

By Anthony Doniger



## A Civil Right to Counsel

For years the Boston Bar Association has stood at the forefront of efforts to improve access to justice for low-income individuals. Among the BBA's singular purposes, as enumerated in its By-Laws, is "to serve the public interest by working to increase the availability of justice to disadvantaged persons...". Consistent with this mission, the BBA Council in June 2006 voted to support an American Bar Association resolution urging that counsel be provided as a matter of right to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody. The ABA subsequently adopted this resolution.

A right to counsel at the state's expense in civil proceedings where basic human needs are at issue is a subject that has been debated for years. While the United States Supreme Court in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) held in a 5-4 decision that the United States Constitution did not mandate a civil right to counsel, numerous legal services advocates, judges, and scholars have long urged the proposition that a civil right to counsel is not only a positive thing but one that should be recognized as a legal right. Few would argue with the proposition that as a general matter it is better that litigants be represented than not, in terms of ensuring accurate decision-making and thereby reducing the risk of unjust outcomes. Numerous studies prove that parties with lawyers massively increase their odds of winning over parties who represent

themselves. I believe that we are now beyond the point of debating whether the civil right to counsel concept is a good idea - we must now address the harder issue, which is how to go about implementing such a right.

Funding is at the crux of this debate: how to provide and pay for such legal representation, and in what types of cases. While hamstrung state budgets and already too limited appropriations for legal services may seem a daunting reality, research and common sense suggests that there is actually likely to be overall cost savings to the state in providing counsel at public expense in various civil cases. New York City, for example, has calculated that it saves \$4.00 in shelter and other social services costs for each dollar spent on legal representation of low-income tenants in eviction proceedings. We need to make the case.

Given its stature, the BBA is well-situated to help move the issue forward to the next stage. To this end, I have appointed a Task Force on the Civil Right to Counsel. Chaired by former BBA President Mary Ryan, the Task Force is composed of leaders of legal services organizations, representatives of the bar, academics, and individuals with broad government experience. The task force will address the issue of how to implement such a civil right to counsel. It will consider *inter alia* the extent to which legislation, litigation, model projects in specific courts or areas, or further cooperative efforts between bench and bar, are called for, as well as the question of what basic human needs are to be covered and how they are to be defined. Our hope is that recommendations will be made that will creditably provide direction in the near term for making this goal a reality in the Commonwealth. While Massachusetts is already in the first tier nationally in providing counsel to low-

income people as a right in certain civil cases, there is much more to be done before the full realization of this important right can be achieved.

It is a tremendous honor, and humbling, to assume the Presidency of this wonderful association. While the headquarters have moved from the Bunch of Grapes Tavern, where John Adams first led the meetings of our predecessor organization, the spirit of collegiality, public service (though of a less revolutionary tone), and professionalism, is alive and well. What a great organization the BBA is, with its myriad public service and community initiatives, professional programs, prominence in the fabric of our city and state, and its energized and skilled staff. It has been superbly led this past year by Jack Cinquegrana, whom I honor, congratulate and thank; though he has accomplished a great deal during his tenure, his most important and bold initiative, the Diversity Task Force continues its vital work, which I have pledged to fully support this year. Jack has been the very model of a bar leader, and it has been a real delight to work with him.

One of my first duties as President (indeed I was still President-elect) was to accept on behalf of the BBA the American Bar Association and National Legal Aid and Defender Association's 2007 Harrison Tweed award at this past August's ABA Annual Meeting. The Award recognizes bar associations that have made extraordinary efforts to improve the delivery of legal services to low-income persons. The BBA and the MBA were the joint recipients of the Harrison Tweed Award this year, and it is particularly fitting that we share this honor with our comrades at the MBA. We should all take pride in the fact that nationally we are recognized as being in the vanguard of the unending effort to improve access to justice for those in need.

## Pro Bono – Bar Associations

# Access To Justice In Civil Cases: A Right Whose Time Has Come

The Editor interviews Anthony M. Doniger, Partner, Sugarman, Rogers, Barshak & Cohen, P.C. and President-Elect of the Boston Bar Association.

**Editor:** Mr. Doniger, would you tell our readers something about your background and professional experience?

**Doniger:** I received my undergraduate degree at Oxford University and I graduated from Harvard Law School in 1977. I have been at Sugarman, Rogers, Barshak & Cohen since law school, where I am a trial lawyer. When I began, much of the firm's practice was in the insurance defense area, which involved a great deal of trial work. This represented a wonderful education in trial practice for a young attorney. We do little of this work today, but my practice continues to be in the courtroom, where I handle business cases, complex domestic relations matters, and professional liability cases.

I should mention that Sugarman, Rogers, Barshak & Cohen has long been committed to pro bono work, and I have also worked over the years on a variety of civil rights cases on behalf of individuals and non-profit organizations.

