



**NEW YORK COUNTY LAWYERS' ASSOCIATION**

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## **REPORT**

# **THE NEW YORK CITY HOUSING COURT IN THE 21<sup>ST</sup> CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT?**

**October 2005**

# THE NEW YORK CITY HOUSING COURT IN THE 21<sup>ST</sup> CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT?

## Foreword

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The preeminent challenge facing America's legal system is to ensure universal access to justice. Systemic problems that perpetuate injustice or relegate some segments of society to second-class legal status must be confronted boldly, with dedication and imagination. To that end, the New York County Lawyers' Association (NYCLA) established a Justice Center in September 2003 charged with a fundamental mission: combine the resources and talents of the legal profession with non-lawyer community leaders and groups to promote access to justice and foster a positive public perception of the administration of justice in New York.

The Housing Court Conference, *The New York City Housing Court in the 21<sup>st</sup> Century: Can It Better Address the Problems Before It?*, was convened in October 2004 in furtherance of that mission. Faced with an ever-burgeoning crisis of homelessness and irrefutable evidence linking that societal scourge to residential eviction, NYCLA brought together a remarkable array of individuals who, in one way or another, whether lawyer or non-lawyer, are stakeholders in New York City's Housing Court. The goal of the conference was simple: foster discussion and debate, test ideas, analyze possible approaches and, ultimately, propose reforms. This Report constitutes tangible evidence that the Conference was a remarkable success. It envisions a path that can lead to greater justice in an overwhelmed, but vital area of the law.

The road to reform is neither straight nor smoothly paved. No one should harbor any illusions that the path to enhanced justice will be without twists, turns or obstacles. Yet, with the spirit of dedication and generosity exemplified by those who participated in NYCLA's Housing Court Conference, I am confident we will reach our goal. Though complete success may be elusive, for having made the effort, for having dared to dream of a more effective, more just and more compassionate system of justice, each and every person who participated in this project deserves the respect, admiration and gratitude of our community. On behalf of the New York County Lawyers' Association, I am proud to have played a small part in what represents an historic step forward in the cause of justice.

Suggestions and proposals, no matter how meritorious, are of little consequence unless implemented. To that end, NYCLA is empanelling a Task Force on Housing Court Reform, chaired by Hon. Marcy S. Friedman, Justice, New York State Supreme Court, and Paula Galowitz, Clinical Professor of Law, New York University School of Law. It will be the responsibility of this distinguished group of bar and community leaders to take the tangible steps necessary to effectuate the bold and imaginative reforms envisioned by the Conference. In their endeavors, I pledge that they will have the steadfast support of NYCLA's Justice Center and the full resources of a bar association whose principal goal since its inception nearly 100 years ago has been expanding access to justice.

Norman L. Reimer  
President  
New York County Lawyers' Association

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## Acknowledgements

On behalf of the Justice Center of the New York County Lawyers' Association, I would like to acknowledge the exceptional dedication of the Conference Planning Committee, a group that met regularly for months to develop the format, select the issues for discussion, identify speakers, moderators and recorders, organize the invitation list and support the Conference in every way possible. The members of this unique, inspiring group were: Paris R. Baldacci, Bruce A. Green, Lynn M. Kelly, Contessa Nyree, Marie Richardson, Sandy Russo, Ellen Yaroshefsky and Mary M. Zulack.

NYCLA is also very grateful for the contributions of those who generously agreed to prepare articles, speak at the opening plenary, moderate the Working Groups, record their discussions and recommendations for change, and prepare the Working Group reports. Authors of Articles: Paris R. Baldacci, Andrew Goldberg, Andrew Scherer, Hina Shamsi, Jeanette Zelhof, Mary M. Zulack. Keynote Remarks at the Opening Reception: Hon. Fern A. Fisher. Welcoming Remarks at the Conference: Hon. Jonathan Lippman. Plenary Panel: Moderator, Hon. Fern A. Fisher; Panelists, John D. Feerick, Hon. Marcy S. Friedman, Maria Mottola, Conrad A. Johnson, Jonathan Newman. Working Group Moderators and Authors of the Reports: Hon. Marcy S. Friedman, Paula Galowitz, Conrad A. Johnson, Ann Moynihan, Olga Perez, Raun Rasmussen. Working Group Recorders: Paris R. Baldacci, Gerard Cabrera, Justin Campoli, Samuel V. Jones, Diane Lutwak, David Robinson.

Ruth Zipper's administrative support and Anita Aboulafia's public relations assistance also contributed significantly to the Conference's success.

The three Conference co-sponsors, Benjamin N. Cardozo Law School, Columbia Law School and the Louis Stein Center for Law and Ethics of Fordham University School of Law, provided critical resources and support.

The following organizations, law firms and individuals made generous financial and in-kind contributions to the Conference: Finkelstein Newman LLP, JP Morgan Chase, Legal Services of New York City, Melvin C. Levine, Esq., MFY Legal Services Inc., The New York Community Trust, NYCLA Civil Court Practice Section, The Legal Aid Society, and Weil Gotshal and Manges LLP.

NYCLA appreciates these extraordinary contributions and looks forward to collaborating with our Conference partners on the NYCLA Task Force on the Housing Court that will review Conference recommendations and seek to implement those that will enhance the functioning of the Housing Court.

Marilyn J. Flood  
Counsel to NYCLA  
Executive Director of the NYCLA Foundation

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## **REPORT**

# **THE NEW YORK CITY HOUSING COURT IN THE 21<sup>ST</sup> CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT?**

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### **Introduction**

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 21<sup>st</sup> Century: Can It Better Address the Problems Before It?" occasioned by the Court's 30<sup>th</sup> 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 nonpayment 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.

#### Conference Purpose and Format

The conference was an invitational forum, with 82 participants representing a broad array of experience and perspectives and drawn from both the landlord and tenant bars, the judiciary, government, legal academia and public advocacy organizations. The overarching goal was to identify and propose ways in which the Housing Court might better meet its future challenges and address the legal and social issues that come before it. Significant articles, authored by members of the Conference planning committee and other participants and drafted in advance of the Conference, were distributed to all conferees and discussed during the workshops.

Co-sponsored by Benjamin N. Cardozo Law School, Columbia University Law School and the Louis Stein Center for Law and Ethics of Fordham University School of Law, the Conference began on the evening of October 28 with remarks by Norman L. Reimer, President of NYCLA, and a keynote by Hon. Fern A. Fisher, Administrative Judge of the Civil Court of the City of New York, followed by a reception for current and former Housing Court judges.

On October 29, after remarks by Hon. Jonathan Lippman, Chief Administrative Judge of the Courts, the following plenary panelists provided an overview of the critical issues confronting the Housing Court: Hon. Fern A. Fisher, moderator; John D. Feerick, Chair, NYCLA Justice Center and former Dean, Fordham University Law School; Hon. Marcy S. Friedman, New York State Supreme Court; Maria Mottola, Executive Director, New York Foundation; Conrad A. Johnson, Clinical Professor of Law, Columbia University Law School; and Jonathan Newman, Partner, Finkelstein Newman LLP.

Conference participants then spent the rest of the day working in small groups discussing a particular area significant to the delivery of justice in the Housing Court. These areas were:

- Pre-adjudication steps in the Housing Court
- The adjudicative process and the role of the Court
- Right to counsel
- Litigants of diminished capacity
- Preserving the housing stock: are there new ways to approach this and measure results?
- Social services and volunteer programs in the Court

In a closing plenary session moderated by Professor Ellen Yaroshefsky of Cardozo Law School, the Working Groups reported on the recommendations for change that emerged from their deliberations. While each of the groups had a distinct mission, there were several issues the groups had in common and complementary recommendations. All of the groups discussed the Housing Court's overwhelming workload and the problems engendered by summary proceedings. Overall, the groups recognized the need to improve representation in Housing Court; gather information and improve data collection; provide additional resources, especially for litigants of diminished capacity; and divert cases from Housing Court to appropriate social service agencies. Notably, the Conference presented a workable proposal for a right to counsel in Housing Court cases that could result in eviction. The groups made detailed recommendations in all six areas of inquiry.

These recommendations have been compiled into this conference report and will be used to develop a plan of action that NYCLA will spearhead. Planned follow-up activities are more fully described in a section following the Working Group reports.

## Summaries of Conference Papers

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The four articles commissioned for the Conference will be published in a fall 2005 issue of the *Cardozo Public Law, Policy and Ethics Journal* and are included here as very brief summaries.

***Assuring Access to Justice: The Role of the Judge in Assisting Pro se Litigants in Litigating Their Cases in New York City's Housing Court.* Author, Paris R. Baldacci, Clinical Professor of Law, Benjamin N. Cardozo School of Law**

Professor Baldacci characterizes the *pro se* litigant as systematically silenced by an adversarial system he/she does not understand procedurally or substantively. Several factors contribute to this silencing—a lack of understanding about defenses and claims, an inability to present them effectively and the strictures on the appropriate role of the judge in an adversarial system.

Decrying the current system as “a largely one-sided eviction apparatus,” Professor Baldacci describes several strategies for helping *pro se* litigants enjoy their constitutional right to be heard. One model would involve creating a more active judicial role within the present system, which would allow judges and court personnel to provide additional assistance to *pro se* litigants at motions and evidentiary hearings. A second model would incorporate simplified evidentiary procedures applicable to Small Claims Court actions that would allow *pro se* litigants to present their cases in a more narrative form with minimal interruptions and objections and would permit judges to intervene to ensure information presented is factually correct and legally sufficient. A third model, one that Professor Baldacci suggests may be necessary, involves a more drastic change in the role of the judge to one where he/she has an affirmative duty to develop the factual record as is done in administrative hearings or in jurisdictions such as France that use an inquisitorial model.

***Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel.* Author, Andrew Scherer, Executive Director, Legal Services for New York City**

Andrew Scherer argues in favor of what he characterizes as a simple proposition: people in danger of losing their homes must have a right to be represented by counsel in those proceedings whether or not they can afford a lawyer. And if they cannot pay for representation, government must do so.

Because the loss of a home is devastating in so many ways to an individual or a family and because eviction proceedings in New York City are adversarial proceedings, counsel makes a difference in the outcome. A lawyer understands the court procedures, knows the defenses, can help secure government benefits and can negotiate for more time when an eviction cannot be avoided. Studies have repeatedly demonstrated the determinative difference the presence of counsel makes.

Mr. Scherer lays out a persuasive case that a right to counsel is not only sound public policy but is required under the U.S. Constitution, New York Constitution, New York Civil Practice Law and Rules, and New York Civil Rights Law.

***Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts.* Authors, Jeanette Zelhof, Deputy Director and Managing Attorney at MFY Legal Services, Inc., Andrew Goldberg, Supervising Attorney at MFY Legal Services, Inc., and Hina Shamsi, a former Staff Attorney at MFY Legal Services, Inc.**

The authors review the evolution of society's understanding about people with mental illness and the reflection of that evolution in legislation and jurisprudence and then assess the implementation and adequacy of the Guardian *Ad Litem* (GAL) procedures of the New York Civil Practice Law and Rules before presenting recommendations for change.

Their recommendations, which would bring the Housing Court into compliance with the Americans with Disability Act (ADA) and offer better protection for the rights of litigants with diminished capacity, focus on new procedures and include: creating a system to identify such litigants early in the process; providing additional training for judges, clerks and Housing Court staff; using technology to cross-reference prior Court appointments of GAL's and records of Adult Protective Services about litigants at risk; ensuring that landlords and their counsel inform the Court immediately upon becoming aware of the possible diminished capacity of a litigant; and providing adequate notice to litigants of their right to request accommodation under the ADA. The authors also recommend that to accommodate litigants with diminished capacity, the Housing Court should provide a quiet waiting room and an afternoon calendar for elderly people and those on certain medications, call a case first to avoid long waiting times for people with diminished capacity and permit video appearances.

***The Housing Court Act (1972) and Computer Technology (2005): How the Ambitious Mission of the Housing Court to Protect the Housing Stock of New York City May Finally be Achieved.* Author, Professor Mary Marsh Zulack, Clinical Professor of Law, Columbia University School of Law**

Professor Zulack describes the mandates and powers given to the Housing Court when it was created in 1972, including the authority to impose relief not sought by either party and to enjoy continuing jurisdiction over a building until all violations are corrected. Additionally, new causes of action were established such as the Housing Part (HP) proceeding to allow both the City Department of Housing Preservation and Development and tenants standing to seek corrections to Housing Code violations.

Although in the past the Housing Court issued detailed reports about violations corrected, it no longer does so, preventing an evaluation of the Court's success in preserving the housing stock. Professor Zulack recommends the design and implementation of a database system that records all repair-related information relevant to a case and makes this information available to the Court, litigants and the public. Additionally she recommends that judges take an active role in ensuring that repairs are made, including their use of their power to punish for contempt when repair orders are not followed, and that evaluation for reappointment be based, in part, on results achieved.

## **Remarks on the Conference**

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### **Remarks by NYCLA President Norman L. Reimer**

My role as NYCLA's President, indeed my involvement in this Association, derives from one basic fact: I believe in expanding access to justice. And so does NYCLA. And that, above all, is the reason we are here tonight and why I am confident that tomorrow will bring great strides toward improved justice.

I recognize that there are many people who have far more valuable insight to offer on the subject that brings us together than I can provide. After all, housing law is not my field. I am a criminal defense lawyer. But one thing I have learned from a quarter of a century working in the criminal justice system is that many of the afflictions that lead people into Criminal Court are rooted in the very same economic stresses and the myriad pathologies that thrust people into Housing Court. Poverty. Addiction. Diminished capacity. Unemployment. These are the common denominator social issues that incubate an array of legal problems.

The blight of homelessness is at record levels in this City. This is a misery-producing scourge that is wholly unacceptable in this metropolis – perhaps the wealthiest city in the history of civilization.

