem there because counsel is available in a high percentage of cases before that court. Similarly, the Land Court has no serious lack of legal representation because, in its case, the numbers of contested matters involving people of low income is small.

\(^1\) Although it would be burdensome to annex their written responses to this report, the Commission will undertake to make those responses readily available.
Some trial court Chief Justices were concerned that our June, 2007 report did not fully acknowledge existing programs and plans that address certain access-to-justice issues. This was a fair observation. It should be noted, however, that our June 2007 report was a summary of information offered by witnesses at four public hearings over the course of the previous year. Although the report did note some of the existing programs and plans (as they related to the Commission’s interest in identifying means of lowering and even removing barriers to access to justice), the primary purpose of the report was to identify and attract attention to problems identified by the witnesses.

One trial court Chief Justice commented that the tone of our June, 2007 report was a problem, although expressing no specific criticism of the details in the report. Because the report was not designed to assess the trial court generally or to identify all positive circumstances, the report understandably created a desire on the part of trial court Chief Justices to supplement the report with descriptions of various programs designed to face access-to-justice issues, including those identified in the report.

Now each Chief Justice has presented his or her views on the June, 2007 report and has had an opportunity to educate the
Commission about existing programs that deal with access-to-justice issues. The Commission recognizes, as do the trial court Chief Justices and as does our June, 2007 report, that the lack of adequate funding makes the achievement of desired goals difficult or sometimes impossible. This said, however, there are excellent programs and materials to instruct and guide judges, lawyers, court personnel, and the public. The range and quality of the educational programs and written materials of the Trial Court’s Judicial Institute is outstanding. We support the ongoing efforts of the Trial Court to disseminate these materials and encourage their use by judges and court staff.

Some problems do lie, however, in the failure of judges and others to adhere to the prescribed procedures. Other problems that the report lists, and the trial court Chief Justices acknowledge, go unsolved for want of higher priority attention by the courts, the bar, the legal services community, the legislature and the executive branch of the Commonwealth.

**PARALLEL ENDEAVORS**

We would be remiss if we did not acknowledge the excellent work of two other entities engaged in specific areas of concern in the delivery of adequate legal services to low-income residents of the Common-
wealth, areas that were subjects of discussion and recommendations in our June, 2007 report.

The Supreme Judicial Court’s Steering Committee on Self-represented Litigants, headed by Justice Cynthia J. Cohen of the Appeals Court, has championed several worthwhile endeavors. That group has been supervising the experiment in “limited assistance representation,” known generally as “unbundling.” The concept is sound and probably has more practical application in certain situations and courts than in others.

The same group is working on material to furnish to clerks, assistant clerks and others, advising them that they may assist an individual by providing information on how a person may take steps to help him or herself (as opposed to advising on which course to follow). This welcome change, which we urge the Justices of the Supreme Judicial Court to endorse, would help to eliminate the reluctance of certain personnel to assist a person because of concerns that to do so would (a) constitute the practice of law or (b) prejudice the appearance of impartiality.

The Steering Committee also is endorsing the concept of consumer service centers in courthouses where anyone can go to seek
advice on how to deal with a court-related legal problem. The Commission supports this concept and also the Steering Committee’s advocacy of the appointment of a person in the Administrative Office of the Trial Court to deal with access-to-justice matters. In our June, 2007 report we recommended that there be such a coordinator to deal with the provision of services and the implementation of initiatives designed to eliminate obstacles to justice.

The second entity engaged in work within the range of the Commission’s activities is the Boston Bar Association’s Task Force on Expanding the Right to Civil Counsel. Two members of the Commission (Van Buren and Soden) serve on that Task Force and our consultant (Gerry Singsen) was detailed to the Task Force as a liaison.

That Task Force has engaged in serious and valuable investigations of many areas in which counsel is not provided at public expense but should be. That group has formulated pilot projects to be implemented in the areas of housing, family, immigration, and juvenile law. The Task Force is presently seeking funding sources for each pilot and preparing a report. The thoroughness of that group’s work will result in a compelling case for taking steps toward furnishing a lawyer, or at least legal advice, to needy individuals facing important legal
problems for whom there is now no provision for legal assistance at public expense. The obvious problem is that to expand the range of required public funding to include new and worthy situations will need to be accompanied by appropriate increases in the relevant appropriations (or funds from private sources).

TRIAL COURT DEPARTMENTS

The District Court

Chief Justice Lynda M. Connolly presented a detailed response to the Commission’s Report and appeared before the Commission in February, 2008. She outlined the various procedures and practices in the District Court that deal with the Commission’s expressed concerns.

