

MASSACHUSETTS ACCESS TO JUSTICE COMMISSION

FINAL REPORT OF THE SECOND
MASSACHUSETTS ACCESS TO JUSTICE COMMISSION

April 2015

I. INTRODUCTION

In February 2010, the Supreme Judicial Court appointed the second Massachusetts Access to Justice Commission (“Second Commission”), after the scheduled termination of the first Commission. Charged with providing leadership, vision and coordination in the search for “equal justice for all persons in the Commonwealth,” the Second Commission adopted a Mission Statement that focused on five core strategies:

- 1) increasing funding for legal aid;
- 2) increasing services provided by private attorneys;
- 3) improving assistance to unrepresented litigants;
- 4) improving access to justice beyond the courts, such as in administrative agencies; and
- 5) increasing justice by improving the effectiveness of civil legal aid.

This report provides an update on the Second Commission’s accomplishments under each of these five core strategies, and highlights some challenges that remain for the recently constituted third Access to Justice Commission (“Third Commission”).

The Second Commission had twenty-three members (“Commissioners”), including judicial, lawyer, bar association, legal aid program, social service agency, client, law school, and at-large representatives. See Appendix 1 for a full membership list. The Second Commission was fortunate to have a part-time consultant funded by the Massachusetts Legal Assistance Corporation, Gerry Singen, to provide guidance and staff support. Most of the Second Commission's work was accomplished through the Second Commission’s working groups and committees, comprised of both Commissioners and committed volunteers. The Second Commission pursued an aggressive agenda; the Second Commission's "Statement of Strategies, Goals and Objectives for 2014," for example, listed more than forty pending projects.

For the past five years, we have had the pleasure of working with a dedicated network of volunteers committed to improving access to justice in the Commonwealth. We thank them for their service.

Chief Justice Ralph D. Gants
David W. Rosenberg, Esquire
Co-Chairs, Access to Justice Commission 2010-2015

II. CORE STRATEGY 1: INCREASING FUNDING FOR CIVIL LEGAL AID

Civil legal services programs in Massachusetts, like their counterparts nationally, encountered a financially bleak period during the tenure of the Second Commission. One of the major funding streams for legal aid in the state, Interest on Lawyers Trust Accounts (“IOLTA”), decreased from \$31.8 million in 2007 to \$4.5 million in 2014, in large part due to very low interest rates and the recession. Federal funding for legal aid from the Legal Services Corporation was also cut during this period. The only positive trend during this period came from an increase in the annual appropriation from the state legislature to the Massachusetts Legal Assistance Corporation (“MLAC”), from \$9.5 million in FY 2010 to \$15 million in FY 2015. This increase was not enough to overcome the devastating overall budget shortfall or curb the resulting legal staff layoffs at legal services programs state-wide. The need for legal services continued unabated, however, with legal aid programs turning away 64% of income-eligible individuals in 2013.

A. Accomplishments of the Second Commission

The Second Commission spearheaded several innovations to increase funding for civil legal services and successfully collaborated with others in the access to justice community on other related initiatives.

- Created Innovative Funding Mechanisms for Increased IOLTA Funding.
 - The Second Commission, through its Revenue Enhancement Committee, proposed and the Supreme Judicial Court adopted a \$51 “Access to Justice Fee” as a voluntary opt-out contribution to the Massachusetts IOLTA Committee with the annual attorney registration fee. Since initiated in 2010, this contribution has been paid by over 30% of all attorneys and has generated about \$1.2 million per year for the IOLTA Committee to distribute among the Massachusetts Legal Assistance Corporation, the Massachusetts Bar Foundation and the Boston Bar Foundation.
 - The Second Commission, again through its Revenue Enhancement Committee, successfully advocated for a new *Pro Hac Vice* rule - SJC Rule 3:15 – that established a *pro hac vice* fee for lawyers from other jurisdictions who seek permission to appear in a Massachusetts court. The rule adopted by the SJC provides that a lawyer admitted to practice in another jurisdiction, but not in Massachusetts, shall pay a \$301 registration fee to the Board of Bar Overseers for permission to practice in a case in Superior Court, the Land Court or any appellate court. The fee for registration in a case in the other departments of the Trial Court is only \$101. The fees, collected by the Board of Bar Overseers, are given to the IOLTA Committee for distribution to legal assistance programs. The fees have generated approximately \$200,000 per year for the Massachusetts IOLTA Committee.