From the working papers that will guide the conferees, I know that there are approximately 381,000 New Yorkers suffering from some form of mental illness. There are approximately 895,000 persons over the age of 65 living in New York. These and other vulnerable individuals whose lives are torn asunder by misfortune all too often find themselves the target of eviction proceedings.

And I also know that more than 90 percent of tenants are not represented by counsel – and that the correlation between lack of representation and eviction is undeniable.

We cannot ignore the reality that while the Housing Court processes roughly 300,000 filings per year, modern technologies that could streamline the process, aid the Court in its mission to preserve the housing stock and provide much needed social support are largely untapped.

If the purpose of our Housing Court is solely to adjudicate eviction proceedings, we need not have gathered here. But if a mission of the Court is to find ways to resolve the underlying social and economic issues that give rise to these proceedings, then there is much work to do. I hope that you will explore all of these issues and bring your collective ingenuity and creativity to bear on proposing new approaches.

The Housing Court is a crucible in which two of the most cherished interests collide: the legitimate rights of a property owner in a free market system and the fundamental human right to the shelter of a home.

We all know that these are not the best times for social justice initiatives. But, as we have throughout American history, lawyers remain in the vanguard in the quest for justice – no matter

the obstacles. With that in mind, the NYCLA Justice Center was founded on the principle that interaction and collaboration between the legal profession and the community at large are essential to expanding the hope of justice.

I neither ask nor expect that you solve all of the world's ills at this Conference. I just ask that you try.

I do not expect you to completely halt the flow of the stream that carries the poor and unfortunate to eviction. I just ask that you slow it to a drip.

If your efforts result in even a modest improvement in Housing Court processes, if we can—even in a small way—save some families, especially children, from the curse of homelessness, then this Conference will have been a great success. For my part, on behalf of NYCLA, you have my promise that if you propose concrete reforms, no matter how incremental or bold, you will have a friend and tireless advocate in NYCLA.

## Reports of the Working Groups

### **Working Group I: Pre-Adjudication Steps in the Housing Court**

**Overview:** This Working Group examined the pre-adjudication process—the stages of a housing case from the first notice that a claim exists, up to, but not including, the stage when the claim is formally presented to a judge or jury for adjudication. This process is crucially important, since most cases in the Housing Court end with a default judgment or a stipulation of settlement, not formal adjudication. This process is long and complex, with many substantive and procedural rights hanging in the balance. The process is further complicated by the fact that the overwhelming majority of tenants are unrepresented. To assist self-represented or *pro se* litigants, the Housing Court has an array of services and systems designed to help them navigate this important and complex process.

**Author:** Raun J. Rasmussen, Chief of Litigations and Advocacy, Legal Services for New York

**Recorder:** Justin Campoli, Law Secretary, Civil Court

**Participants:** Robin Bernstein, Rent Stabilization Association; Elizabeth Bolden, Department of Housing Preservation and Development; Justin Campoli, Civil Court (recorder); Marshall W. Green, The Legal Aid Society; Hon Pam B. Jackman-Brown, Judge of the Civil Court; Jennifer Levy, South Brooklyn Legal Services; Ricardo E. Morales, New York City Housing Authority; Jonathan Newman, Finkelstein Newman LLP; Keith A. Schwam, Department of Investigations; Raun J. Rasmussen, Legal Services for New York City (moderator).

#### **The Process**

Our group was asked to focus on pre-adjudication steps in the Housing Court, which were defined by the planning committee to include the following:

1. Stating the landlord's claim
2. Service of process
3. Obtaining procedural and substantive information
4. Setting aside defaults
5. Answering the claim
6. Preparing to challenge or refute the landlord's claim
7. Preparing to establish defenses and counterclaims
8. Information provided or available to Court personnel
9. Court and agency databases
10. Negotiations
11. Settlements

Prior to the discussion, our group exchanged emails to refine the agenda. We agreed that the topics could be usefully organized, for discussion purposes, into three main areas: commencing the case; information for litigants; and information for Court personnel.

Our group had good representation from the public and private sectors, and included members who represent landlords primarily and tenants exclusively. We also had representatives from the major City agencies that provide housing for low-income New Yorkers, as well as a judge of the Civil Court. As a result of this diversity of perspective, our discussion was engaged, spirited, at times contentious, and mostly friendly. Reported here are those topics on which we could reach agreement.

In addition to the specific recommendations set out below, our group thought it critical to remind all the Conference participants about one of the important themes that underlie the prosecution of Housing Court cases: the vast majority of housing litigation is about money. If there were better/faster ways for landlords to get rent that was due, lots of litigation could be avoided. Here are our recommendations:

### **Commencement of Proceedings**

Quick Access to Necessary Information: We agreed that it is important to get relevant information before the Court as soon as possible in the litigation process. Examples of the kinds of information we discussed are landlord rent histories (accurate breakdowns are essential in resolving most nonpayment proceedings) and Section 8 and welfare rent payment histories. There was some disagreement about what kinds or forms of information were necessary in each case.

We agreed that the Court should do what it can to help the parties get necessary information into Court quickly and at the least cost to the parties. To accomplish this, we agreed that:

- Subpoena forms (pre-addressed) should be readily available for *pro se* litigants and Court personnel should be trained to help litigants fill out the subpoenas so that they are accurate and inclusive.
- Liaisons should be established between the Court and those agencies whose records are most frequently needed to resolve disputes and questions concerning issues such as payments so that information can be obtained promptly and efficiently without the need for a subpoena whenever possible. Those agencies include at least the following: New York City Housing Authority (NYCHA), Department of Housing Preservation and Development (DHPD) and Human Resources Administration (HRA).
- Technological solutions should be explored and might include giving the Court access to certain agency records or email access to agency personnel who could quickly respond to requests for information.

Disclosure by Petitioners of a Perceived Need for a Guardian *Ad Litem*: We discussed whether there should be any additional pleading requirements for petitioners who had reason to believe that respondents might be in need of a Guardian *Ad Litem* (GAL). After much discussion, we agreed that rather than require petitioners to assert information that they might not be certain about, we would recommend the following:

- The Court should keep records regarding the cases in which a motion for appointment of a GAL was made and the disposition of that motion.
- For new cases, a computer check should be made, cross-referencing names and addresses, to determine if a party had been the subject of a previous motion for a GAL.
- In situations where a party had been the subject of a previous GAL motion (regardless of the result of that motion), the file should be noted so that the Court (whether clerk or judge) could make an inquiry, inform the adversary and take other appropriate action, and Adult Protective Services (APS) should be notified by the Court (clerk or judge).

### **Information for Litigants**

Materials are now distributed by the Court in a wide variety of ways: printed materials are available in Resource Rooms located in each Court; computer terminals are available in the public areas of some of the Courts (with access to CourtChannel and LawHelp); a five-minute videotape about the Housing Court is presented twice daily in each Housing Court room in Manhattan (and perhaps elsewhere); and the clerks in each Court have access to a wide variety of printed materials.

We agreed on several overall goals for the provision of information to litigants:

- Information, in whatever form, should be available in as many languages as necessary, depending on the communities served by the Court. Since “accessibility” is the overriding issue, information should also be made available to litigants with disabilities (e.g., hearing or sight impaired).
- Interpreting services should be provided, where possible, at every stage of the proceeding, including when the parties appear in Court to answer the proceeding.
- Information should be presented at an appropriate education level.
- The mode in which information is presented makes a difference: the Court should strive to provide information in a variety of formats (e.g., on paper, in person, by video or by website).

Pre-Litigation: Agencies (e.g., NYCHA, HPD, HRA and APS) should designate “community liaisons” who could speak with potential litigants (landlords and tenants), provide relevant information and help to prevent the commencement of litigation when possible. Successful use of these resources could relieve a significant burden on the Housing Court. These liaisons might be especially helpful, for example, when a small amount of back rent was due, when a Section 8 rent subsidy is suspended due to conditions, or when a “Collyers” (hoarding or excessive clutter) situation exists.

There was specific concern raised about APS, which, according to panel members, often refuses

to get involved prior to commencement of litigation or, in the worst cases, prior to service of a Marshal's Notice of Eviction.

During Litigation (Available at Court): Information should be more widely available; at present, there is a significant discrepancy from borough to borough. At a minimum, the following categories of information should be available:

- Overview of the Housing Court and Housing Court litigation
- Overview of trial procedures, including especially a discussion of the evidence needed to support claims/defenses (this should be provided when the parties first appear in Court, since some of this evidence may facilitate settlement)
- How to get grants for tenants and landlords to pay for rent arrears
- Negotiations and settlements, covering at least the following topics:
  - the process (in the hallway; with the clerk; before the judge);
  - the consequences of settling (and not settling);
  - details that will make settlements more effective (e.g., proper rent breakdowns and language that spells out the consequences of default); and
  - what happens when the term of the settlement has expired and there has or has not been compliance.

There should be an in-Court expert on the payment or resolution of rent arrears. This person should be familiar with the range of options, including back rent owed by agencies (HRA, NYCHA, etc.), emergency or other rent grants from HRA and funds available from the Department of Homeless Services (DHS) through community-based organizations and charity funds. *Pro se* litigants should be referred to this expert as early as possible in the course of litigation.

### **Information for Court Personnel**

At the very least, Court personnel (clerks and judges) should have access to the following: HPD violations list and Multiple Dwelling Registration information and the procedural status of the case before them. We assume that all this information is already available online in most courtrooms.

## **Working Group II: The Adjudicative Process and the Role of the Court**

**Overview:** The overwhelming majority of tenants and a not insignificant number of landlords (primarily outside of Manhattan) are unrepresented in Housing Court. The primary emphasis of the Court, bar associations and advocacy groups in recent years has been assisting unrepresented parties in understanding their legal rights and negotiating fair settlements of their cases. However, settlements either articulate or presume that the parties are knowingly and willingly giving up their right to go to trial. Indeed, unrepresented litigants are frequently advised by the Court that if they do not settle their cases, they will have to go to trial. Litigants are also further advised (in materials prepared by the Court, bar associations and individual judges) that if they choose to go to trial, the only assistance the Court (the judge) will/can provide is to explain procedures. It cannot help them to establish their claims or defenses.

Under such circumstances, it is appropriate to ask whether the right of such unrepresented litigants to have their claims or defenses adjudicated by a trier of fact, rather than to accept what they may believe is an unfair settlement, is effectively nullified, thus denying them access to justice and due process. On the other hand, it also appropriate to ask whether demanding that the Court provide assistance, in addition to the procedural explanations, would significantly and negatively alter the role of the judge as an impartial arbiter of claims and defenses based on facts and claims presented in evidentiarily admissible form to it by adversaries.

**Authors:** Hon. Marcy S. Friedman, Judge, New York State Supreme Court, and Paris R. Baldacci, Clinical Professor of Law, Benjamin N. Cardozo Law School

**Recorder:** Paris R. Baldacci, Benjamin N. Cardozo Law School

**Participants:** Paris R. Baldacci, (recorder); Carl O. Callender, Queens Legal Services; Hon. Marian C. Doherty, Civil Court, Housing Part; Elizabeth Donoghue, Housing Court Committee, Association of the Bar of the City of New York; Warren E. Estis, Rosenberg & Estis, P.C.; Hon. Geraldine Ferraro, HF Communications Group; Alan Fester, New York City Human Resources Administration; James Fishman, Fishman & Neil; Hon. Marcy S. Friedman, New York State Supreme Court (moderator); Kenneth Lau, MFY Legal Services; Hon. Maria Milin, Civil Court, Housing Part; Barbara Mulé, Office of Court Administration; April A. Newbauer, The Legal Aid Society; and Tracy Welsh, HIV Law Project.

### **The Process and the Issues Addressed**

This group was initially asked to focus on the proper role of New York City's Housing Court in handling cases in which *pro se* parties litigate their claims. In preparing for the working session, it became clear that the group should address the Court's role in settlements as well as litigation by *pro se* parties. The group's focus was expanded because the overwhelming majority of cases in Housing Court are resolved by stipulations of settlement rather than by actual litigation, and because the settlement process was not the subject of consideration by any other group at the conference.

In most Housing Court cases, *pro se* parties are opposed by represented parties.<sup>1</sup> This disparity in access to representation results in the parties' unequal access to information about their legal rights and unequal ability to assert legal claims, and thus presents unique challenges for the Court in the delivery of justice. The traditional model of the judge's role in Housing Court, as in our other courts of record, is an adversarial model based on representation. Although this model recognizes a right of self-representation, it presupposes that both sides will ordinarily be represented by counsel; that both sides will therefore be able to advocate their positions zealously; and that the role of the judge, as neutral decision-maker, is to determine which side has presented the strongest case. Under this model, the role of the judge is that of a generally impartial arbiter of the facts and law.

The problem with this model for the Housing Court is that it is a representational model without the representation. Given the lack of representation for at least one side in the great majority of cases brought in Housing Court, the critical issue the Court faces, and the issue addressed by this group, is the Court's proper role in such cases and, in particular, the extent, if any, to which Housing Court judges should, and may properly, intervene in cases in which *pro se's* face represented adversaries.<sup>2</sup>

The Working Group agreed that its goal was to build consensus and recommend solutions to address the identified problems. In the morning session, the group identified the problems faced by *pro se* litigants in litigating and settling their cases, and also considered the proper role of the judge in general and in assisting *pro se* litigants in that process. In the afternoon session, the group focused on identifying solutions to the problems identified in the morning session.

### **Identifying the Problems Faced by *Pro se* Litigants**

The morning began with a brainstorming session, the purpose of which was to identify the problems faced by *pro se* litigants in litigating or settling their cases. The problems that were identified broke down into two broad categories with some overlap: 1) the lack of information available to *pro se's* about their legal claims or defenses, compounded by their difficulties in "negotiating the system" to articulate or present such claims; and 2) inconsistent or insufficient protocols for the Court's oversight of cases in which *pro se's* have represented adversaries.