Extensive programs have been held on handling domestic violence proceedings (G.L. c. 209A), and, but for funding deficiencies, there would have been more. There is no question that there has been excellent focus and training in the domestic violence area and the Commission supports such ongoing efforts to educate judges and court personnel. The Commission’s concerns remain, however, in the areas expressed in its June, 2007 report. The Commission urges ongoing efforts to educate judges and court personnel regarding the handling of G.L.c. 209A matters. See pages 15 and 42 of that report.
Chief Justice Connolly correctly points out that she cannot realistically deal with asserted deficiencies of individual judges unless she is told who they are. Although the Commission has data on non-compliance by judges, it does not have information by case and judge. Individual lawyers are reluctant to report specific instances because the judge will likely be able to identify the source of the complaint.

The Commission is concerned at the delay in the release of revised guidelines for abuse prevention proceedings, which the District Court Domestic Abuse Professional Development Group has had under consideration for many months. It is also hoped that the domestic abuse interdepartmental working group on the inter-relationship of the trial court departments dealing with G.L. c. 209A proceedings will lead to the elimination of the problems the Commission has identified. See our further discussion of this topic in the remarks below concerning the Probate and Family Court.

On the matter of advocates in G.L. c. 209A proceedings, Chief Justice Connolly rightly points out that oral presentations by the parties are more crucial for the judges than the statements of an attorney or trained advocate. However, the Commission continues to believe that a trained lay advocate can have an important affirmative role in certain
matters involving an indigent individual and not just the current role, which is limited to responding to questions a judge may ask. Even in the limited in-court role that lay advocates now have, they are engaged in the practice of law in the traditional sense. The primary situation in which a lay advocate should be allowed to act affirmatively involves an advocate who is already with the indigent client in the courtroom before the judge and a client who is unable to present relevant facts for one of a variety of reasons (e.g., intimidation, nervousness, confusion, a language barrier, or failure of memory).

The Commission looks forward to the implementation of the proposals that will follow from the August, 2007 recommendations of the Report of the Small Claims Working Group. Affirmative action in this respect would go a long way toward solving the small claims problems identified in our June, 2007 report.

The Boston Municipal Court

The Commission’s observations regarding access-to-justice issues in the District Court apply equally to the Boston Municipal Court. Chief Justice Johnson observed correctly that the Commission’s report was not based on empirical data. It could not have been, considering the Commission’s limited financial resources. Nor, however, need it
have been. The problems that the Commission found, such as in the handling of certain G.L. c. 209A matters and small claims, were identified from first-hand observations by people who testified before the Commission.

**The Probate and Family Court**

Chief Justice Paula M. Carey of the Probate and Family Court furnished the Commission with a comprehensive response to our June, 2007 report. She provided extensive information on steps already taken in that court to assist *pro se* litigants and on steps to be taken. The Probate and Family Court is the site of the pilot program on “unbundling” (limited assistance representation). It is clear that much has been done and will be done (within fiscal constraints) to assist unrepresented litigants,

Chief Justice Carey had a cautious view of the use of non-lawyers in advocacy roles. Domestic violence shelter workers may stand next to a party to guide the party, and they do answer questions a judge may ask. She thought that there could be a supervisory role for family facilitators that might lead to limited advocacy opportunities.

Chief Justice Carey commented on the interdepartmental working group designed to address issues of common concern regarding
procedures under G.L. c. 209A and to further the cooperation among Trial Court departments in implementing joint jurisdiction in G.L. c. 209A matters. It is hoped that this group will generate uniform interdepartmental policies and procedures that are currently absent. The working group is likely to develop draft legislation to eliminate the current interdepartmental complexity when an order of one court is amended by another, to provide procedures to improve transmittal of ex parte orders to the police for service and to propose policies that would encourage uniformity in judges’ decisions on whether to make an order returnable in the District Court, the Probate and Family Court or the Boston Municipal Court. The delay in the report of this working group, which was formed months ago, is unfortunate. The Commission regrets that the domestic abuse interdepartmental working group is not

2 In our June, 2007 report the Commission created a misconception concerning the scope of the right to appointed counsel in guardianship proceedings. In our recommendations we urged appropriate legislative action concerning the appointment of guardians for persons with disabilities. See pages 44 and 45. In that the Commission still agrees, and the Chief Justice Carey concurs. And there is now the prospect of favorable action in this area by adoption of a remedial provision in the proposed Massachusetts version of the Uniform Probate Code.

Our report went wrong, however, in its implication that counsel should be appointed at public expense in situations where there is no such requirement and in our quoting a lawyer’s statement that S.J.C. Rule 3:10, section 5, was "honored, as far as I can tell," virtually only "in the breach." The requirement of section 5 that counsel be appointed for an indigent party applies only if the party has a right to counsel on a basis apart from section 5 itself.
planning to take comments from groups interested in the Trial Court’s handling of interrelated problems in G.L. c. 209A matters.