- Raised Awareness About Fee Generating Cases.
 - Through its Special Planning Committee, the Second Commission identified cases in which a court could award attorneys' fees to legal aid programs as a potential revenue source for legal aid programs. The Committee developed a statewide planning and training process to help every legal aid program claim fees in appropriate cases.

- Collaborated With Others in the Access to Justice Community on Funding Initiatives.
 - The Second Commission supported annual increases in appropriations of state funds for MLAC. During the life of the Commission, annual appropriations grew from \$9.5 million in FY 2010 to \$15 million in FY 2015.
 - It also supported the efforts of the 2014 Boston Bar Association's Statewide Task Force to Expand Civil Legal Aid in Massachusetts ("Task Force"). The Task Force's report concluded that providing civil legal assistance to low income individuals is a sound investment, generating savings in public expenditures greater than its costs. The Task Force proposed annual increases of an additional \$10 million for the next three years, including a proposed \$25 million in FY 2016.
 - The Second Commission supported an IOLTA Committee proposal to amend Mass. R. Civ. P. 23(e) to designate at least 50% of class action residuals for distribution to the IOLTA Committee. The proposal was not adopted by the SJC, but led to the initiation of a new rule (still pending) that would require the IOLTA Committee to be notified before any decision is made by a court regarding the allocation of class action residuals. This initiative also included a parallel educational effort among state court judges, federal court judges, and class action practitioners about the importance of designating residual class action funds to IOLTA.

- Established a Separate Charitable Foundation to Raise Funds From Private Companies, Non-lawyers and Foundations.
 - The Second Commission's Revenue Enhancement Committee identified the lack of civil legal aid fundraising efforts in Massachusetts that target private corporations, non-lawyer donors, and foundations. To determine whether such a targeted campaign was workable, the Committee obtained an American Bar Association Public Welfare Foundation grant to study this issue. The study confirmed that such a campaign focused on this target audience was indeed feasible once the potential donors were educated about the issue. The Committee determined that an independent charitable foundation – separate from the

Commission – was the appropriate vehicle for raising such funds.^[1] Several Commissioners, acting on their own, incorporated a nonprofit, the Massachusetts Equal Justice Fund, with plans to move forward with a fundraising plan.

B. Remaining Challenges

While the Second Commission has made important progress in increasing funding for legal aid, much work remains. Sufficient funding to provide legal representation to all low-income residents of Massachusetts will continue to be a primary concern. With that in mind, a continued emphasis on both core legislative appropriations (MLAC funding) and creative new sources of support will remain important. The Third Commission should also continue to monitor the developments in the civil right to counsel movement. Establishing a right to counsel in certain types of cases – by legislation, litigation, or other means – would lead to the availability of legal help as of right for low income individuals.

III. CORE STRATEGY 2: INCREASING SERVICES PROVIDED BY PRIVATE ATTORNEYS

The Massachusetts private bar has a rich tradition of providing pro bono legal services. The state is also home to a vast network of pro bono referral organizations covering a variety of legal issues, from political asylum to domestic violence to bankruptcy. While the environment is a favorable one for pro bono, detailed information on the hours and types of pro bono work is lacking, so it is somewhat challenging to think strategically about how to improve the delivery of pro bono services.

Over the recent past, many new lawyers have been exposed to pro bono service while in law school, with some of the state's nine law schools adopting mandatory pro bono requirements, and most of them having some structured pro bono offerings. This early indoctrination bodes well for the future of pro bono service in the state. More and more, however, law school graduates cannot find post-graduation employment. Arming our law school graduates with the skills to develop a community lawyering practice for low and moderate income clients who cannot otherwise afford representation is another important part of legal education for our future lawyers, and an important component to our access to justice agenda.

A. Accomplishments of the Second Commission

- Increased Pro Bono Representation by Encouraging Lawyers Who Have Not Traditionally Performed Pro Bono Work.

^[1] Because of the ethical issues implicated by judicial involvement in fundraising legal services, Commissioners who were also judges recused themselves from such discussions and projects, while participating in the Second Commission's general efforts to support legal aid delivery.