Lack of Information: As to the first category, the group recognized, as a threshold matter, that *pro se's* lack the knowledge of the substantive law and legal process that represented parties have. There was consensus that appointment of counsel for *pro se* parties would be the optimal means to ensure greater fairness in cases in which *pro se's* face represented adversaries. Absent a general right to counsel, the group identified as problematic the absence of a pool of *pro bono* attorneys to represent *pro se's*, and the lack of a structure for appointment of counsel, *pro bono*

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<sup>1</sup>While statistics do not appear to have been kept, practitioners in Housing Court estimate that 90 to 95 percent of tenants are unrepresented by counsel, whereas 85 percent of landlords are represented. The great majority of unrepresented litigants are poor or low income.

<sup>2</sup>Throughout this report, cases in which only one side has counsel will be referred to as "*pro se* litigants" or "*pro se's*."

or other, in exceptional cases, such as those involving persons of diminished capacity or eviction from long-term tenancies.

The group further recognized that as a general matter, *pro se*'s have difficulty in articulating or presenting their claims or defenses because the court system embodies a language and culture with which *pro se*'s are unfamiliar and in which they are untrained. In particular, members of the group noted that *pro se*'s are frequently unable to function effectively as a result of the fear they experience in a "strange" atmosphere and they are willing to sign stipulations of settlement, no matter how unbalanced, rather than face the daunting formality of a trial. Members of the group also observed that "hallway justice" was the process still followed in most cases: *pro se*'s meet with their adversaries' attorneys in the hallways and sign stipulations of settlement drafted by the attorneys before meeting with a court attorney or the judge. It was also noted that in reviewing stipulations signed in the hallways, the Court will often treat a signed stipulation as a *fait accompli*. Further, in such reviews or settlement conferences, the court attorney or judge will often accept the landlord's attorney's narrative about the issues in the case as controlling, without giving the *pro se* tenant the opportunity to explain his/her own version of the facts and issues.

The group noted that many *pro se*'s are confused even about the identity of the various persons encountered in the Court—who is the landlord's lawyer, the court attorney and judge, and what is the role of each. In this regard, the group noted that some useful procedures instituted to help orient *pro se*'s have been eliminated. The group contrasted the appearance of *pro se*'s in the Resolution Parts, without any framework in which to understand the process they are about to enter, with the "pre-appearance" in the former Part 18 where some information was available about legal procedure. The group expressed significant concern that instructional videos originally made to provide such a framework and that were played first thing in the morning in the Resolution Parts are no longer being played with sound. Other problems that were identified regarding the orientation of *pro se*'s to the process were: failure to provide *pro se*'s with written information at appropriate junctures such as the delivery of the petition or at the time of answering; lack of protocols regarding the basic contents of announcements about the court process; predominance of "hallway justice" where *pro se*'s spend most of their time in the hallways talking with their adversaries' lawyers without court supervision; and lack of opportunity for *pro se*'s to learn by observing what happens in the Resolution Parts. A similar problem was noted in the Trial Parts where *pro se*'s are instructed to appear without a prior opportunity to observe.

Other problems identified by the group included: lack of uniformity among the counties regarding resources available to *pro se* parties; difficulties for *pro se*'s in obtaining adjournments so that they can utilize such resources, where available (e.g., counsel from legal services programs for low-income clients, public assistance and inspections for repairs); and *pro se*'s acting on "legal advice" improperly given by their adversaries' attorneys.

Protocols for Court Oversight: There was strong consensus in the group that more intervention by the Court in overseeing negotiations and reviewing stipulations of settlement is necessary to bring greater fairness to cases in which *pro se*'s face represented adversaries. A primary area of concern for the group was that the judges of the Resolution Parts follow inconsistent practices in overseeing negotiations of settlements and in reviewing ("allocuting") stipulations of settlement in *pro se* cases. The group strongly agreed that protocols for such cases are needed for two main reasons. First, the proper role of the Court in dealing with *pro se* cases presents difficult issues that have only recently begun to be systematically addressed not only by New York City's Housing Court but by courts around the country. Protocols will help to provide useful guidance without undermining the proper exercise of judicial discretion. Second, protocols will enhance public confidence in the Court by promoting more consistent treatment of similarly situated litigants and, more specifically, by helping to ensure that the oversight of a case will not depend, to the significant extent that it does currently, on the particular Resolution Part to which a case has been assigned.

While the group strongly supported the need for protocols for judges' oversight of settlement negotiations and allocution of stipulations, the group also recognized that heavy caseloads present challenges to oversight and review. Judges who participated in the group also expressed concern that protocols providing for greater intervention by judges in overseeing settlement negotiations and reviewing stipulations will have an impact on the practice of represented parties' attorneys in Housing Court, and will not be effective without the support of the Court Administration.

The group briefly addressed some specific issues in connection with judicial review of stipulations of settlement. Some members of the group expressed the view that the Court should not approve stipulations written on pre-printed forms prepared by certain firms representing landlords, because the forms may be mistaken by *pro se*'s for court forms. Some members took the position that the Court should not approve stipulations where the *pro se* has no reasonable expectation of being able to comply with the terms (e.g., dates for payment of back rent). No consensus was reached on these issues.

The group agreed on the need for protocols for court attorneys dealing with *pro se* cases. Although the judges in most, if not all, Resolution Parts rely heavily on court attorneys to conference cases and conduct the principal review of stipulations of settlement, there is a lack of protocols regarding the proper role of court attorneys, including protocols governing what information court attorneys may properly give *pro se*'s; whether a distinction may properly be made between giving legal information and giving legal advice; and how actively court attorneys should elicit narrative information from *pro se*'s, as well as the represented parties, about the issues in the case.

The need for protocols regarding information about the court process (e.g., announcements in the Parts) has been discussed above.

## Addressing the Problems

There was an overwhelming consensus in the group that the problems identified above mandate a response from the court system not only because the scale of the problem involves literally tens of thousands of *pro se* litigants in Housing Court each year, but also because it raises profound constitutional issues of access to justice.

The group also agreed that it is not possible to address the problems without examining the role of the judge.

### The Proper Role of the Judge in General and in Addressing the Problems of the *Pro se* Litigant:

The Working Group identified a number of aspects of the role of a judge in general and in the particular context of a predominantly *pro se* court such as Housing Court. In Housing Court, as in other courts, judges perform two main functions: Judges approve (“so order”) settlement agreements by giving judicial imprimatur to the parties’ stipulations and approving enforcement mechanisms (e.g., judgments and warrants). Secondly, judges preside over bench trials and make findings of fact and law. In performing both functions, judges in Housing Court, as in all other courts, have a primary obligation to maintain impartiality both in fact and in appearance. All judges also have a primary obligation to ensure that cases are resolved fairly and that all litigants have a meaningful opportunity to be heard, whether or not they can afford counsel. In courts where both sides to a case are represented, the judge ordinarily performs these duties by functioning largely as an impartial decision-maker. In Housing Court, the issue is whether judges may and should play a more active role in the oversight and resolution of cases in which only one side has representation.

The group recognized that Housing Court judges are understandably concerned that if they deviate from the traditional model of impassive decision-maker, if they take a more active role in cases involving *pro se* litigants, they will violate or appear to violate this duty of impartiality. The group agreed, however, that in order to provide a fair and meaningful opportunity to be heard in cases where only one side has representation, judges have a necessary and legitimate oversight function that can be performed without violating the duty to maintain impartiality. This function, which involves “leveling the playing field,” is properly performed by making sure that *pro se*’s understand the court process, are aware of options (e.g., settlement versus trial), have a meaningful opportunity to explain their claims or defenses and, if a case is settled, have a meaningful understanding of the terms of the stipulation.

There was general agreement that some neutral techniques for providing a fair hearing to *pro se*’s, without compromising impartiality, would include the following:

- As finders of fact, Housing Court judges may and should ensure that the parties are heard by asking questions in a way that will be likely to obtain information from both sides. For example, by eliciting narrative from a *pro se*, the Court will be giving the *pro se* an opportunity to speak in a familiar manner about facts and claims or defenses that may be relevant to the resolution of the case (whether by trial or settlement).
- If the narrative indicates a colorable defense or claim, judges may and should pursue

inquiry to assure that the defense or claim is not being waived unknowingly or unwillingly and, where appropriate, judges may and should refer *pro se*'s for possible legal assistance.

There was also strong consensus that judges should review all stipulations of settlement to make sure *pro se*'s understand them, even where such stipulations have been reviewed by a court attorney or where they do not contain a judgment of eviction. It was noted that a 1997 Administrative Notice (AN LT-10) advised that “[n]o stipulation in which any party is *pro se* should be approved by the Court unless the Judge is convinced that a *pro se* litigant understands the terms of the stipulation and an allocution is conducted on the record.” This Administrative Notice also provided that “[t]he judge should also ascertain if a *pro se* litigant’s claims or defenses are adequately addressed prior to so ordering any stipulation,” and that review of stipulations by court attorneys “should be in addition to the allocution.” The group agreed that this procedure is not being followed and that in many Resolution Parts stipulations are not being allocuted by the judge if they have been reviewed by a court attorney or if they do not contain a judgment. The group strongly agreed that all stipulations should be reviewed by the Resolution Part judge, not only because review gives the judicial imprimatur to the stipulation, but also because even first-time stipulations without judgments define the parties’ rights and obligations for the future, and are the basis for future enforcement action and the potentially severe remedy of eviction. The group further agreed that while judges should review all settlements to make sure they are understood, judges should exercise heightened scrutiny of facts and claims where an apartment is being surrendered.

There was strong consensus that in undertaking more thoroughgoing questioning and oversight in *pro se* cases, judges should not suggest claims or defenses to *pro se*'s, should not “cross the line” into advocacy, should not appear to be partial to *pro se*'s and should not make rulings based on the fact that one side is *pro se*. The group did not have time to consider or make detailed recommendations as to questioning that should be conducted or information that should be provided to *pro se*'s. (For example, although the group agreed that all stipulations should be allocuted by the judge, it did not discuss in any detail the questions that should be asked in an allocution.) Recognizing the importance of the judge remaining evenhanded while performing a more active role in *pro se* cases, and faced with the time constraints posed by the working session, the group recommended further study of current judicial practices in overseeing trials and settlements and of proper protocols for such oversight.

Finally, members of the judiciary in the group noted that in the absence of approved protocols and the support of the Court Administration, judges who undertake more active oversight of *pro se* cases may face problems with reappointment. It was the consensus of the group that the court system must take steps to enhance the role of the judge in oversight of *pro se* cases.

## Recommendations

Best Practices: The group strongly agreed that best practices or standards should be articulated for more active oversight by judges of cases in which *pro se*'s face represented adversaries. The reasons that the group cited for articulating best practices included the following:

- Uniformity of practice would counter concerns about the appearance of partiality on the part of individual judges or court attorneys.
- The failure of the Court to provide appropriate assistance to such large numbers of *pro se* litigants presents special problems for a court system committed to the delivery of justice.
- The failure of the court system to deal with the problems presented by *pro se* litigation raises significant constitutional implications regarding all citizens' fundamental right to access to justice.
- Articulation of best practices would improve public confidence in the legal system as a mechanism for delivering justice and providing access to justice that is not limited to those who can afford private counsel or have the good fortune to obtain free legal representation.
- Best practices will foster the expeditious and economic final resolution of cases, free from the current uneconomic cycle of *pro se* litigants returning repeatedly to Court to modify or vacate judgments and stipulations approved without the appropriate level of Court review or oversight.

Study: The group recommended that as an aid to the development of best practices, a study be conducted of 1) the current procedures and protocols used by individual judges to address the problems of the *pro se* litigant; 2) the circumstances under which *pro se* cases are currently settled and the effect of these circumstances on whether *pro se*'s enter into meaningful settlements; and 3) protocols developed in recent years in other jurisdictions for court supervision of *pro se* cases.

Judicial Training and Continuing Legal Education (CLE): The group strongly recommended that judges and court attorneys receive appropriate levels of training in the skills necessary to address the problems of *pro se* litigants. The group suggested that the Office of Court Administration give consideration to training at the Judicial Institute.

The group further suggested that CLE programs be developed for attorneys who routinely deal with *pro se* adversaries. It was noted that the sole provision in the ethical rules concerning attorneys' dealings with *pro se* adversaries (22 NYCRR § 1200.35 [DR 7-104]) advises, without elaboration, that attorneys shall not “[g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel.” Given the lack of any definition of what constitutes “legal advice,” and widely differing understandings of the meaning of this term, CLE training could provide useful guidance.

Judicial and Attorney Responsibility: The group suggested that consideration be given to 1) amending the Code of Judicial Conduct, or appending commentary, to acknowledge the responsibility of judges, consistent with the duty of impartiality, for active oversight and review of cases involving *pro se*'s, and 2) development of protocols by the Chief Administrative Judges for judges' performance of this responsibility.

The group suggested that consideration also be given to enactment, by amendment of the Code of Professional Responsibility, if necessary, of penalties for attorneys who give legal advice to *pro se* adversaries.

Explanation of Court Procedures: The group recommended that court procedures be explained in both Resolution and Trial Parts and that guidelines be established as to the minimal information about procedures that should be given by the judge or clerk in each Part.

The group recommended that the use of explanatory videotapes in the Parts be reinstated and that their contents be improved.

The group recommended that consideration be given to including the rules for the assigned Resolution Part in a short written attachment to the answer form for a non-payment proceeding.

The group recommended that Court procedures and Part rules be included on the Court's website.

Allocation of Stipulations: The group strongly recommended that judges review all stipulations of settlement where at least one party is *pro se* and particularly where a *pro se* party is surrendering an apartment.