The Housing Court

The Commission has been impressed with the way in which the Housing Court has been able to deal effectively with a high volume of low-income self-represented litigants. Housing specialists, lawyer for the day programs, the right of a lawyer to assist a party without entering an appearance (a form of “unbundling”) and the work of the Tenancy Preservative Program contribute to the effectiveness of the system at large. Chief Justice Pierce supports the extension of the “unbundling” process to the Housing Court, regrets the absence of day-care facilities, and is of two minds on “ghostwriting”. He recognizes that in certain situations on a case-by-case basis he has allowed non-lawyer workers from ABCD or City Life to speak in court. These individuals have been trained, have good knowledge of the Court’s process, and know the facts of the case because they have been involved in the negotiations.

On the matter of legislative expansion of the Court’s jurisdiction to the entire state from its current coverage of 80% of the state, Chief Justice Pierce recognizes that such a change requires consensus among
interested groups. The Commission has observed that other Trial Court departments dealing which have concurrent subject matter jurisdiction with the Housing Court lack certain resources that are present in the Housing Court (such as housing specialists) and, given their heavy caseloads in other areas, are not in a position to provide the level of attention to housing cases that the Housing Court can. The Commission’s view is that it would be more efficient, fiscally and otherwise, to expand the Housing Court’s jurisdiction rather than try to duplicate the Housing Court’s services and procedures in these other courts.

The Superior Court

The Superior Court is one of the Trial Court departments that is relatively free of problems arising from unrepresented civil litigants. Chief Justice Rouse listed several areas, however, where the Superior Court does encounter such problems. In administrative appeals in welfare cases, the availability of lawyers would be helpful. There is a problem with civil suits by inmates, where Massachusetts Correctional Legal Services is often unable to provide assistance. In G.L. c. 209A proceedings there may be a mental health or substance abuse problem where the availability of counsel and a social worker would be
beneficial. Finally, the court deals with claims for equitable relief from unrepresented individuals that take time to resolve and the court also faces the perennial problem of dealing with chronic litigants (labeled by Chief Justice Rouse as “frequent fliers”).

Chief Justice Rouse questioned whether “unbundling” would be helpful in the Superior Court. She also questioned whether “ghostwriting” should be allowed there. It is apparent currently that some self-represented litigants are acting on the advice of undisclosed lawyers. Often the document presented involves bad lawyering, and the circumstances prevent the judge from confronting the lawyer and leave the “client” confused and frustrated.

**The Land Court**

The Land Court has few problems related to unrepresented litigants because there are not many contested matters in which an indigent person is involved. It is the first step in the foreclosure process for the non-payment of local property taxes. In these matters, however, there is rarely a dispute and concerns can be handled by telephone. If the Court has a difficult case where a pro se litigant cannot afford counsel, the real estate bar often steps in to assist the litigant.
Chief Justice Scheier told the Commission that she favors “unbundling” and “ghostwriting.” She noted that there are occasions when a non-lawyer party might effectively assist another party in a proceeding, such as when one party is articulate and another is not.

Because of the nature of its jurisdiction, the Land Court is able to deal with the concerns of unrepresented litigants, even though it has only one facility in the Commonwealth.

**The Juvenile Court**

The Commission has been informed of only relatively few access-to-justice problems in the Juvenile Court. Finding interpreters for the hearing impaired has been a problem, and assuring that such an interpreter will in fact be present at a scheduled proceeding needs attention. Some school departments continue to pass off disciplinary matters to the Juvenile Court in circumstances in which the school system itself should deal with the matter.

The Commission continues to praise the “Aging Out Project” which has been expanded to all of Essex County. The Court, the Department of Social Services and the local bar are to be commended for their efforts in helping juveniles who will be “aging out” of state institutions and jurisdiction.
Mediation has reduced delay in the disposition of child welfare cases, and, even when full resolution is not attained, the issues for trial often are narrowed.

The recent opinion of the Supreme Judicial Court in Matter of Hilary, 450 Mass. 491 (2008), resolved the concern that indigent parents in CHINS case should have a lawyer to represent them in the dispositional phase of a CHINS proceeding if custody of the child could be granted to the Department of Social Service.