**Editor:** You have also enjoyed a parallel career with the Boston Bar Association and will be installed as President in September. Would you share with us some of the highlights of your BBA career and what has led to your becoming its next President?

**Doniger:** I have been involved with the BBA since my earliest days as a lawyer. One of my partners, Ed Barshak, was President of the BBA in the mid-70s, and the firm encouraged all of its lawyers to become involved. I served on a number of committees, on the Council of the Association, and as a trustee of the Boston Bar Foundation, which is the charitable arm of the BBA. My interests have always been on access to justice issues, which is one of the key elements in the BBA's mission, and much of my work has been in this area, which includes founding the Individual Rights and Responsibilities Section. All of these things contributed to my ascent up the leadership ladder of the organization, and in time I became Treasurer, Vice President and President-Elect and, in September, I will become President. I will only add that this aspect of my career has been a labor of love.

**Editor:** Would you tell us about your agenda for 2007-2008?

**Doniger:** First and foremost is a broad-based multi-year initiative committed to addressing the need for greater ethnic and racial diversity in the legal profession. Last year, my predecessor, Jack Cinquegrana, boldly mobilized a task force consisting of highly respected leaders who come from all segments of the legal profession, and they are committed to taking a fresh look at this issue, with an eye toward determining what role the BBA can play in achieving



Anthony M. Doniger

real improvement in this area. I look forward to seeing this important project through.

Another initiative for 2007-2008 is a task force on the civil right to counsel, which I am in the process of appointing now. This is essentially the next step in the discussion about what is called Civil Gideon, the right to counsel for low income persons in civil cases where substantial human needs are at issue.

We are also going to look at the development of a long range plan and mission statement for the BBA, something that needs to be done periodically.

**Editor:** What is the background on the civil right to counsel?

**Doniger:** This is a subject that has been debated for years. In the early 1980s a closely divided United States Supreme Court reluctantly determined, in *Lasiter*, that the Constitution did not mandate a civil right to counsel. Nevertheless, the decision did include a variety of suggestions on how individual states might, and should, find ways in which to address this issue. The case served to put a spotlight on a very important human needs issue.

In recent years we have moved from the proposition that the civil right to counsel is a good thing to one that it should be recognized as a legal right. A year ago the BBA embraced a resolution that the American Bar Association, under the leadership of its then President, Mike Greco, was about to bring to its House of Delegates. That resolution, which was indeed adopted by the ABA, states that the individual states *should* provide counsel as a matter of right to low-income persons in adversarial proceedings where basic human needs – shelter, sustenance, safety, healthcare, child custody, and the like – are at stake.

We are now beyond discussing the civil right to counsel as a positive concept and must address the harder issue, which is how to go about implementing such a right. Funding is a crucial issue, as is the question of what basic human needs are to be covered and how they are to be defined. The task force is also going to have to consider how to implement the right in an effective and efficient way. At this point it is difficult to know what the task force will recommend, but there are a number of possi-

bilities, including legislation, litigation, perhaps a pilot project with both public and private sponsorship.

While I am not yet at liberty to announce the composition of the task force, I can say that it will include leaders from legal services organizations in Massachusetts, representatives of the bar, particularly those with experience in the provision of legal services to the indigent, academics and people with broad governmental experience.

The good news is that Massachusetts is in the forefront on the provision of the civil right to counsel in certain cases, and we have representation on the task force from the state body that currently provides funding and appoints lawyers in certain civil cases.

**Editor:** What areas have been carved out in Massachusetts?

**Doniger:** There are a number of statutes that now provide that there must be a state-appointed attorney where the individual is unable to afford counsel in certain cases. These include care and protection cases, child guardianships, mental health commitments, and the like. Here the state has recognized that it is unthinkable that, for example, a parent might run the risk of losing custody of a child to the state without the benefit of counsel.

There are other areas of the law, however, where basic human needs are at stake and the right to counsel has not been legally recognized. In the housing area, for example, it is clear to me that there ought to be a right to counsel in certain eviction proceedings, say, where a family is being evicted from public housing because a family member has been convicted of a drug offense. If you think of the social ills – and the costs to society that derive from such ills – of such an eviction, the civil right to counsel in this area ought to be high on the list.

**Editor:** How do you see the BBA's efforts in this area connecting to what has already been undertaken by the ABA?

**Doniger:** Very closely connected. During Mike Greco's tenure as President of the ABA in 2005-2006 this was very high on his agenda, and, in light of Mike's presence here in Boston, we in this state have been influenced by the very eloquent and principled stand he has made on the issue over many years. Because he has spoken and written about the civil right to counsel for such a long period of time, and in so many important forums, he has given a profile to the issue that, without his intervention, it simply would not enjoy today. Judge Earl Johnson in California has spoken on this for many years, as has Howard Dana, a former Maine Supreme Court Justice. And in Massachusetts we now have a state access to justice committee that has backed the principle. There is no question, however, but that Mike Greco has brought the discussion to the national level. We continue to monitor this discussion, as well as what is underway in various states across the

country, and we believe these resources will be absolutely crucial to the work of our task force.