- Retired lawyers: In 2012, the Second Commission provided critical support for the creation of the Access to Justice Fellows Program, which partners retired or retiring lawyers and judges with legal services organizations, nonprofits, and courts. Fellows spend an academic year volunteering 10-20 hours per week to a significant pro bono project, and each month the Fellows meet over lunch to discuss their projects. Fellows come from large and small firms, legal aid programs, corporate legal departments, government offices, and the judiciary; the program takes into account the unique background, skill set, and interests of each attorney when developing the most effective placement. The program has grown each year, from seven Fellows the first year, to twelve the following year, and then to sixteen in the current year. During the past three years, the Fellows delivered approximately 21,600 hours of pro bono legal service. Projects range widely, from helping veterans in our Veterans Treatment Courts resolve their civil legal issues, to establishing a lawyer for the day program in District Court, and to providing governance advice to nonprofits. In an encouraging trend, each Fellow has continued to work in their placement after their fellowship year. This past year, the Lawyers Clearinghouse agreed to oversee the program on a pilot basis, hiring a half-time project director. See www.lawyersclearinghouse.org. Our ultimate goal for the program is that every member of the bar, when contemplating retirement, will consider providing pro bono service during a fellowship year.
- In-house counsel: In-house pro bono initiatives have grown over the past decade. In Massachusetts, legal departments of major companies have partnered with law firms, community organizations, bar associations, and the courts to initiate or expand their pro bono programs. In 2011, the Second Commission sponsored an in-house pro bono summit and pro bono fair as a means of increasing in-house pro bono participation. Following the summit, in 2013, the Supreme Judicial Court amended SJC Rule 4:02, section 9 (b), to allow in-house counsel who work in Massachusetts but are licensed to practice in other jurisdictions to perform pro bono legal work in the Commonwealth. With this rule change, Massachusetts joins several other states that permit in-house lawyers, licensed elsewhere, to perform pro bono legal services. The Supreme Judicial Court's Standing Committee on Pro Bono Services, in concert with the Second Commission, recommended the new provision in an effort to increase the participation of these 250 in-house attorneys (18% of all in-house counsel in the state) who are licensed to practice in other jurisdictions, but not in Massachusetts, and who may be interested in providing pro bono legal services here.
- Expanded Pro Bono Recognition Programs.
 - Each year since 2002, the Supreme Judicial Court has recognized the extraordinary pro bono work of a handful of attorneys through the Adams Pro Bono Publico Awards program. In 2010, the Second Commission, working in concert with the SJC's Pro Bono Committee, sought to increase recognition opportunities for pro bono attorneys to incentivize pro bono participation. Those

attorneys, law firms, and law students who meet certain criteria during the year can earn the award of being named to the SJC Pro Bono Honor Roll. Each year, the number of Honor Roll participants has increased, from 19 in 2010 to 85 in 2014. See <http://www.mass.gov/courts/court-info/sjc/attorneys-bar-applicants/sjc-about-pro-bono-recognition-gen.html>.

- Developed a Pilot Appellate Pro Bono Program.
 - In 2014, when the Second Commission became aware of pro bono appellate initiatives in fourteen other states, a committee of bar leaders, legal services attorneys, and appellate judges reviewed best practices and studied the feasibility of a program here in Massachusetts. The committee recommended a six-month pilot program at the Brooke Court Service Center, a center located within a multi-department courthouse in Boston, with both a weekly lawyer for the day component and a panel of large law firms interested in working on select (six-eight) appeals. The Volunteer Lawyers Project (VLP) and the law firm of Mintz Levin will oversee this pilot.

- Supported the Launch of A Statewide Pro Bono Website.
 - The Second Commission supported the successful application of the VLP for a Legal Services Corporation Technology Innovation Grant, with which VLP created a promising statewide pro bono website, www.Massprobono.org.

- Incorporated “Access to Justice” on the Massachusetts Bar Examination.
 - The Second Commission successfully petitioned the Supreme Judicial Court to add "access to justice" as a topic on the bar examination in order to equip law school graduates with an understanding of the legal issues facing low and moderate income people. A committee with Commissioners and bar association representatives developed the idea, which the Board of Bar Examiners and the SJC accepted. The "access to justice" essay question will first appear on the bar examination in July 2016.