The group strongly recommended that NYCLA's implementing Task Force develop protocols for review of stipulations of settlement by Court attorneys and judges where at least one party is *pro se*.

There was a strong consensus that the Task Force should recommend protocols for the allocation of stipulations by judges that would encourage the *pro se* litigant to give a narrative explanation of the case so that the Court could determine whether the *pro se* litigant has a meaningful understanding of and has made a knowing agreement to the terms of the stipulation.

The group recommended that studies be conducted to assist the Task Force in developing guidelines and protocols:

- There was a consensus that a study be conducted regarding the present methods by which individual judges allocate stipulations of settlement involving *pro se* litigants, and whether such methods affect a *pro se*'s understanding of the terms of the stipulations.
- There was a consensus that a study be conducted regarding the circumstances under which *pro se* litigants enter stipulations (e.g., negotiations in the hallways without Court supervision versus negotiations in the presence of Court attorneys), and whether the

circumstances affect whether *pro se*'s reach a meaningful understanding of and agreement to the stipulations.

The group expressed its concern about the use of law firm pre-printed stipulation forms that include substantive provisions and recommended, as an alternative, that consideration be given to developing a Court form with substantive provisions, including enforcement remedies.

The Court's Role at Trials/Evidentiary Hearings with *Pro se* Litigants: The group recommended that the Court develop a written script to be given to *pro se* litigants prior to trial and also repeated on the record immediately prior to trial, regarding the process and procedures that will be followed at the trial and the evidentiary rules (e.g., hearsay) most likely to be relevant to the matter before the Court.

The group recommended, with some dissent, that the Task Force prepare protocols for judges to develop the record by asking non-leading questions when a *pro se* testifies to determine whether there is evidentiary support for the elements of claims or defenses asserted by the *pro se*.

The group recommended that pleading requirements be relaxed for *pro se* litigants so they are not precluded from raising defenses and claims at trial.

The group discussed, without reaching a recommendation, the value of importing the Small Claims relaxed evidentiary rules model into Housing Court. Some members expressed concern that this model would, in fact, aid represented parties more than *pro se*'s. Other members suggested that a compromise might be for the Court to permit a *pro se* to testify without objections by the opposing side and to reserve all objections until the *pro se*'s testimony was completed.

The group agreed that further consideration of the proper role of judges in trials of *pro se* cases is warranted.

## **Working Group III: Right to Counsel**

**Overview:** The overwhelming majority of tenants who appear (or default) in New York City Housing Court proceedings cannot afford to pay for counsel to represent them. Housing Court proceedings are summary proceedings that move faster than normal civil litigation and involve a complex web of procedural requirements and substantive law that govern rent level, quality of housing and a wide range of federal, state and local government subsidies and programs. Landlords are, in large measure, represented by counsel in Housing Court matters. Most tenants are unable to afford or obtain counsel and are forced to litigate without representation. Low-income tenants who are evicted (or who leave in advance of actual eviction as a result of eviction proceedings) are displaced into a housing market that has virtually no affordable options in the private sector and a dwindling stock of publicly subsidized housing with enormous waiting lists. Eviction continues to be a significant factor in causing homelessness, with all of its attendant costs to homeless people and society.

Against this backdrop, New York City's Housing Court is charged with adjudicating landlord-tenant disputes and assuring that fundamental fairness and the constitutional guarantee of due process of law are observed.

This Working Group considered the question of whether a right to counsel should be enacted and, if so, how it might be funded and administered and whether it would reduce homelessness and expenditures on a variety of housing and social service programs.

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### **Organization**

This report will proceed from a brief description of the context for considering a right to counsel, followed by a recap of our workshop discussions and concluding with our recommendations. Where possible, the discussion summary is annotated with cites to supporting information. Cites to online versions of resources are provided where available.

## Context

The overwhelming majority of tenants who appear or default in proceedings before the Housing Court cannot afford to pay for counsel to represent them. Housing Court proceedings are summary proceedings that move faster than normal civil litigation and involve a complex web of procedural requirements and substantive law that govern rent level, quality of housing and a wide range of federal, state and local government subsidies and programs.<sup>3</sup> Landlords are, in large measure, represented by counsel in Housing Court matters. Most tenants are unable to afford or obtain counsel and are forced to litigate without representation. Low-income tenants who are evicted, or who leave in advance of actual eviction as a result of summary proceedings, are displaced into a housing market that has virtually no affordable options in the private sector and a dwindling stock of publicly subsidized housing with enormous waiting lists. Eviction continues to be a significant factor in causing homelessness, with all of its attendant costs to homeless people and society.

Against this backdrop, Housing Court is charged with adjudicating landlord-tenant disputes and assuring that fundamental fairness and the constitutional guarantee of due process of law are observed.<sup>4</sup> This effort is undertaken by 50 Housing Court Judges. Each year, more than 350,000 residential cases are filed in Housing Court.<sup>5</sup> This caseload is larger than that of all of the civil and criminal cases lodged in all of the federal district courts combined.<sup>6</sup> Regrettably, the budget for the Housing Court pales in comparison to funding allocated to the federal courts.<sup>7</sup> Moreover, the Civil Court, of which Housing Court is a part, remains underfunded even when compared to comparable components of New York's judicial system. While the Civil Court for the City of New York handles approximately 26 percent of the case filings statewide, it receives only 6

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<sup>3</sup> The New York Court of Appeals has described the complexity of housing laws and regulations as "an impenetrable thicket, confusing not only to laymen but to lawyers." 89 *Christopher Inc. v. Joy*, 318 N.E.2d 776, 780 (N.Y. 1974). Similarly, an extensive study by the Association of the Bar of the City of New York Committee on Legal Assistance, "*Housing Court Pro Bono Project: Report on the Project, Parts I and II*," [hereinafter, "*Pro Bono Project Report*"] concluded that, "it is unreasonable to assume that unrepresented parties are able to understand the legal possibilities that exist at any stage of a proceeding." pp. 12-13 (June and Nov. 1988).

<sup>4</sup> The "Context" section up to this point was adapted from the conference program description.

<sup>5</sup> New York City Civil Court, Housing Part, <http://www.nycourts.gov/courts/nyc/housing/index.shtml> last visited February 15, 2005. This has been the average number of filings each year for the past 20 years. <http://www.nycourts.gov/courts/nyc/housing/civilhistory.shtml> last visited March 2, 2005.

<sup>6</sup> See, Report of Chief Justice William Rehnquist: <http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html> last visited February 15, 2005.

<sup>7</sup> Note that the budget allocation for the federal judiciary in fiscal year 2003 was \$4.9 billion. For fiscal years 2004 and 2005, the budget was \$5.1 billion and \$5.42 billion respectively. See, U.S. Courts, "Judiciary Budget Facts and Impact," <http://www.uscourts.gov/judiciary2005.html> last visited February 15, 2005. This far exceeds the budget allocated to the Housing Court. As per a conversation with Jack Baer, Chief Clerk of the Civil Court, the budget for Housing Court during the fiscal year that began April 1, 2003 and ended March 31, 2004 was \$31,668,418. That sum is less than 1 percent (0.65 percent) of the budget for the federal judiciary in 2003.

percent of the State judiciary budget.<sup>8</sup>

### Workshop Discussion

To begin, we listed a number of considerations for discussion: fairness, cost, effectiveness, legality, political will and efficiency. We considered the impact of a right to counsel on judges, landlords, tenants and particular populations, as well as the effect that such a right might have on other important issues such as access to the courts, the administration of justice, the utilization of existing law, homelessness and public faith in the justice system. Finally, we discussed concerns about implementation.

Disparity in Representation: There was no doubt among the experts assembled that there is an enormous disparity between the high percentage of landlords who are represented and the dearth of tenants who are able to retain counsel in Housing Court. This disparity is reflected in the available statistical information.<sup>9</sup> Despite the best efforts of the private bar, The Legal Aid Society, legal services organizations, bar associations, law school clinics and *pro bono* counsel, the vast majority of tenants facing eviction proceedings are unrepresented.<sup>10</sup> While non-judicial Housing Court personnel and community groups are helpful in providing information to those without attorneys, they cannot serve as counsel. This disparity has persisted unabated throughout the 30-year history of the Court.<sup>11</sup>

Representation Makes a Difference: There was also agreement that retaining competent counsel makes a substantial difference in the outcome of Housing Court cases. This was reflected in the daily experiences of all those who regularly work in and observe the Court. It is also echoed in

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<sup>8</sup> Remarks by Hon. Fern A. Fisher, Administrative Judge of the Civil Court of the City of New York, made at the morning plenary session of the conference, October 29, 2004.

<sup>9</sup> See, e.g., “Housing Court, Evictions and Homelessness: The Costs and Benefits of Establishing a Right to Counsel,” Community Training and Resource Center and City-Wide Task Force on Housing Court 13 (June 1993) [hereinafter “Costs and Benefits”], finding that 11.9 percent of tenants in New York City Housing Court were represented by an attorney and 97.6 percent of landlords were represented by an attorney. As grim as these figures are, they likely understate the percentage of low-income tenants who are unrepresented in that the figures include tenant litigants of all incomes and only those tenants who answer the eviction petition.

<sup>10</sup> Russell Engler, “And Justice for All - Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks” [hereinafter “And Justice for All”], 67 *Fordham L. Rev.* 1987, 2064 (1999).

<sup>11</sup> See, e.g., *144 Woodruff Corp., v. Lacrete*, 154 *Misc.2d* 301,304, 585 *N.Y.S.2d* 956, 958 (1992) [hereinafter “*Lacrete*”], citing a variety of early studies confirming that “landlords are represented in approximately eighty to ninety percent of summary eviction proceedings, while tenants are unrepresented in all but ten to fifteen percent of such proceedings...” The opinion also quotes the findings of the Marrero Commission appointed by then Chief Judge of the State of New York Sol Wachtler, which concluded, “[I]n short, whether one resorts to the evidence of everyday experience, the demographic statistics of the State, in-depth studies of particular areas like the Housing Court or a comprehensive survey of legal needs such as the New York State Bar Association report and similar studies across the country, a single conclusion is inescapable: our society has evolved so that the poor need legal help to obtain basic human requirements and to an appalling degree cannot get it.” *Id.* at 305, 959.

the available empirical data. The group noted the November 2003 report of the court-appointed Special Master Panel, which found that “legal services can prevent evictions at every stage in the eviction process,” and that “a very small percentage of tenants who obtain representation in Housing Court eviction proceedings actually lose their home.”<sup>12</sup> We also discussed “the first randomized evaluation of a legal assistance program for low-income tenants in New York City’s Housing Court...which demonstrates that the provision of legal counsel produces large differences in outcomes... independent of the merits of the case.”<sup>13</sup> This well-recognized study concluded that legal representation dramatically reduced the number of final judgments and warrants of eviction entered against tenants, while increasing Court efficiency through a reduction in the number of motions brought before the Court.<sup>14</sup> Finally, we were influenced by the experience of the New York City Human Resources Administration’s anti-eviction program, which “saved 3,600 families from eviction or restored them to apartments from which they had been evicted, a 90% success rate.”<sup>15</sup>

Eviction and Homelessness: The group recognized the substantial connection between evictions and homelessness. Homelessness is at record levels in New York City. We discussed statistics indicating that as of September 2004, 36,700 people, including more than 15,400 children, were sleeping in homeless shelters.<sup>16</sup> In addition, the group noted that many more New Yorkers, 221,000 in 1999, live in “doubled-up” households, often as a result of eviction or the threat of eviction posed by summary proceedings.<sup>17</sup> Moreover, the City’s Department of Homeless

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<sup>12</sup> New York City Family Homelessness Special Master Panel, Family Homelessness Prevention Report, November 2003, p. 24 [Hereinafter, “Special Master Report”]. The Special Master Panel was created by the January 17, 2003 agreement approved by the New York State Supreme Court (Freedman, J., Index No. 45177/86). Available online at: <http://www.nyc.gov/html/dhs/downloads/pdf/preventionreport.pdf> last visited January 27, 2005.

<sup>13</sup> Carroll Seron et al, “The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment,” 35 Law & Society Review 419 (2001). Available online at: <http://links.jstor.org/sici?sici=0023-9216%282001%2935%3A2%3C419%3ATIOLCO%3E2.0.CO%3B2-M> last visited February 22, 2005.

<sup>14</sup> *Id.* at 429.

<sup>15</sup> New York City Human Resources Administration, “A Proposal for a Legal Services Program to Prevent Homelessness” (1987) at p. 56, quoted in “Costs and Benefits” *supra*, note 9, June 1993, at p. 14.

<sup>16</sup> The Coalition for the Homeless, “Basic Facts about Homelessness,” [http://www.coalitionforthehomeless.org/advocacy/basic\\_facts.html](http://www.coalitionforthehomeless.org/advocacy/basic_facts.html) last visited March 28, 2005. The Coalition estimates that “thousands more sleep on city streets, park benches, and subway trains.” *Id.*

<sup>17</sup> See, the “Special Master Report,” indicating that “[T]he City of New York estimates that the number of doubled-up households increased by 9.1% between 1996 and 1999 – from 203,000 to 221,000.” p. 23, citing: New York City Department of Housing Preservation and Development, *The New Marketplace: Creating Housing for the Next Generation*, 4 (Dec. 10, 2002) (available at [www.nyc.gov/html/hpd/pdf/new-marketplace.pdf](http://www.nyc.gov/html/hpd/pdf/new-marketplace.pdf)); and Wallin et al, *State of New York City’s Housing and Neighborhoods 2002*, 199 (“According to data from the U.S. Census, the percent of severely crowded households (defined as 1.5 persons per room or more) in New York City grew from 5.6% of all households in 1990 to 7.5% of households in 2000.”).