ACTIVITIES OF THE DELIVERY OF LEGAL SERVICES COMMITTEE

At its initial public hearing, the Commission became aware of the role played by social service agencies in providing legal information to their clients, learning as well that some information could be dated or inaccurate. To address this deficiency in the provision of legal services to the needy, a sub-committee of the Delivery of Legal Services Committee developed a questionnaire to be distributed to social services agencies that form an essential part of the Commonwealth’s greater justice community. The questionnaire focuses on (a) agency staffs’ ability to identify legal issues affecting presenting clientele; (b) their
knowledge of providers (other social, government or legal services providers) that can address those issues or help them do so; and (c) their present practices and future willingness to provide their clients with relevant and accurate legal and referral information and to make referrals as appropriate.

A limited distribution of the questionnaire in the Lowell area revealed that agency awareness of available support depended on the size and sophistication of the social service entity. Smaller, more local entities have far less knowledge than state or regional providers (some of which even have in-house counsel). This year, the sub-committee will distribute a similar questionnaire statewide. The results will be shared with both legal services programs and the greater civil justice community, in order that both groups may grasp the nature and extent of the social service entity roles and of missing services, collaborating where possible to close these service gaps with educational materials and programs.

A second sub-committee of the Delivery of Legal Service Committee created a questionnaire that was distributed to the executive directors of state and federally-funded legal services field programs to determine the effect of the recent reorganization of both sets of
programs. Specifically, the Commission is seeking empirical information on how funder-mandated regionalization – and the “pairing” of state and federally funded programs in four distinct geographic areas – has impacted the ability of the field programs to deliver quality legal services to their client populations.

From the initial response to this questionnaire, sub-committee members have obtained information already provided by the programs to either the Massachusetts Legal Assistance Corporation or the Legal Services Corporation in regular reports and funding applications. With this information in hand, members will generate additional questions to field service program directors, followed by in-person meetings between members and directors.

The sub-committee expects the results of its efforts will generate further questions, comments, and, where appropriate, suggestions. Ultimately, the sub-committee will report its findings and conclusions to the Commission. The Commission expects to follow up with each individual region as to any specific findings or recommendations.

Recent federal legislation has produced an unparalleled opportunity for law students willing to commit to public service, including those employed by legal services providers, to accept these
traditionally lower-compensated positions without undue concern about meeting their student loan obligations. The legislation allows qualifying graduates initially to defer part of their monthly principal and interest obligations on certain federally-guaranteed loans, and, eventually, depending upon the length of their public service, to have the entire balance forgiven.

To maximize the opportunity presented by this legislation, committee members have approached Massachusetts law schools to encourage them to coordinate their efforts in publicizing and simplifying the process for obtaining loan forgiveness. Members have offered the Commission’s support and sponsorship to those law school deans who have expressed interest in such a coordination effort.

DISPUTE RESOLUTION

The Commission gave brief but intense attention to resolution of disputes by means other than trial. Our reaction is that greater focus on alternative dispute resolution would be generally beneficial and specifically beneficial in its potential to assist people of low income. Court-connected dispute resolution is governed by S.J.C. Rule 1:18, which in Rule 2 defines dispute resolution as any process in which any
impartial third party is involved in assisting in the disposition of a case without trial (by arbitration, mediation, conciliation, mini-trial, etc.).

As is true in many access-to-justice problems that the Commission has encountered, the lack of adequate funding has hindered progress. On the other hand, there appears to be the potential for greater use of alternative dispute resolution within the trial court system, notwithstanding limited resources. We add that it is our impression that the same is true for administrative agencies in the Commonwealth. In other jurisdictions, alternative dispute resolution services are better integrated into the system. This is, for example, what happens at consumer service centers in Connecticut. In an integrated alternative dispute resolution process, a pro se litigant would be advised of a series of options on first coming to court.

First Justice Gail L. Perlman of the Hampshire Division of the Probate and Family Court and Chair of the Trial Court Standing Committee on Dispute Resolution told the Commission that there were few situations in which alternative dispute resolution services would be inappropriate. She thought that an access-to-justice official in the trial court administrative office would be helpful. She added that, when there are alternative dispute resolution personnel on the court’s staff,
there is greater use of alternative dispute resolution than when the dispute resolution personnel are independent contractors. When the dispute resolution person is on the court premises ("right down the corridor"), it is far easier to implement the dispute resolution process. Unfortunately, insufficient space is available for this purpose in courthouses.

There are some beneficial alternative dispute intervention activities in the court system. Housing specialists in the Housing Court (often non-lawyers) and probation officers in the Probate and Family Court serve worthy goals, but they are the only such personnel funded in civil dispute resolution activities statewide. Without the successful resolution of many matters referred to them, the system could not operate. With an unbundling of services permitted, it would be expected that legal service entities would be better able to participate in the alternative dispute resolution process.