The funding of legal services is a major concern, particularly when we speak of a state-mandated right to counsel. How is this to be funded? I am hopeful that, following a careful analysis of the discussion elsewhere and a vigorous discussion on the part of the task force, some practical funding alternatives may emerge.

**Editor:** Massachusetts has led the way for the rest of the country in many areas of the law. I suspect that may be the case here.

**Doniger:** Massachusetts has always recognized the importance of the rule of law and the essential nature of the legal system in the protection of human rights. Lawyers hold the keys to the palace of justice, and I believe that the state *must* find a way to ensure that poor people have access to those who hold those keys. In light of our history, I am optimistic that Massachusetts will see this through to conclusion, and the Boston Bar Association will do everything in its power to make this a reality. If we are successful, I think we will see other states follow our lead, as has been the case in many other areas of the law.

**Editor:** Obviously, you would not be making this effort if you did not believe it can be accomplished. How do you see this playing out?

**Doniger:** I would hope that we will see a full set of recommendations from the task force within my term as President of the BBA, which runs from September to September. At this point I cannot say how long it might take to implement any such recommendations. A legislative initiative – perhaps a model statute – involves a very complicated, and invariably time consuming, process. Likewise, litigation – such as a Massachusetts constitutional challenge – entails a significant investment of time. A thoughtfully designed pilot project that is focused on a particular area of need, however, may be a way of achieving success in a relatively small arena, and that, in turn, may point the way to other areas. I think the only certainty here is that we are talking about a subject that is controversial because it involves money. Very few people argue with the principle of the civil right to counsel. The problem arises when they consider how we are going to pay for it. To meet that problem we are going to have to be creative.

**Editor:** Is there anything you would like to add?

**Doniger:** I am delighted to be having this conversation. I am very excited about the upcoming year. The Boston Bar Association is a wonderful organization and a key player in the civic fabric of this great state; it has a fabulous staff and it couldn't be more exciting to work with such committed individuals on such topical issues.

**From:** Bonnie Sashin [mailto:bsashin@bostonbar.org]  
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**For Immediate Release**

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September 5, 2007

**Boston Bar Association Creates Task Force on Civil Right to Counsel  
Mary K. Ryan Named Chair**

BOSTON – Underscoring the Boston Bar Association's commitment to ensuring access to justice, regardless of a person's ability to pay for a lawyer, BBA President Anthony M. Doniger today announced the creation of the BBA Task Force on Civil Right to Counsel. The Task Force will be chaired by Mary K. Ryan, a partner at Nutter, McClennen & Fish, and a past President of the BBA.

"Most people know that if a person is charged with a crime and cannot afford a lawyer, a court-appointed lawyer will be appointed at public expense as a matter of right," said Doniger. "By contrast, low-income people facing adversarial proceedings involving fundamental human needs such as shelter, sustenance, safety, or healthcare typically do not receive publicly funded legal services because of inadequately funded civil legal aid programs."

Doniger added: "We are now beyond discussing the civil right to counsel as a positive concept, which we accept, and must address the harder issue, which is how to go about implementing such a right. That will be the role of the BBA Task Force on Civil Right to Counsel."

The concept of providing civil counsel to low-income people by right is one being considered by a number of states, and has been buttressed by a 2006 resolution of the American Bar Association, which had been previously endorsed by the Boston Bar Association.

Mary Ryan and Tony Doniger will be joined on the Task Force by a broad array of lawyers and judges with expertise in the provision of civil legal services to low-income people: Jayne B. Tyrrell, Massachusetts IOLTA Committee, who will serve as Vice-Chair; Stephanie A. Balandis, Greater Boston Legal Services; Susan J. Cohen, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; Professor Russell Engler, New England School of Law; Massachusetts Housing Court Judge Wilbur J. Edwards, Jr; Susan M. Finegan, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; Professor David Hall, Northeastern University Law School; Joseph L. Kociubes, Bingham McCutchen LLP; Joyce Kauffman, Law Office of Joyce Kauffman; William J. Leahy, Committee for Public Counsel Services; Jay T. McManus, Children's Law Center; Ilene Mitchell, Probate & Family Court; Professor Eva S. Nilsen, Boston University Law School; Lonnie A. Powers, MA Legal Assistance Corporation; Allan G. Rodgers, MA Law Reform Institute; Robert A. Sable, Greater Boston Legal Services; Richard A. Soden, Goodwin Procter LLP; Suleyman D. Walker, Meehan, Boyle, Black & Bogdanow; and Robert S. Sanoff, Foley Hoag LLP.

The Boston Bar Association has 9,000 members and is driven by its mission of promoting the highest standards of excellence for the legal profession, facilitating access to justice, and serving the community at large.

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