See also Marybeth Shinn et al, “Predictors of Homelessness Among Families in New York City: From Shelter Request to Housing Stability,” 88 *American Journal of Public Health* 1651, 1656 (1998) [hereinafter

Services reports that it is common for families who become homeless to enter the shelter system after leaving a shared-living situation, usually with immediate family members.<sup>18</sup> The link between eviction proceedings and homelessness is easily observed in Housing Court and well established.<sup>19</sup>

Costs—Direct and Indirect: We also spent significant time on the issue of cost. We measured costs from a variety of perspectives to assess whether, in addition to other benefits, providing counsel would preserve the public fisc.

As described above, one direct result of eviction is homelessness. In the last decade, nearly \$4.6 billion has been spent building and maintaining a network of emergency shelters in New York City.<sup>20</sup> It costs the City \$36,000 per year to shelter one family in the City shelter system; the annual cost of sheltering an individual is approximately \$23,000.<sup>21</sup> We estimated that preventing just 10 percent of the 25,000 evictions each year would yield a savings to the City of roughly \$75 million in direct shelter costs alone.

In addition to shelter costs, the group noted a wide array of very real and quite costly less direct consequences of homelessness, including: hospitalization for the chronic physical and mental health problems associated with homelessness; longer hospital stays; disruptions in the education of homeless children; family disintegration with a resultant increase in foster care costs; higher

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“Predictors of Homelessness”], (reporting that “13% of families on the welfare caseload in New York City in 1988 doubled up with others and that almost half of those on welfare lived in “crowded conditions, with more than two people per bedroom”).

<sup>18</sup> Department of Homeless Services, “Uniting for Solutions Beyond Shelter: The Action Plan for New York City,” p. 15 (2004) [hereinafter, “DHS Action Plan”], [http://www.nyc.gov/html/endinghomelessness/html/action\\_plan/action\\_plan.shtml](http://www.nyc.gov/html/endinghomelessness/html/action_plan/action_plan.shtml) last visited February 11, 2005. See also “Predictors of Homelessness,” supra note 15 at p. 1652, (there is evidence that suggests that, “people on the verge of homelessness obtain substantial assistance from families and friends but eventually wear out their welcomes.”). See also, Peter H. Rossi; James D. Wright; Gene A. Fisher; Georgianna Willis “The Urban Homeless: Estimating Composition and Size,” *Science*, New Series, Vol. 235, No. 4794. (Mar. 13, 1987), 1336, 1338 (study showing that many homeless were helped by their families and friends but that the, “patience, forbearance, or resources of these benefactors eventually ran out...” Available online at: <http://links.jstor.org/sici?sici=0036-8075%2819870313%293%3A235%3A4794%3C1336%3ATUHECA%3E2.0.CO%3B2-%23> last visited February 23, 2005.

<sup>19</sup> See, Department of Investigation, City of New York web site indicating that, “[M]arshals collectively perform approximately 25,000 evictions per year.” [http://www.nyc.gov/html/doi/html/marshals/marshal\\_main.html](http://www.nyc.gov/html/doi/html/marshals/marshal_main.html) last visited January 12, 2005. See also, the “Special Master Report,” which notes that in fiscal year 2003, “recently evicted families entering shelter comprise 19% of the family shelter population representing approximately 4,500 individuals.” p. 24. Again, this figure does not include single individuals who were evicted, homeless people not in shelters and those who were evicted and moved to doubled-up housing. See also, “Costs and Benefits” supra note 7, p. ii, (1993) estimating that “44% of the families entering homeless shelters in New York City have become homeless as a result of an eviction.”

<sup>20</sup> “DHS Action Plan,” supra note 18, p. 4.

<sup>21</sup> Coalition for the Homeless, “Basic Facts about Homelessness,” [http://www.coalitionforthehomeless.org/advocacy/basic\\_facts.html](http://www.coalitionforthehomeless.org/advocacy/basic_facts.html) last visited March 28, 2005.

rates of incarceration; and increases in domestic violence.<sup>22</sup> A report prepared for the Corporation for Supportive Housing sheds light on the magnitude of such expenditures. For example, in New York City, hospitalization costs per day per person were estimated at \$1,185 in fiscal year 2004.<sup>23</sup> Jail costs were \$164.57 per day per person, while hospitalization in a mental illness facility costs \$467 per day per person.<sup>24</sup>

We benefitted from the experience that some of the participants had with past or existing anti-eviction programs. All available data indicate that providing counsel to low-income tenants facing eviction results in substantial identifiable savings. New York City Council Member Alan Gerson, who, along with two members of his staff, participated in our session, shared a draft of proposed legislation with our group. This legislation would provide counsel to eligible individuals and cites a finding by the Association of the Bar of the City of New York indicating that funds allocated to the Emergency Assistance Fund for anti-eviction legal services kept an estimated 6,000 families in their homes, saving the City \$27 million in projected shelter costs in 1996 alone.<sup>25</sup> The proposed legislation also notes a 1993 study, which concluded that “providing counsel to low-income tenants facing evictions in the city would produce a net savings of \$67 million.”<sup>26</sup> The sense of the Working Group was perhaps best summarized by a New York City Department of Social Services report that evaluated a prototype eviction-prevention program and determined that the provision of counsel resulted in saving approximately \$4 for every \$1 spent.<sup>27</sup>

Judges and the administration of justice: Another issue that occupied our attention was the role of judges in the Housing Court. Specifically, we thought that it was important to answer the

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<sup>22</sup> This list is supported by findings of the “Special Master Report,” supra note 7 at p. 23. See also, Dennis P. Culhane et al, “Public Service Reductions Associated with Placement of Homeless Persons with Severe Mental Illness in Supportive Housing,” Housing Policy Debate, Vol. 13, Issue 1, Fannie Mae Foundation, 2002.

<sup>23</sup> The Corporation for Supportive Housing (CSH), “Costs of Serving Homeless Individuals in Nine Cities: Chart Book,” November 19, 2004, p. 4, citing the Mayor’s Management Report FY 2004. This report, prepared by the Lewin Group for CSH, is available online at: [http://documents.csh.org/documents/ke/csh\\_lewin2004.PDF](http://documents.csh.org/documents/ke/csh_lewin2004.PDF) last visited February 23, 2005.

<sup>24</sup> *Id.*

<sup>25</sup> October 19, 2004 draft Local Law proposed by Council Member Gerson, p. 2, [hereinafter “Local Law”] citing James Windels, Committee on *Pro Bono* and Legal Services of the Association of the Bar of the City of New York, Memorandum dated April 9, 2002.

<sup>26</sup> “Local Law,” supra note 25, p. 2; “Costs and Benefits,” supra note 9, p. iv.

<sup>27</sup> Helaine M. Barnett, “An Innovative Approach to Permanent State Funding of Civil Legal Services: One State’s Experience – So Far,” 17 Yale L. & Pol’y Rev. 469, 477 n.13 (1998) (citing New York City Department of Social Services, “The Homelessness Prevention Program: Outcomes and Effectiveness,” p. 2 (1990)). This article chronicles the findings of the Legal Services Project appointed by Chief Judge of the State of New York Judith S. Kaye. The Project issued a report evaluating an array of legal services programs, including an anti-eviction program, and concluded that “the funding of legal services programs is highly cost-effective and results in the savings of significant State funds. In many instances, the savings to the State outweigh the costs of providing counsel several times over.” Legal Services Project, Funding Civil Legal Services for the Poor 11, p. 7 (1998).

question of why unrepresented litigants would need counsel given the presence of competent judges in the courtroom.

The prevailing system of justice in the Housing Court is based on the traditional adversarial model.<sup>28</sup> Each side bears the burden of persuading the judge of the efficacy of its position. The judge is the trier of fact, not an advocate. Housing Court judges are constrained in their actions and are unable to act as counsel for unrepresented parties.<sup>29</sup>

In many ways, the nature of Housing Court makes the presence of counsel crucial. Summary proceedings operate without formal discovery. Thus, the Court does not benefit from the development of significant facts or any narrowing of the factual issues that might result from pre-trial discovery. Moreover, Housing Court dockets are enormous. As a practical matter, Housing Court judges have very limited time to ascertain the facts.<sup>30</sup> As a result, they often find themselves in a difficult position. They can either dispense justice in the dark, without the benefit of the even-handed factual development that can only be achieved by the work of diligent counsel on both sides, or they can spend time that they do not have to cull the legally relevant facts from unrepresented parties. If the Court is to act in a fully informed, efficient and just manner, it is dependent on the ability of both sides to quickly and persuasively articulate the facts. This result is best achieved through the presence of counsel.

Furthermore, the very purpose of the Housing Court is frustrated when its judges are unable to learn of important facts regarding the condition of the premises sought to be recovered. The New York City Civil Court created the Housing Court “for the establishment and maintenance of housing standards.”<sup>31</sup> The legislature gave the Court the power to “recommend or employ any

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<sup>28</sup> There is ongoing experimentation with less adversarial, “problem-solving” models of Housing Court adjudication such as those that are in effect in the Red Hook and Harlem Justice Centers. While some in our group saw potential in this approach, we noted that in these examples, as well as problem-solving courts in other arenas such as criminal and juvenile justice, the presence of counsel was an essential element for many of the same reasons that apply in traditional court settings.

<sup>29</sup> Many in our group shared the view that those judges who more actively promote fairness in their courtrooms risk being viewed as “activist” judges and jeopardize subsequent career-enhancement opportunities.

<sup>30</sup> Noting that since its inception, the Housing Court had never been the subject of a “comprehensive examination,” the City-Wide Task Force on Housing Court issued a report in 1986 entitled, “Five Minute Justice: Ain't Nothing Going On But the Rent.” [hereinafter “5 Minute Justice”], Introduction p. 2. The report was based on research including observations of nearly 3,000 cases in every pre-trial, mediation and trial part citywide, an analysis of the court files in approximately 10 percent of the cases observed, an examination of building violations in sampled cases and interviews with a sizable group of Housing Court judges. *Id.* pp. 12-16 (November, 1986).

As one summary of the report states, “[N]early 44 percent of all pre-trial conferences before a judge lasted for five minutes. Eighty-one percent of all cases in pre-trial hearings before a judge and half of all trials lasted less than 15 minutes. In nearly 59 percent of these pre-trial hearings, no explanations were given to provide unrepresented tenants an understanding of the purpose or process of the hearing. This percentage rose to 68 percent when the tenant was Black or Hispanic.” <http://www.interactivist.net/housing/justice.html>, last visited February 8, 2005.

<sup>31</sup> NY City Civ Ct Act art 1, §110 (a), [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$CCA110\\$\\$@TXCC](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$CCA110$$@TXCC)

remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest....”<sup>32</sup> The Court’s responsibility to enforce housing standards is hamstrung when the inadequate factual development that inevitably results from a lack of counsel combines with the crush of daily dockets to obscure the Court’s view of relevant facts.

Those charged with the administration of the Housing Court have long held a deep concern that the Court be a court of law in both reality and perception. Much effort has gone into improvements along these lines and some progress has been made. Statutes have been enacted by the legislature and precedent has been crafted by the judiciary to guide the Court. Nevertheless, all too often, the law takes a back seat to expediency and the prevalent practice of conducting business in the hall, where parties frequently stipulate to terms that are not justified by the law or facts continues.<sup>33</sup> Providing lawyers to unrepresented litigants would permit invocation of legal doctrine and judicial authority. Recognition of a right to counsel would foster both the perception and reality that Housing Court proceedings are governed by the rule of law.<sup>34</sup>

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[A0110+&LIST=LAW+&BROWSER=54185833+&TOKEN=12890702+&TARGET=VIEW](#) last visited March 2, 2005.

<sup>32</sup> *Id.* §110 (c).

<sup>33</sup> “5 Minute Justice,” supra note 30, pp. 57-60. See also, “*Lacrete*,” supra note 11, “Based on allocutions of approximately 5,000 such cases in the past year, this court’s conclusion is that the stipulations are generally signed without knowledge of possible defenses and out of fear of eviction or the sense that there is no alternative: The overwhelming majority of unrepresented tenants lack even basic understanding about their legal rights and the defenses which they may have to the petitioners’ claims for rent. Most have repair problems but do not know that housing code violations may affect their landlords’ entitlement to rent. Many are unaware that they may even seek repairs if they are behind in their rent. Few tenants have any idea whether their rents are legal. Virtually none understand the differing legal consequences of the various enforcement remedies for which the stipulations provide (for example, the difference between an installment agreement with a provision for entry of judgment upon default, and a judgment with issuance of a warrant of eviction forthwith and stay of execution provided payments are made). Many do not seem to be aware that the stipulations are supposed to be the result of negotiations, and that they are not required to sign the stipulations as drafted by the landlords’ attorneys. Most tenants do sign whatever is presented to them, frequently without reading it or having it read to them first, and often even when they are not sure whether they owe or dispute the amount the landlord claims is due. Startlingly, many tenants appear to be unaware not only of what their defenses are but of the fact that they may have defenses.” 154 Misc.2d 301, 307-8, 585 N.Y.S.2d 956, 960-1.

