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NEW YORK COUNTY LAWYERS' ASSOCIATION REPORT ON RIGHT TO COUNSEL IN HOUSING COURT

This Report was approved by the Board of Directors of the New York County Lawyers' Association at its regular meeting on December 4, 2006.

1. Background

On October 28-29, 2004, the Justice Center of the New York County Lawyers' Association (NYCLA), chaired by former dean of Fordham Law School, John Feerick, hosted a conference, "The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?" occasioned by the Court's 30th anniversary. Conference participants considered how the Housing Court is facing the challenges of the new century in light of ever-changing social and economic conditions, and whether it is well prepared to meet the challenges of the coming decades. Conferees examined the Court's role in responding not only to the legal questions that come before it, such as housing conditions, holdovers and non-payment of rent, but also to the myriad social and financial problems that underlie many Housing Court cases—problems that if unaddressed can and do lead to homelessness. Recognizing that the preeminent challenge facing America's legal system is to ensure universal access to justice, conference participants focused extensively on the challenges of making that access a reality in a court in which the overwhelming majority of cases involve *pro se* parties.

After the Conference, NYCLA issued a Report (available on the NYCLA website at http://www.nycla.org/siteFiles/Publications/Publications195_0.pdf),¹ which contained recommendations and proposals for reform, including establishment of a right to counsel in Housing Court for parties unable to afford counsel, as a means to reduce homelessness in New York City; improved resources, especially for litigants of diminished capacity; and establishment of Protocols and Best Practices (or standards) for more active oversight by judges of cases in which a *pro se* party is opposed by a represented party. NYCLA subsequently created the NYCLA Task Force on the Housing Court (hereinafter "Task

¹ The report of the Conference, the recommendations of the working groups at the Conference and significant articles authored by Conference participants are published in the January 2006 publication of the Cardozo Public Law, Policy and Ethics Journal (3 Cardozo Pub. L. Policy & Ethics J. 591 [2006]).

Force”), co-chaired by Professor Paula Galowitz and Hon. Marcy S. Friedman, to work towards the implementation of some of the reforms recommended at the Conference.

The Task Force produced three reports: Report on Right to Counsel in Housing Court, Report on Protocols for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court, and Report on Resources in the Housing Court, which were adopted by the NYCLA Board of Directors on December 4, 2006, December 4, 2006, and February 5, 2007, respectively. This Report was prepared by the Task Force Subcommittee on the Right to Counsel in Housing Court, chaired by Andrew A. Scherer.

2. Introduction

NYCLA has prominently and vigorously promoted the adoption of a right to counsel for low-income tenants who face eviction. On March 14, 2005, the NYCLA Board of Directors passed a resolution endorsing “as a matter of principle, a right to the appointment of free counsel for all tenants in Housing Court unable to afford counsel, and support[ing] initiatives to establish a right to the appointment of free counsel for such tenants in Housing Court, including initiatives that recognize the right for particularly vulnerable sub-populations of tenants such as the elderly.”² The resolution implemented the recommendation of the Working Group on the Right to Counsel that was convened at NYCLA’s October 2004 Conference described above.³

² Resolution on Right to Counsel in Housing Court, New York County Lawyers’ Association, March 14, 2005. pages 20-30 at http://www.nycla.org/siteFiles/Publications/Publications195_0.pdf

³ The consensus of the Right to Counsel Working Group was that:

- The right to counsel must be recognized for individuals in danger of losing their home due to a legal or administrative proceeding. Counsel shall be appointed based on clear guidelines for those who are unable to afford counsel.
- In order for this right to be realized, government must provide appropriate funding.
- This right is based upon concerns relating to the state and federal constitutions, statutes, costs associated with homelessness, budgetary fairness and other sound public policy.
- Implementation is key and there are concerns about the quality of counsel, the question of who appoints counsel and models of delivering this right.
- Delivery models should involve the courts, judges, legislative bodies, bar associations, community and landlord representatives, government agencies, not-for-profit legal organizations, law schools and the private bar.

See, NYCLA Report, The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It? October 2005, p. 30 (The Report is available at: http://www.nycla.org/siteFiles/Publications/Publications195_0.pdf) The report contains additional useful information that supports this Report’s recommendations.

In addition, NYCLA was one of the first bar associations to sign on as a co-sponsor of a more general civil right to counsel resolution that was unanimously passed by the House of Delegates of the American Bar Association (ABA) in August 2006 that urges:

state, territorial and federal jurisdictions to provide counsel as a matter of right at public expense 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, as determined by each jurisdiction.