- Supported Limited Assistance Representation and Incubator Programs.
 - The Second Commission sought to increase attorney representation of moderate income residents through limited assistance representation. It also studied the development of law school incubators and related models that help new lawyers learn to make a living providing legal services to low and moderate income clients, reviewing entrepreneurial approaches at Suffolk University Law School and the University of Massachusetts Law School. In 2014, the former initiated its Accelerator-to-Practice Program, a comprehensive three-year program designed to prepare graduates to join or start sustainable legal practices serving average-income clients; the latter initiated its JusticeBridge incubator, with twelve recent law school graduates providing various low cost legal services under the

supervision of an experienced managing attorney and two volunteer mentors who were Access to Justice Fellows.

B. Remaining Challenges

The Third Commission should continue to work closely with the SJC's Standing Committee on Pro Bono Legal Service to increase pro bono engagement. Moreover, matching the surplus of lawyers, particularly new lawyers, to the unmet demand for lower cost legal assistance – in the form of incubators or related programs – is a challenge that lies ahead.

IV. CORE STRATEGY 3: PROVIDING ACCESS TO JUSTICE FOR UNREPRESENTED LITIGANTS IN COURT

Increasingly, more and more litigants in our state court system do not have access to lawyers. In the Probate and Family Court, for example, an estimated 50 to 75% of all litigants statewide are unrepresented. Housing Court litigants fare no better, with 93% of tenants and 41% of landlords representing themselves in summary process cases last year. Given this reality, a major focus of access to justice commissions across the country, and ours, has been on the needs of self-represented litigants.

The First Access to Justice Commission had recommended the appointment of a judge to lead access to justice initiatives in the Trial Court. The Trial Court adopted this recommendation and, in 2009, Judge Dina Fein was appointed to lead the Court's Access to Justice Initiative. The Second Commission has benefited greatly from Judge Fein's active role in addressing access to justice throughout the court system. Over the life of the Second Commission, Judge Fein identified basic access problems in the trial courts and, over time, has addressed many of them, such as: standardizing court forms, and providing them in multiple languages; developing small claims videos for self-represented litigants; and overhauling the system-wide court website to make it more user-friendly and uniform. Judge Fein has benefited greatly from the hiring of full-time Access to Justice Coordinator Erika Rickard, who has done excellent work for the courts in this area. A full report of the Initiative can be found at <http://www.mass.gov/courts/court-info/court-management/plan-initiatives/access-to-justice-gen.html>.

As the Second Commission ends its tenure, it is fortunate to have judicial and staff resources committed to access to justice, court leadership in place that understands these important issues, and a Trial Court Strategic Plan that embraces access to justice as a “core value.”

A. Accomplishments of the Second Commission

The Second Commission supported, and attempted to complement, Judge Fein's varied initiatives.

- Enhanced Resources for Self-Represented Litigants.
 - There has been much progress in disseminating information to those who cannot afford attorneys, such as an improved court website (at www.mass.gov/courts); a court-based law library website; Massachusetts Law Reform Institute's masslegalhelp.org; law librarians who can answer questions by telephone, online chat, and text message; and an instructional small claims video, available in eight languages.

- Promoted the Establishment of Court Service Centers.
 - The Second Commission studied the use of court service centers as an invaluable tool to provide information to unrepresented litigants. Such centers, which had already been successfully implemented in a number of other states, employ court staff and other resources to provide information to self-represented litigants within the courthouse. After study, the Second Commission recommended the development of court service centers, and the Trial Court formed a committee co-chaired by a commission member and Judge Fein. Two highly successful pilot centers, in the Brooke Courthouse in Boston and in Greenfield, began operation in 2014, with four more to follow in fiscal year 2016. Soon, every multi-department courthouse will house such a center: by 2017, the Court plans to have one in each of the fifteen largest courthouses, which serve half the litigants in the Commonwealth.