<sup>34</sup> See e.g., “*Pro Bono* Project Report,” supra note 3, p. 36, finding that the “provision of counsel to persons facing eviction constitutes the single indispensable reform required in the Housing Court.” See also, the Committee to Improve the Availability of Legal Services, more commonly known as the Marrero Commission, “Final Report to the Chief Judge of the State of New York” (April 1990), reprinted in 19 Hofstra L. Rev. 755, at 775 (1991), which concluded that “the imbalance between the need for legal services and their availability undermines the legitimacy of the legal system itself. It is grotesque to have a system in which the law guarantees to the poor that their basic human needs will be met but which provides individuals no realistic means with which to enforce that right. The absence of legal assistance to the poor goes to the essence of some fundamental principles ingrained in our jurisprudence: simple equity, due process, equal protection, equal elementary access to the judicial system to redress wrongs. When the stakes of legal representation versus no representation at all to an indigent tenant run as high as the difference between having a home and being homeless, and when this harsh outcome could be easily averted by the mere courtroom presence of a lawyer on the tenant’s behalf, then the denial of counsel undercuts the basic ideals of justice that our society proclaims. The gap between the demand for legal services and their availability thus amounts to a gap in justice, a blot on our legal system and our whole society. As Chief Judge

Landlords: We also examined the ramifications of a right to counsel from the landlords' perspective. Naturally, there will be those who object to recognizing the right based on a perceived loss of the strategic advantage that having counsel on only one side of a case can provide. However, we tried to look past visceral reactions with a view towards analyzing more substantive consequences. Certainly if, as we recommend, counsel is provided to any landlord who is in danger of losing her home and cannot afford representation, then a right to counsel has obvious benefits to low-income petitioners.<sup>35</sup>

We noted that, by far, the largest percentage of cases commenced by landlords in Housing Court are "non-payment" cases.<sup>36</sup> In the ordinary course of such cases, if the rent is paid, the matter is concluded and there cannot be an eviction. In contested actions, only if the rent is not paid after a judgment is issued obligating the tenant to do so, can the landlord seek to recover possession of the premises.<sup>37</sup> It was helpful to hear from a representative in our group of the landlords' bar who indicated that, contrary to popular opinion, most landlords do not commence summary proceedings in the hope of evicting the tenant. Instead, far more often than not, the goal is to collect rent that the landlord feels is owed. This assertion squared with the statistical makeup of the Housing Court docket, as well as the experience of the tenant representatives and judges in the group.

The overwhelming majority of tenants appearing in Housing Court are low income.<sup>38</sup> The successful resolution of many cases depends on the ability of tenants to navigate the complex web of administrative policies and regulations that are implicated by their entanglement in entitlement programs administered by the city, state and federal government. As rents escalate and benefit programs shrink, advocacy of the type typically provided by counsel familiar with this area becomes increasingly important. Certainly, paralegal and administrative assistance can be helpful. Regrettably however, "no" is the first response provided to many who properly seek relief. Lawyers are needed to push past initial and subsequent unjust denials to secure results that are both extremely cost effective for the public and desirable to the majority of landlords who ultimately receive payment for rent to which they are entitled.

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Wachtler observed when he delivered his charge to the Committee, a justice system which allows vast disparities in access to justice based on ability to pay cannot truly be called a system of justice at all."

<sup>35</sup> See, "Implementation" and "Recommendation," *infra* pp. 11-12.

<sup>36</sup> On January 3, 2005, Sean Koehler of my office conducted a phone inquiry of Ernesto Belzaguy, First Deputy Chief Clerk of the Civil Court, New York County. Mr. Belzaguy indicated that of the 344,944 cases commenced in Housing Court throughout the City in 2003, 92.2 percent (318,077) were non-payment cases.

<sup>37</sup> See RPAPL § 711(2), <http://assembly.state.ny.us/leg/?cl=100&a=8> last visited February 28, 2005.

<sup>38</sup> "Costs and Benefits," *supra* note 9, pp. 9-10 (1993), indicating that: "[T]he poverty level of tenants in Housing Court is dramatic. Tenants with incomes below \$10,000 comprise 47.9 percent of the Housing Court population. Only 18 percent of the tenants have incomes over \$25,000....The median income for tenants in Housing Court was \$11,082...well below the median household income in New York City of \$29,823." This report is the product of two research projects: a survey of more than 2,000 tenants in the Housing Court in the four most heavily populated of New York City's five boroughs (Bronx, Brooklyn, Manhattan and Queens - all but Staten Island); and a study of 2,772 Housing Court files in only residential non-payment and holdover cases. *Id.*, pp. ii and Appendix A.

Legality: There was no doubt within the group that providing counsel is legally permissible. Indeed, there was consensus that the law supports such a right. An article submitted in conjunction with the conference addressed this issue more thoroughly. In our discussions, participants noted the following: a) under the due process clause of the United States and New York State Constitutions, people are entitled to a meaningful hearing when faced with the loss of an important property interest<sup>39</sup>; b) Article XVII of the New York State Constitution mandates that “[t]he aid, care and support of the needy... shall be provided by the state”<sup>40</sup> and that this provision supports a right to counsel to prevent indigent persons from being rendered homeless; c) Article 11 of Civil Practice Laws and Rules (CPLR) gives judges the power to assign counsel where appropriate<sup>41</sup>; d) the Department of Homeless Services is under a mandate to prevent homelessness and recognizes the necessity of access to counsel as a means of doing so<sup>42</sup>; and e) failure to provide a meaningful opportunity to be heard has a disparate impact on members of legally protected classes.<sup>43</sup>

### Implementation

The group was charged, as its primary mission, with making a recommendation regarding the propriety of recognizing a right to counsel in Housing Court. That question consumed nearly all of our time and resulted in a recommendation that is presented following this section. Naturally, providing counsel for those in need raises implementation concerns that must be addressed.

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<sup>39</sup> U.S. Const. amend. V.  
[http://www.archives.gov/national\\_archives\\_experience/charters/bill\\_of\\_rights\\_transcript.html](http://www.archives.gov/national_archives_experience/charters/bill_of_rights_transcript.html) last visited March 2, 2005. N.Y. Const. art. I, § 6. <http://assembly.state.ny.us/leg/?co=3> last visited March 2, 2005.

<sup>40</sup> N.Y. Const. art. XVII, § 1. See also, art. XVII, § 3 (“The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state....”) and art. XVII, § 4 (“The care and treatment of persons suffering from mental disorder or defect and the protection of the mental health of the inhabitants of the state may be provided by state....”) <http://assembly.state.ny.us/leg/?co=19> last visited February 10, 2005.

<sup>41</sup> CPLR § 1102 states, “[T]he court in its order permitting a person to proceed as a poor person may assign an attorney.” <http://assembly.state.ny.us/leg/?cl=16&a=10> last visited February 10, 2005.

<sup>42</sup> See e.g., “DHS Action Plan,” supra note 18, p. 13.

<sup>43</sup> See e.g., “Costs and Benefits,” supra note 7, pp. 8-9 (1993) citing its “Housing Court survey [which] showed that a majority (57.5 percent) of the tenants in Housing Court are African-Americans. Latinos represent an additional 29.1 percent of the tenants, while non-Latino Whites and Asians account for only 10.8 and 1.0 percent of tenants respectively.” See also, “And Justice for All,” supra note 8. Prof. Engler reports that “unrepresented litigants disproportionately are poor women of color, often with a limited understanding of English.” *Id.* at 2064. See also, “Special Master Report,” supra note 10, pp. 12-13 (2003), “African-American (60%-65%) and Latino (30%-35%) families comprise most households in shelter; only 5% of families entering shelter are white and very small percentages of Asian and Native American families [are] entering shelter. The data suggest that African-American families are over-represented among the family shelter population.”

Three such concerns seemed particularly important.

The first is quality. For a right to counsel to be effective, those appointed must be competent to provide high-quality representation. Housing Court is a specialized setting with a unique culture and practices. The applicable law is complex and requires an understanding of a variety of doctrinal areas. Failure has immediate and traumatic consequences. Counsel must have sufficient skill and expertise to navigate this system successfully.

The second concern centered on the creation of proper eligibility guidelines. There was consensus that counsel be made available to anyone, landlord or tenant, who both faced the harsh consequence of losing his/her home and was unable to afford an attorney.

Finally, careful consideration will have to be given to the choice of delivery mechanisms. We took no position on the optimal means of providing counsel. Should counsel be drawn from a pool of individuals or made available through contract with non-profit organizations? Is it best administered by the courts and/or through a City agency? These matters will have to be resolved. We agreed that the mechanisms should be developed through involvement of the courts, judges, legislative bodies, community and landlord representatives, government agencies, not-for-profit legal organizations, bar associations, law schools and the private bar. In this way, we can benefit from the collective expertise and experience of all those who can contribute to the success of this important goal.

### **Recommendation**

It is the consensus of the Right to Counsel group 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.

## Working Group IV: Litigants of Diminished Capacity

**Overview:** The business of the residential part of Housing Court is dominated by summary eviction proceedings commenced by landlords alleging tenants 1) have not paid their rent (nonpayment proceedings) or 2) have breached their leases or created a nuisance (holdover proceedings). The law in New York forbids the “locking out” of tenants who have resided in an apartment for more than 30 days or who have a written lease, and requires the landlord to commence a summary proceeding. Some of the respondents in Housing Court most at risk for homelessness are persons who are eligible for or dependent upon fixed-income streams such as Supplemental Security Income (SSI), Social Security Disability (SSD), disability pensions or veterans’ benefits due to mental disability or advanced age.

This Working Group examined the use of Housing Court to bring summary eviction proceedings against tenants of diminished capacity. It considered issues such as how well has the Court evolved to address the needs of litigants in these cases and what happens to tenants who have diminished capacity to defend their rights in a summary proceeding because of advanced age, mental retardation, brain damage or mental illness, or other medical conditions.

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### Introduction

The Working Group on Litigants of Diminished Capacity was comprised of a lively cross-section of New York City Housing Court players – advocates from both sides of the bar, the judiciary, City employees from both within and outside the court system, representatives from advocacy organizations, an academic and a representative of a private funder. Prior to the conference, participants were provided with an article, co-authored by one of the members of the Working Group, offering a set of recommendations for ways to meet the needs of diminished-capacity respondents in Housing Court, and the needs of the Court itself, in eviction proceedings.<sup>44</sup>

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<sup>44</sup> *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, Jeanette Zelhof, Deputy Director and Managing Attorney, and Andrew Goldberg, Supervising Attorney, MFY Legal Services, Inc. In the final version of the paper, Hina Shamsi, a former Staff Attorney at MFY Legal Services, Inc., was also a co-author.

The group began by discussing each participant's experience and perspective with respect to the issue of litigants of diminished capacity. There was a general consensus on a few considerations that guided the discussion. One was the importance of balancing the diminished-capacity litigant's right to autonomy while educating the judiciary and court personnel on issues of capacity and mental health. The group agreed that any discussion of the question of a litigant's capacity must bear in mind that the concept of capacity is a fluid, dynamic continuum, and that whether a given litigant's place on that scale requires accommodations by the justice system involves an individualized inquiry. The group observed that acknowledgement of a tenant's right to counsel in Housing Court would be a significant development that would help to protect the interests of litigants of diminished capacity, of other tenants and of the court itself. Finally, the group recognized the need to ensure that adequate resources be made available to support the proper implementation of the proposed measures and emphasized the need to increase the level of resources devoted to Housing Court.

The group's recommendations address five areas:

- Identification of litigants with diminished capacity
- Right to counsel
- Education of court personnel
- Resources and accommodations
- The Civil Court of the City of New York's existing *Guardian Ad Litem* project

In addition, the last section summarizes other significant issues of concern.

### **Recommendations: Identification of Litigants with Diminished Capacity**

Preamble: While the group struggled with the sensitive question of whether, when and how the Housing Court system should identify litigants with diminished capacity, there was eventual consensus that litigants themselves and all parties in the Housing Court would benefit if the issue of a litigant's diminished capacity was identified at the earliest point possible in the process and if the litigants were then provided with reasonable accommodations or assistance<sup>45</sup>. A number of factors were considered. Diminished capacity may be obvious in some people but not so overt in others. Additionally, capacity may be cyclical; it may be more or less diminished at varying times of the day or week, and can come and go over time depending upon its cause, the use of medication and other treatments or the availability of community supports.

Recommendations: With the goal of obtaining earlier identification of diminished-capacity litigants and in recognition of the fact that any one recommendation may make sense only for a segment of the targeted population, we have the following recommendations:

- Notice: Propose and support legislation requiring language in the Notice of Petition in a non-payment or holdover proceeding to alert respondents of their statutory right to request from the Court reasonable accommodation or assistance to address any physical

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<sup>45</sup> The Working Group noted that the diminished-capacity litigants whose rights the recommendations set forth seek to protect are not limited to those qualified individuals with disabilities for purposes of the American with Disabilities Act of 1990 (42 USCS §§ 12101).

and/or mental impairments.

- Special Needs Form: At the time of answering a Petition, provide respondents with a form – separate from the answer form – that will go into the Court file on which they can indicate that they have special needs requiring a reasonable accommodation or assistance due to physical and/or mental impairments.
- Signs: Post signs in visible areas of the courthouse (including the clerks’ offices and courtrooms) inviting litigants to advise the Court of any special needs requiring a reasonable accommodation or need for assistance due to physical and/or mental impairments.
- Guardian *Ad Litem* (GAL) Computer Field: Create a field on a screen in the courthouse computer case file to indicate appointment of a GAL, with a corresponding hand stamp for the paper file.
- Detect Past GAL: Develop a system for Housing Court clerks to routinely review, upon filing of a new case, respondents’ landlord and tenant case history during the prior 12-month period so that when a subsequent case is filed against the same respondent, the prior appointment of a GAL is noted on the new case file.
- Check for Adult Protective Services (APS): Establish a computer link-up system between Housing Court and APS<sup>46</sup> and develop a system for Housing Court clerks, upon filing of a new case, to routinely check for current or prior APS involvement and to indicate such APS involvement in a screen in the computer case file, with a corresponding hand stamp for the paper file.
- Designate Current Case as APS: Mark computer and paper files with APS designation where APS referral is made during the pendency of the case.
- Stamp APS on Warrant: Stamp warrants of eviction to indicate APS involvement or to identify cases where diminished capacity of the respondent is otherwise known.
- Develop Protocol for Judges: With participation of appropriate professionals, develop a protocol for judges’ interactions and follow-up with *pro se* litigants who have diminished capacity.