3. Report and Recommendations

Given NYCLA's leadership role in advocating for a right to counsel in housing and other civil matters,⁴ the general recommendation of the Task Force on the Housing Court is that NYCLA should continue to aggressively look for every opportunity to lead the bar in advancing the recognition of a right to counsel for low-income tenants who face eviction. NYCLA should do this by both taking advantage of opportunities that arise to use its influence to advance the principle (as with the ABA resolution) and by looking for ways to affirmatively promote the right to counsel.

Recommendations:

- **Promote organized bar support for a civil right to counsel.** NYCLA should continue to actively promote the support for a right to counsel by the organized bar by taking advantage of opportunities that arise and creating opportunities for other local bar associations, the New York State Bar Association (NYSBA) and the ABA to articulate support for the right to counsel. This will significantly assist with promoting the general acceptance of the notion.
- **Promote New York City legislation providing a civil right to counsel.** NYCLA should continue to actively support local efforts to secure a right to counsel in Housing Court. In particular, NYCLA should continue its active leadership role in the New York City collaborative effort to promote city legislation that would guarantee a right to counsel for low-income senior citizens through a system that assures adequate compensation to counsel so that meaningful representation can be provided.
- **Promote adequate state funding for civil legal services.** NYCLA should take an active leadership role in promoting New York State

⁴ See, e.g., *NYCLA v. State*, 763 N.Y.S.2d 397, (N.Y. Sup. Ct. 2003), *appeal withdrawn*, 767 N.Y.S.2d 603 (N.Y. App. Div. 2003), in which NYCLA argued that the statutory cap on assigned counsel rates denied litigants meaningful representation in a forum in which the right to counsel has been recognized in New York.

funding for civil legal services. New York has yet to make a meaningful commitment to justice by creating a permanent funding stream for civil legal services. While California invests \$10 million in civil justice each year, Ohio reaches \$8 million and New Jersey tops \$18 million, New York in 2006 invested approximately \$4.6 million – and this almost entirely due to the efforts of the Assembly Majority. Even this small amount was vetoed by then Governor Pataki and thankfully restored by the Legislature. NYSBA played an important role in urging the override of the veto. NYCLA should, similarly, make funding for civil legal services a major priority.

- **Promote a high-quality comprehensive state system for access to justice in New York.** At its August 2006 meeting, in addition to passing a resolution urging the adoption of a civil right to counsel, the ABA passed two additional resolutions that are intended to improve access to justice. One urges localities to follow a set of defined principles for developing a state system for delivery of legal services and the other adopts a set of revised standards for legal services providers. NYCLA should take an active leadership role in promoting implementation of these resolutions in New York State.
- **Urge exercise of judicial power to assign counsel.** Finally, NYCLA should urge Housing Court and Civil Court Judges to use their powers under Article 11 of the CPLR to assign counsel in appropriate cases. CPLR Article 11 (New York’s “poor person” statute) gives judges the power to assign counsel in a proper case for an individual who is found to be indigent.⁵ This provision is rarely used.⁶ However, the failure to assign counsel in an appropriate case can be a violation of the obligation to exercise appropriate discretion under Article 11 of the CPLR.⁷ The active exercise of the power to assign counsel will be greatly facilitated if a list of available qualified volunteer lawyers is made available to Judges. The Task Force urges NYCLA to support any existing programs to

⁵ N.Y. C.P.L.R. § 1102 (McKinney 1997) (“The court in its order permitting a person to proceed as a poor person may provide an attorney.”).

⁶ There is no documentation of the extent to which counsel is assigned under CPLR Article 11. This statement is based on the Subcommittee chair’s observation. Probable reasons for the limited use of the power to assign counsel are that litigants and judges are not sufficiently familiar with the existence of the provision, and the provision does not authorize payment, so judges would not easily be able to determine whom to appoint as counsel.

⁷ See N.Y. C.P.L.R. § 1102). See *Hotel Martha Washington Management Co. v. Swinick*, 322 N.Y.S.2d 139 (N.Y. App. Div. 1971); *Jacox v. Jacox*, 350 N.Y.S. 2d 435 (N.Y. App. Div. 1973); *Emerson v. Emerson*, 308 N.Y.S.2d 69 (N.Y. App. Div. 1970); *Brounsky v. Brounsky*, 308 N.Y.S. 2d 72 (N.Y. App. Div. 1970).

develop and maintain such a list and, if needed, to use its resources to expand upon existing programs.

TASK FORCE ON THE HOUSING COURT

The members of the Task Force and of its Subcommittees served in their individual capacities. Their affiliations are listed for identification purposes only. Although there was substantial consensus on many of the recommendations, individual members of the Task Force may have views that differ from those presented in this report. For those members of the Task Force who are also members of the judiciary or employed by government agencies or other organizations, their participation in this project should not be understood as constituting any official endorsement of the conclusions or recommendations in the report.

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