The Commission suggests, as Justice Perlman recommended to it, that it is time for all interested parties to have a comprehensive look at the alternative dispute resolution system in Massachusetts. A well-planned gathering of these people would be a worthy first step in
improving the availability of alternative dispute resolution services in Massachusetts.

**RECOMMENDATIONS FOR MINIMUM ACTION**

The Commission reasserts the recommendations of its June, 2007 report, and specifically recommends implementing the following initial steps to reduce existing barriers to access to justice.

**Ghostwriting.** The Commission recommends that “ghostwriting” by lawyers be authorized in those trial court departments that want it. The anonymous assistance of lawyers is already happening, but there is at least a question whether “ghostwriting” violates the ethical obligations of a lawyer. Clarification of this point by the Justices, so as to make clear that “ghostwriting” does not violate ethical standards, would be helpful. The availability of ghostwriting should not be limited to indigent litigants.

**Lay Advocates.** With a trial judge’s permission, there are today lay advocates speaking in court on behalf of a party, thus appearing to practice law in the traditional sense. The Commission has recommended that, in limited circumstances, a well-trained lay person should be allowed to act affirmatively in court on behalf of an indigent individual. See recommendation 2 on page 40 of the June, 2007 report.
Specifically, the Justices should clarify that the trial judge has the discretion to determine what role, if any, a lay advocate in these limited circumstances should be permitted to play in a given case. It may also be appropriate to endorse the concept of lay advocacy for indigent litigants in a pilot program limited to one trial court department (or one court) and limited to one kind of case (eviction proceedings, for example).

**FUNDING**

As all are acutely aware, the full implementation of needed access-to-justice programs cannot be achieved because sufficient funds are not available. Attempts to increase funding must be persistent. The Commission has been considering two sources of funds that would not require new appropriations by the Legislature.

Several states impose a fee on any out-of-state lawyer who successfully obtains leave to enter an appearance in a court on behalf of non-indigent client. The revenue obtained from this process has been substantial. There are no data in Massachusetts on the number of out-of-state lawyers admitted pro hac vice. A statute (which we suspect is largely ignored) states that a judge may allow an out-of-state lawyer in
good standing to appear in a Massachusetts court only if the lawyer’s home state grants like privileges to a Massachusetts lawyer.

G.L. c. 221, s. 46A. For a comprehensive pro hac vice process it is preferable that that statute (of doubtful constitutionality) be repealed. Not all contiguous states have a provision for reciprocity. Although the funds so collected would go into the general fund, steps could be taken to devote that revenue to access-to-justice issues.

The second possible new, independent revenue source is a provision in the annual attorney registration process for an access-to-justice add-on contribution to be paid to the Board of Bar Overseers (BBO), but not by any attorney who elects not to make the contribution. The BBO is willing to collect the fee and transmit the revenue as the Justices of the Supreme Judicial Court may provide by rule. Legal services organizations do not view such a process as a threat to their fundraising. The Commission contemplates an add-on of perhaps $50. On the assumption that half the attorneys will not opt out, approximately $1,000,000 could be collected annually.

The Commission’s present view of the distribution process is that the IOLTA Committee would receive the funds from the BBO and distribute the bulk of the funds to the three charitable entities in the
same proportions as it now distributes its regular revenue and the balance to the Massachusetts Legal Assistance Corporation for administration-of-justice activities. The Commission is studying the possibility that administration-of-justice purposes could include expenses of the Commission.

Of course, the implementation of such an optional contribution requires the support of the Justices and the bar. The success of such a program will depend ultimately on the willingness of individual lawyers not to opt out.

DEPARTURES

We regret to report that two Commissioners died while in office this year. Nancy King was an extraordinarily helpful and active member of the Commission and served on the Executive Committee. Eileen Ryan was a singular voice for client concerns and served as Secretary of the Commission and as a member of the Executive Committee. We miss them both.

In addition, three Commissioners completed their service during this year. We acknowledge Maxa Berid, Richard Soden, and Paula Toland for their many contributions to our work.
CONCLUSION

During the next year the Commission will pursue the matters for future attention set forth in this report (see particularly the plans of the Delivery of Legal Services Committee, the matter of a voluntary annual contribution for lawyers and the possibility of a fee charged to out-of-state lawyers). The Commission is giving serious attention to an access-to-justice conference to be held in the spring of 2009.

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

The Commission, whose members during the 2007-2008 year are listed in an appendix, appreciates greatly the continued advice and counsel of its consultant Gerry Singsen and the assistance of the Massachusetts Legal Assistance Corporation.

Respectfully submitted,

THE MASSACHUSETTS ACCESS TO JUSTICE COMMISSION
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JUNE 2008

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