### **Recommendations: Right to Counsel**

Preamble: The provision of counsel to all litigants who cannot afford to engage an attorney would address and resolve many of the issues and problems presented and faced by litigants with diminished capacity. Counsel can best perform the triage function of determining what the critical issues facing any given litigant are, and exploring and evaluating the available solutions with and for that individual. Counsel would be able to identify early in the process the fact that a

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<sup>46</sup> APS advised the group that access to its database will be available shortly to the Housing Court.

litigant had diminished capacity; could educate court personnel about the litigant's special needs; could assist the litigant in accessing available community resources needed to address any social or health problems intertwined with the legal matter; and could obviate the need for the appointment of a GAL in many cases. Given what is at stake in an eviction proceeding – people losing their homes – the right to counsel is critical for all and especially this vulnerable population.

Recommendations:

- Establish a right to counsel in Housing Court for parties unable to afford counsel as a means to reduce homelessness in New York City and, particularly, to protect the elderly and mentally impaired.
- In order to effectuate this right, and in recognition of the fact that representation by counsel can help to reduce costs otherwise incurred by society when *pro se* litigants and litigants of diminished capacity become homeless, a government agency (preferably an independent entity not controlled by the courts) should enter into contracts with non-profit legal services and legal aid providers with experience representing litigants in Housing Court. The legislature should allocate adequate funding to provide all tenants facing eviction and, particularly, the elderly and mentally impaired, with counsel possessing experience and resources sufficient to provide competent representation.

**Recommendations: Education of Court Personnel**

Preamble: All court personnel should be well informed about both substantive and procedural issues in this area. With regard to procedure, a central concern is the common misapplication of an “incompetency standard” that is not relevant to the appointment of either a CPLR Article 12 Guardian *Ad Litem* (GAL) nor a Mental Health Law (MHL) Article 81 Guardian. Training should be offered about the differing standards for appointments of GAL's and Article 81 Guardians and to instill the notion that accommodations or assistance short of appointment of a GAL or Article 81 Guardian may suffice, bearing in mind an individual's right to self-determination and use of the least restrictive measures. Some disabled litigants may be “difficult,” but this is not the standard for appointment of either a GAL or an Article 81 Guardian. With regard to substantive issues, instruction on the symptoms and attributes of some of the more prevalent types of mental impairments and developmental disabilities should be provided. For example, instruction and sensitivity trainings about the cyclical or episodic nature of certain conditions, as well as about severe depression and low IQ, should be made available. Equally important is the need to educate Court personnel about the mentally ill person's need for assistance from community advocates (so that community advocates are not discouraged from appearing with litigants at the conference table), about APS standards and about the rights of institutionalized patients.

Recommendation: Ensure the continuing education of judges (and other Court personnel) regarding issues of capacity and mental health. Education of this nature will help eradicate the common misconceptions about mental illness and advance well-informed decision making that

will protect the rights of litigants while ensuring their maximum autonomy. All Court personnel should receive instruction in substantive and procedural matters, as well as sensitivity training. For judges, at least one seminar on the topic of diminished capacity should be included annually in their CLE program. Additionally, as noted above, a protocol should be developed to guide judges in handling cases in which a litigant has diminished capacity.

### **Recommendations: Resources and Accommodations**

Preamble: Following other models of alternative systems of adjudication for litigants with special needs, Housing Court should, in a systematic manner, offer on-site services to litigants of diminished capacity and should offer linkages to outside services as well. If adopted, this integrated approach would often facilitate legal resolution of the pending eviction proceedings and would also avert future proceedings by alleviating and preventing recurrence of the conditions and issues that contributed or led to the risk of eviction. For example, in a non-payment proceeding where, after proper evaluation, a tenant's inability to handle his/her finances is identified as an issue, the intervention would ensure proper referral for set up of financial-management services. Or, in a "Collyer's type" nuisance holdover proceeding (characterized by excess clutter or hoarding of possessions), the respondent could be referred for counseling assistance to facilitate appropriate removal of the clutter or possessions.

#### Recommendations:

- More Social Services On Site: The Housing Court Resource Centers should be infused with additional resources to support social services that would conduct case management (that is, substantial and longer-term type of assistance with regular follow up), psycho-social assessments and appropriate triage services, and that would refer litigants with diminished capacity to appropriate existing community resources, including governmental agencies, social service agencies and health providers. (Adding a social worker to the staff of each borough's Housing Court Resource Center might be a starting point, although ideally the social worker should not be an employee of the Housing Court due to confidentiality issues.)
- More Current Lists of Community Resources: The Resource Centers should maintain a comprehensive, updated list of health providers, social service agencies and other community organizations to enhance the Centers' ability to make appropriate referrals. Specifically, where the basis for the eviction involves excess clutter or hoarding of possessions, community resources should be tapped to assist the respondent and prevent eviction. Court personnel should be educated about the existence of the New York City Hoarding Task Force. ( [http://www.cornellaging.com/gem/hoa\\_nyc\\_hoa\\_tas.html](http://www.cornellaging.com/gem/hoa_nyc_hoa_tas.html) ).
- Scheduling Accommodations: Housing Court should also institute accommodations for litigants of diminished capacity such as the option of choosing an afternoon calendar (for individuals on medications with negative side effects that are more acutely felt in the morning), and quiet conference rooms (to minimize the stress of crowds and arguments

occurring in hallways), as well as slower-track litigation.<sup>47</sup>

### **Recommendations: Guardian *Ad Litem* Project**

Preamble: When properly utilized, the GAL appointment can offer an important device to protect the rights of diminished-capacity litigants in Housing Court. A little over a decade ago, judges in Housing Court even questioned their own authority under CPLR Article 12 to appoint GAL's and, therefore, the creation of the New York City Civil Court Guardian *Ad Litem* Project has been viewed by many as a positive step toward meeting the challenges presented by diminished-capacity litigants who are at risk of eviction. However, common misconceptions on the applicability of this mechanism, coupled with a scarcity of qualified candidates to serve as GAL's, have made this a double-edged sword.

Appointment of a GAL restricts an individual's autonomy and rights of self-determination and, therefore, should be turned to only as a last resort when other accommodations are unavailing. For many individuals with diminished capacity, accommodations short of the appointment of a GAL (including appointment of counsel and access to social services through an improved Resource Center) may very well permit the litigant to fully participate in and resolve the pending litigation.

When a GAL is needed, Housing Court judges now can turn to the Guardian *Ad Litem* Project. However, the Working Group strongly felt that the panel needs improvement. A lack of coordination exists in the process between the Court, Adult Protective Services (often involved when there is a GAL appointment) and the landlords' bar. In addition, the lack of knowledgeable and well-trained GAL candidates is reflected in the inadequate exercise of the GAL duties, which has often jeopardized litigants' rights.

#### Recommendations:

- Strengthen the Pool: Establish standardized and more stringent qualifications and a stricter screening method for acceptance into the GAL Project candidate pool.
- Train and Supervise the Panel: Provide significant and ongoing supervision and training of the GAL panel members, including establishing a system of accountability. To undertake this endeavor, the GAL Project could enlist the assistance of the private bar.
- Stipend for Non-Family Non-APS GAL's: Extend a stipend similar to that available for GAL's when APS is involved in the proceedings to non-family GAL's who are appointed without APS involvement.

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<sup>47</sup> Due to time constraints, formation of a specialized Part for litigants with diminished capacity was raised but was not discussed by the group.

### **Additional Issues**

The Working Group also considered other issues of significant concern that it recommends be contemplated and addressed. However, due to time constraints, more specific recommendations were not developed. These include:

- Additional safeguards should be established when a tenant is hospitalized prior to or during the pendency of an eviction proceeding.
- Due to the high percentage of disabled tenants residing in New York City Housing Authority (NYCHA) projects, the Working Group agreed that prior to commencing litigation, NYCHA should explore other alternatives to the filing of eviction proceedings, particularly where the NYCHA tenant file contains indications of the tenant's disabilities.
- Not-for-profit landlords should establish procedures by which they employ management staff to conduct evaluations where the tenant is disabled or has diminished capacity with the goal of seeking alternatives to the institution of eviction proceedings.

## **Working Group V: Preserving the Housing Stock: Are There New Ways to Approach This and Measure Results?**

**Overview:** The Housing Court was created in 1974 as an “experimental” court, in part, to “preserve the housing stock of the City of New York.” This was a challenging mandate, adding to the already difficult task of seeking to afford justice to the parties before the Court.

The Housing Court Act created a new form of action, the holdover proceeding (“HP”), in which, for the first time, tenants, rather than only a city agency, could initiate proceedings to address code violations. Further, the new Court came into existence at the dawn of a new legal doctrine, the implied “warranty of habitability,” and the Court was given the power to employ “any program” and join additional parties to a case to prevent decay of the housing stock.

This Working Group assessed how the Court has responded and considered what changes might help to better align the workings of the Court with its broad mission.

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**Recorder:** David Robinson, Legal Services for New York City, Legal Support Unit

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This report has two parts. The first reflects the morning session, in which the group brainstormed about possible issues and discussed them. (This includes comments made by one or more than one person and does not necessarily reflect the consensus of the group.) The second part contains those recommendations that were agreed upon by all of the participants (which are so noted), as well as those recommendations in which there was some consensus but not unanimity.

### **Issues Discussed**

The purpose of the Housing Court to preserve the housing stock derives from the legislative findings and policy statement underlying the enabling legislation.<sup>48</sup> In enacting the statute

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<sup>48</sup> One participant thought that, notwithstanding the noble language of legislative intent, the Housing Court, neither in theory nor practice, is a meaningful forum for the preservation of the housing stock. According to this participant, the vast preponderance of cases remain non-payment-related or holdovers and, to the extent that those cases involve the correction of individual conditions and to the extent that tenant-initiated actions involve such conditions, the Housing Court is a forum for violation correction, which is not necessarily synonymous with the preservation of the housing stock.

creating the Housing Court, the New York State Legislature articulated the purposes of this Court:

The legislature finds that the effective enforcement of state and local laws for the establishment and maintenance of proper housing standards is essential to the health, safety, welfare and reasonable comfort of the citizens of the state....The legislature finds that the effective enforcement of proper housing standards in the city of New York will be greatly advanced by the creation of a housing part of the civil court of the city of New York with jurisdiction of sufficient scope (i) to consolidate all actions related to effective building maintenance and operation, (ii) to recommend or employ any and all of the remedies, programs, procedures and sanctions authorized by federal, state or local laws for the enforcement of housing standards, regardless of the relief originally sought by the plaintiff, if it believes that such other or additional remedies, programs, procedures or sanctions will be more effective to accomplish and protect and promote the public interest and compliance, and (iii) to retain continuing jurisdiction of any action or proceeding relating to a building until all violations of state or local laws for the establishment and maintenance of proper housing standards have been removed and until it is satisfied that their immediate recurrence is not likely.<sup>49</sup>

One issue is how to define “preserving the housing stock.” Is it different in different boroughs or neighborhoods? Was it different in 1972? Preserving the housing stock means preserving the housing stock for its current residents (i.e., the purpose of the Housing Maintenance Code is different from that of the Building Code).

If the Housing Court worked better and more efficiently, the housing stock would be improved. Some thought that much of what the Housing Court now does is irrelevant to improving the housing stock. Housing Court policies should give more information and be more pro-active. Repair issues get lost in Housing Court. Some thought that Housing Court judges should take a more active role in repair issues. For example, in non-payment cases, the Housing Court judge should look to see if there are repair issues even if a *pro se* tenant does not raise them. The present procedure for raising building-wide issues (such as heat complaints) is labor intensive. In terms of individual cases, there can be a deterrent effect (that is, deterrent to owners who might otherwise attend to repair and maintenance obligations) if the Court treats individual cases seriously. Housing Court has the powers of contempt and enforcement that are not being adequately used. As to Orders to Correct, questions were raised about whether they are brought and who follows up on the orders to ensure compliance. There were approximately 8,000 holdover proceedings (HP) tenant-initiated actions, with a small percent of civil penalties and contempt. Tenants who bring HP actions *pro se* can get tired by the processes and discontinue their cases.

Questions were raised about why NYCHA apartments are outside of code enforcement and the impact that has on preserving the housing stock. While there can be HP actions against NYCHA

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<sup>49</sup> Laws 1972, ch. 982, & 1 [current version at New York Civil Court Act Section 110 (2001)].

and NYCHA is subject to repair orders, violations are not listed. There was also the issue of the impact of the separate NYCHA Part in Housing Court and whether NYCHA is subject to the same scrutiny as other landlords.

The group discussed the interaction between HP actions and non-payment cases. One question posed was whether orders to correct should be issued by the Court in non-payment cases. Another question was whether the Housing Court judge in the HP Part should be allowed to consolidate and take the non-payment cases (in the same apartment or building) that are in other Parts. The current directive is that the Housing Court judge in the HP Part is not allowed to consolidate. A related issue is whether rent abatements should be part of an HP proceeding since mixing money issues into the HP proceeding may be problematic.

If counsel represented both parties in Housing Court, the likelihood of preserving the housing stock would increase. It would also be much more likely that repair issues would be addressed in cases in Housing Court and settlements, in appropriate cases, would include Orders to Repair. Decent affordable housing is a human right and increasingly recognized as such.

Three interests are at stake in Housing Court: those of the landlord, the tenant and the neighborhood (although the latter's interests are not really heard).

The group discussed whether there should be any differences in the processes when a not-for-profit organization is the landlord. There was also a discussion about whether code enforcement should be taken out of Housing Court and relegated to administrative proceedings or criminal enforcement.