- Developed Information Sheets for Early Dissemination of Resources.
 - Enhanced self-help materials, while commendable, mean little unless litigants attempting to represent themselves know where to find the information. Over the past year, the Second Commission, working in concert with the Trial Court, provided input on a one page, two-sided information sheet for all litigants. This information sheet will provide information on the litigation process, website links with legal information, and lawyer resources. The idea for such an information sheet arose out of a series of Second Commission discussions about the appropriate protocol a judge should follow when asked to approve a proposed settlement agreement involving a self-represented litigant. The impetus for such settlement discussions, which are still ongoing, was to avoid an unknowing or involuntary waiver of the litigant's rights. The Second Commission concluded that some unjust settlements might be avoided by providing information about the legal process and the specific court and type of case upfront, at the summons and complaint stage.

- Promoted Revisions to the Code of Judicial Conduct and Judicial Education.
 - One of the judicial members of the Second Commission chaired the Supreme Judicial Court's Committee to Study the Code of Judicial Conduct ("Code Committee"). As part of its comprehensive review of the Code of Judicial Conduct, which is currently out for public comment, the Code Committee made

several recommendations regarding a judge's role with respect to self-represented litigants. The Second Commission also organized a Flaschner Institute training session for judges regarding self-represented litigants.

- Studied and Supported the Expansion of Housing Court Statewide.
 - The Second Commission's Housing Court Practice Working Group conducted an extensive examination of access to justice initiatives that might enhance the experience of self-represented litigants in the Housing Court. The Working Group presented a series of recommendations, the primary being the expansion of the Housing Court statewide. Presently, nearly one-third of Massachusetts residents have no access to Housing Court. This means that these litigants will generally not have access to judges who are experts in the complexities of housing law, nor will they have access to many specialized aspects of this court such the Tenancy Preservation Program, which seeks to protect those with disabilities from homelessness. A committee comprised of Commissioners and the Massachusetts Law Reform Institute is working on the passage of legislation - co-sponsored by dozens of legislators - that would expand the Housing Court's jurisdiction statewide.

B. Remaining Challenges

Even with the judiciary's attention focused on access to justice issues, there is still much to accomplish. The Third Commission is well-poised to complement and support the courts' efforts. For example, the Third Commission will be able to lend its expertise as the court service centers roll out to more and more courthouses throughout the state. It will also continue to pursue the expansion of the Housing Court to ensure that all citizens can have access to this specialized court. In addition, the Third Commission should likely study the roles of non-lawyers in providing information about the law to low and moderate income individuals. Some illustrative programs in Massachusetts and an increasing number of experiments in other states demonstrate that non-lawyer assistance may increase help to those who need it. Last, the Third Commission can continue the work of the Second Commission in exploring how to ensure the fairness of settlement agreements in those cases where one party is not represented.

V. CORE STRATEGY 4: PROVIDING ACCESS TO JUSTICE BEYOND THE COURTS -- ADMINISTRATIVE AGENCIES AND SOCIAL SERVICE AGENCIES

Many low income families face legal issues that arise from interaction with state and federal administrative agencies. Administrative agencies provide benefits and services to low and moderate-income families, but most individuals who seek such benefits, or need to appeal the denial of such benefits, do so without a lawyer to assist them. It became clear in our work that ensuring justice outside the court system is as important as it is inside the courtroom, as it can be just as difficult for low income individuals to navigate benefits disputes without legal assistance as it is to navigate housing and family court disputes

A. Accomplishments of the Second Commission

- Established Best Practice Guide for Administrative Justice in State Government.
 - The Second Commission worked closely with the Executive Office for Administration and Finance, the Governor’s Office of Legal Counsel, and several administrative agencies to develop a set of best practices that will ensure that all residents in the state have access to administrative justice within state government. Adopted in December 2014, these best practices represent many policies and practices already in place across state government, as well as some newly identified areas of enhancement. In order to ensure these best practices continue to be utilized and enforced, these guidelines will be posted on the state website and made available to individuals at all client services and problem resolution offices across the state.
- Improved Quality of Notices by Department of Transitional Assistance.
 - The Second Commission, through its Administrative Justice Working group, sought to improve the notices issued by the Department of Transitional Assistance to ensure the language was clear and understandable. Successful litigation by Greater Boston Legal Services superseded this Second Commission initiative when litigants achieved a settlement order setting forth the necessary content of adequate notices. Other administrative agencies are also considering how to incorporate the settlement’s principles.
- Began to Study the Important Role of Social Service Agencies and Other Nonprofits in Increasing Access to Justice.
 - It became clear to the Second Commission that many low income individuals access legal information through social service agencies and other nonprofits. One way that the Second Commission sought to disseminate legal information to these important entities is the replication of “Know Your Rights” programs. Several Know Your Rights programs, organized primarily by affinity bar associations (for example, the South Asian Bar Association of Greater Boston, the Women’s Bar Foundation/Association, and the Massachusetts Black Lawyers Association) sought to train nonprofit leaders about the legal issues faced by their constituencies, and the legal and other resources available to them.

B. Remaining Challenges

A challenge for the Third Commission is to build a broad-based access to justice community in which non-lawyers from social service agencies coordinate their efforts with the traditional providers of access to justice services, legal aid and the courts. Also, the Third Commission may likely want to advance the work of the Second Commission in urging the Executive Branch to adopt a single, multi-purpose benefits application form and database to ease duplication of efforts.

VI. CORE STRATEGY 5: INCREASING JUSTICE THROUGH CIVIL LEGAL AID

At the beginning of the Second Commission, thirteen local legal aid programs served low income clients throughout the state. All programs faced critical decisions involving consolidations, leadership changes, and severe funding shortages. Yet, information sharing and joint planning among the programs were inadequate or non-existent. The Second Commission, through an appointed Special Planning Committee, attempted to fill the void. By coordinating the decision-making and sharing best practices, the Special Planning Committee benefited the legal services system as a whole.

A. Accomplishments of the Second Commission

- Reviewed Legal Aid Programs System-wide Through Commission's Special Planning Committee.
 - The Second Commission has played an important role in planning the efforts of the civil legal aid community through its Special Planning Committee. The Special Planning Committee was comprised of seven individuals, each of whom had personal experience as staff or board members of field legal aid programs. The Committee met with the executive directors and board chairs of each region, the Massachusetts Law Reform Institute, and the other seven statewide MLAC grantees to help them develop a long-term strategy and set planning goals.
 - The Committee issued a Progress Report and recommendations for more central planning in the complex delivery system, with coordination provided by the Commission. The report detailed a number of weaknesses in the state's legal aid governance; called for more impact advocacy; and sought a better understanding of the screening, telephone advice and intake processes among the regions. In response, the legal aid providers developed a planning process to encourage more impact advocacy, began an arduous examination of intake practices, and continued to consolidate programs. By the end of the Second Commission, the thirteen programs had consolidated into nine.
- Supported the Enhancement of Technology by Legal Services.
 - With consistent support from the Commission's Web and Technology Working Group, and financial assistance from a Legal Services Corporation Technology Innovation Grant, legal aid experts developed the Legal Resource Finder. The Legal Resource Finder asks litigants to enter basic information about their cases to determine whether they are eligible for legal services and, regardless whether they are, to provide guidance as to where they can seek help, such as from MassLegalHelp.org (an invaluable self-help tool overseen by Massachusetts Law Reform Institute) or other legal services organizations that are not need-based.

B. Remaining Challenges

The Special Planning Committee conducted a second round of meetings with executive directors and board chairs in 2013-14. Based on its updated findings, the Committee issued an Interim Report in 2014 that identified seven areas for future planning: screening and intake, systemic advocacy, technology, more effective priority setting, improved methods of evaluating project success, the equitable distribution of resources, and the potential need for a statewide governance system. The Third Commission will continue this important ongoing work. The Third Commission will also continue to provide support for and coordination of technological advances by legal services organizations.

VII. CONCLUSION

We are proud of the work of the Second Commission. Yet, we are mindful that several challenges remain. The newly appointed Third Commission, led by Co-Chairs Justice Geraldine Hines and Attorney Susan Finegan, is well poised to take on such issues.

Appendix 1

Members of the Second
Massachusetts Access to Justice Commission
2010-2015

Honorable Ralph D. Gants, Co-Chair
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¹ Served 2014-2015.

² Served 2012-2015.

³ Served 2012-2014..

⁴ Served 2011-2015.

⁵ Served 2010-1011.

⁶ Served 2012-2015.

⁷ Served 2010-2012.

⁸ Served 2014-2015.

⁹ Served 2010-2012.

¹⁰ Served 2013-2015.

¹¹ Served 2010-2013.