Professor Mary Zulack's paper on using technology to assist the Housing Court to preserve the housing stock was also discussed.<sup>50</sup> Some of her suggestions were: in every type of case, the conditions in the building should be a focus; every case should result in a review, with information readily retrievable by litigants, judges and the public, and accessible by address, owner and judge's name; information should include Housing Maintenance Code violations, as well as the records of other relevant bodies; all information produced by or furnished to the Court should be in digital form (including pleadings, motions, photos, inspections, orders); each judge should be required to review the full informational database on a building and apartment in each case and, upon resolution, respond to every field pertaining to a violation or repair issue; information on the prior state of the premises should not be erased from the database; a simple procedure should be developed for all interested parties to petition to correct any data in the database; if the Court has ordered repairs, a *sua sponte* notice of a hearing for contempt of court should be issued if the order is violated; and Housing Court judges should be evaluated for reappointment, in part, based on their effectiveness in preserving the housing stock.

The Housing Court, which does not avail itself of available information from within and without

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<sup>50</sup> Mary Marsh Zulack, *The Housing Court, Thirty Years Later: Will Technology Help Us Transform the Court So It Can Truly Preserve the Housing Stock? New Information Systems Combined with New Judicial Accountability Could Make it Happen* (draft October 20, 2004). The title of the published article is *The Housing Court Act (1972) and Computer Technology (2005): How the Ambitious Mission of the Housing Court to Protect the Housing Stock of New York City May Finally be Achieved*.

the Court, should make use of modern technology. Currently, there are significant and relevant data available to the public on the internet, including the following (listed by agency):

**Department of Housing Preservation and Development:** registration / violations<sup>51</sup> / status of violations / Emergency Repair Program / status of building in the Community District / if the building has HPD Section 8 / registration information, such as who is the managing agent

**Department of Health:** window guards / lead paint / rodent infestation

**Department of Buildings and Environmental Control Board:** structural violations (but the details of the violations are not currently available online) / Certificate of Occupancy

**Department of Finance:** title /mortgages / regulatory agreements / tax abatements

**Office of Court Administration:** court calendars

**Housing Court records** (but only available in the computer in Housing Court)—listed by parties and index number: status of case / number of times case on calendar / disposition / numbers of Orders to Show Cause and the judges involved

The key to integrating public records is for the Housing Court to adopt the existing city address system for its records (the system used by HPD). The group discussed whether all agencies should share information and whether information from other agencies should trigger actions in Housing Court to help preserve the housing stock.

Privacy issues relating to access (of public and non-public records) need to be addressed. Some thought that limited information about cases should be available online. There are also competing privacy issues (i.e., what if a *pro se* tenant does not care about repair issues). To implement some of these suggestions, legislative changes may be necessary (i.e., adding all residential buildings in the HPD database and adding DHCR data to the database of available information). Currently, parties can ask DHCR for the information about themselves, but the Court cannot obtain the information directly, nor can potential tenants or tenants' attorneys doing factual research. Some concerns were raised about the efficiency of the present system and the lack of information about access to the records and opinions of DHCR.

## **Recommendations**

### **Unanimous Recommendations**

- The Housing Court, a component of a larger system to preserve the housing stock, could utilize government programs such as Section 8 and the refinancing of Coop City to make repairs.

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<sup>51</sup> The specific complaints and by whom the complaints are made are not currently available to the public.

- The New York City Department of Housing Preservation and Development has a critical role to play in preserving the housing stock and should coordinate its litigation as part of a building-wide and neighborhood strategy. HPD should analyze which landlords and which neighborhoods have problems and target those landlords and neighborhoods. However, in all neighborhoods there are landlords who do not maintain their housing and HPD should enforce the laws against all landlords. There should be an integration of efforts in the communities but not to the exclusion of individuals and groups bringing HP and 7A actions. HPD should execute enforcement actions on heat and hot water complaints (among other complaints), litigate where there are problem owners and bring 7A proceedings on a building-wide basis that have an impact on the building and on neighborhoods and communities. If B and C violations are present in a building, HPD should initiate some action, whether litigation or other enforcement tools.
- The data in the Court system should be organized by building address. All cases initiated in Housing Court should be address-identified, using HPD's building address system.
- Public records should be used to preserve the housing stock. The public records listed above (i.e., HPD, Department of Health, Department of Buildings, Environmental Control Board and Department of Finance) should be available on computer terminals in each courtroom, including one on the desk of the Housing Court judge.
- Court personnel should be trained to access public records online.
- Public information should be easily available to all litigants in places such as computer terminals in the Resource Centers in the Courts. Some group members suggested that there should be a DHCR staff person in the Housing Court in each borough to provide litigants with DHCR records.
- A system to track litigation must be developed. The Housing Court now tracks only final judgments due to default or settlements, but the Court and HPD should track HP's including the number of times each case is returned to Court if stipulations are breached. All cases should be tracked if the case is settled and if there is satisfaction of the settlement. Organizing data by building would be a way to track what happens in individual buildings (i.e., orders to correct and stipulations).
- Housing Court judges must have a comprehensive understanding of the housing conditions in a building or neighborhood. Technology is key. Records should be accessible by neighborhood (to assist in understanding housing conditions in a neighborhood and the role of the Housing Court). Some thought that community courts might be useful in that regard while others had concerns about such courts.
- Stipulations that include repairs should be accepted by Housing Court judges (after proper allocution) even if the case was not a non-payment.
- Digital pictures taken by HPD in its Emergency Report Program should be accessible to the Housing Court, with the caveats that the only pictures available should be those of the

complaints about conditions in the apartment and only those taken by HPD inspectors. Also methods need to be developed to challenge, correct or expunge the pictures and attention should be paid to the privacy of tenants who may not want their domicile photographed.

- The next time that the Office of Court Administration (OCA) engages in an initiative on the Housing Court, it should get input from the relevant actors in the system. This recommendation stemmed from disappointment that the reorganization of 1997 did not arise from a process more like this Conference.
- There should be more user-friendly computers, and one on every Housing Court judge's bench.
- Electronic filing of cases should include multiple fields such as building addresses. There should be further study about electronic filing (including legislative changes relating to oral answers). If and when there is electronic filling, court personnel should be trained to assist and scan documents for *pro se* litigants.
- There needs to be a directive that all records, both public and internal to the Court, shall be utilized by Housing Court judges and that they have the authority and obligation to utilize such records.
- Court records should keep track of defenses raised, including the breach of the warranty of habitability.

#### Other Issues and Non-Unanimous Recommendations

- There was some disagreement about whether technology should be used to determine if the cases in one building should be assigned to the same Housing Court Part, within a defined period of time, affording the Housing Court judge the discretion to decide if the cases should be heard together. While there are advantages to this, it needs further study.
- The Housing Court is not currently obliged to enforce its own orders and ensure compliance. Parties, including HPD, have an obligation to bring contempt motions when repair orders have not been complied with. Court orders need to be taken seriously. Some group members proposed a more activist role for the Court in initiating a motion for contempt when repair orders are violated.
- The majority believed that fixing repairs through a code enforcement system preserves the housing stock. The State Legislature, in the statutory purpose of the Housing Court, said that compliance with the code equals preserving the housing stock.
- Some thought that there should be a triggering mechanism for HPD to initiate an HP action (for example, after a particular number of B and C violations).
- In regard to additional records being made public and available online, there should be

further study about whether those additional records should only be for the Court and Court personnel or also for the litigants. A larger question pertains to the confidentiality issues that need to be examined and addressed, including the accuracy of the information and ways to correct any inaccuracies. There was a difference of opinion about whether DHCR records should be available online; if so, legislation is required. Unrepresented litigants need to know that they can obtain the records. (Each owner and tenant can currently have access to all of the data on his/her own apartment.) One suggestion was that a DHCR employee should be placed in the Housing Court in each borough to access DHCR records for the parties. Some felt that more information will make the playing field between *pro se's* and represented parties fairer. Others thought that while in theory complete access to public records is attractive, such access can introduce irrelevant considerations. One response to that concern is that it is the role of the judge to decide that.

- When both sides are represented, it helps preserve the housing stock and solve the enforcement problem. Those who disagreed thought that representation was not connected to preserving the housing stock.
- A code-compliant atmosphere is critical to preserving the housing stock. An individual tenant preserves the housing stock by bringing one HP action. Those who disagreed thought that an HP action is not relevant due to the economics of housing.
- Some thought that the HP Part should be expanded to five days a week.
- Some thought that the Court should have all information furnished or produced in Court in digital format and that the Housing Court judge should look to the informational databases in every case.

## **Working Group VI: Social Services and Volunteer Programs in the Court**

**Overview:** The New York City Housing Court currently provides space in the courthouse for the Department of Social Services. This gives members of the public easy access to social services needed to address their case. (Space is also provided for Adult Protective Services to be available for “at risk individuals.”) Judges refer tenants to the Housing Court liaisons’ offices and sometimes ask liaisons to testify about a tenant’s ability to get social services or to document the actual social services benefits that the litigant is receiving. The goal of having these agency personnel on site is to give information to Housing Court judges in order to resolve cases.

This social service system has been in place for approximately ten years now and is readily relied upon by most of the judges. Similarly, the Housing Court provides resource assistants in the four larger boroughs who can assist judges by making home visits and otherwise investigating social issues and reporting back to the Court. Additionally, the Court has encouraged volunteer programs, generally *pro bono* programs, where lawyers seek to assist tenants or serve as guardians for tenants with special needs.

This Working Group analyzed the problems presented by those appearing in Housing Court, the effectiveness of the social services and volunteer programs currently provided in and by the Court and whether supportive programs should be expanded.

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### **The Process**

The Working Group first addressed the question: “Who is appearing before the Housing Court?”<sup>52</sup> It concluded that it could not answer this question with any degree of precision. There

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<sup>52</sup> Working Group members were provided with the following list of questions by the conference organizers: 1. Who are the people appearing in Housing Court? 2. What are some of the social service problems that these individuals are likely to face? 3. What services are provided through and in the Courts? 4. Who determines who gets referred for services? 5. Are the services readily accessible to all the eligible people? 6. Should this type of intervention take place at an earlier stage, perhaps before the proceeding is commenced? 7. Should the role of DSS be limited/expanded? 8. How successful has the Court been in addressing the social services needs of the people? 9.

are simply no demographics or tenant profiles available that would contribute to a meaningful discussion about the social service needs of the tenants who appear in the Housing Courts in each of the boroughs across the City. The group recommended that priority be given to the collection of the necessary information.<sup>53</sup>

In the absence of data, the group shared their impressions of who are the tenants in Housing Court. Impressions ranged from a minority view that the tenants in Housing Court represent a cross-section of the population to a more broadly held view that emphasized the significant presence in the Court of the poor, working poor and those unable to speak English. These diverse impressions reenforced the group's conclusion that hard data are needed.

Without making any attempt to quantify them, the group agreed that tenants appear in Housing Court with other problems that increase the risk of eviction. Individuals and families appearing before the Court need health, mental health and legal services, present problems of substance abuse, domestic violence or elder abuse, would benefit from financial management or relocation assistance, need help accessing sources of governmental or private financial assistance and benefits to which they are entitled, and require assistance with immigration problems.

The group readily agreed that the fractured and limited assistance and services that are available to address these issues are not generally well known by or readily accessible to those appearing or working in the Housing Courts. The group noted that there has been some improvement in the work being done by the Courts and agencies in this area, but much more remains to be done.

In thinking about how to identify the social services needs of a population whose size and characteristics are so poorly understood, the group began by breaking down the types of cases that appear before the Court. Group members agreed to think separately about tenants facing problems that are primarily financial and those that present other issues.

The group easily agreed that there are in the Housing Courts a large number of people who should not be there because their situations present no housing issue needing legal resolution. These tenants have what the group decided to refer to as financial cases, which were tentatively defined for working purposes as those cases in which both the landlord and tenant want to continue a tenancy but are in Court because the tenant, though otherwise coping, is unable to pay all or part of rent arrears, current rent or both. These cases, which present no dispute as to the facts or applicable law, were broken down further into tenants eligible for but not receiving financial assistance and tenants not eligible for financial assistance who are, in essence, facing eviction because of a larger societal failure to provide an available stock of affordable housing.

The group unanimously agreed that priority should be given to identifying the first class of

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What are some alternative methods of addressing the social services needs of people who are being sued in Housing Court? 10. What kinds of *pro bono* legal services or other volunteer programs should be available?

<sup>53</sup> Members suggested that some information might be collected through eviction prevention programs being run around the City, such as the law/social service project and foster-care prevention effort going on in the Highbridge section of the Bronx, or through other means available to governmental agencies or funding organizations.

tenants – those eligible for financial assistance from government, private charities or other sources – long before they ever reach the Housing Courts and, failing that, as soon as they reach the courthouse doors. Once identified, efforts should be directed toward funneling such tenants away from the legal processes of the Housing Court and into the systems of governmental and non-governmental agencies responsible for providing financial assistance. The group recognized that such an effort would require a fundamental rethinking and restructuring of the current system by which the executive and court systems work, but agreed that it is important that we not shy away from such thinking.

The group noted its impression that governmental administrative agency policies and errors play a significant part in creating this first class of financial cases and recommended that steps be taken to ensure that tenants' cases are properly and promptly dealt with and that agencies eliminate policies that are counter productive. The group felt that much work was needed in this area. Any such effort would be advanced if administrative agencies changed policies requiring Court action before administrative action is taken to address financial need. Thus, for example, applications for public assistance emergency rental assistance should be dealt with administratively at the point the landlord issues a demand for rent, and should not await, as a matter of policy, the issuance of a judgment or warrant of eviction by the Housing Court.

Administrative agencies should also expedite procedures to handle the financial needs of tenants at the earliest possible point in non-payment-of-rent cases. The group recommended that a primary mandate and focus of all governmental agencies should be the prevention of eviction and homelessness. Moreover, agencies should coordinate their efforts with other governmental and non-governmental entities to resolve a case of rent non-payment. Group members noted that for such an effort to be successful, cooperation within the highest levels of City government is necessary.

The group recognized that, despite best efforts, some financial cases will reach the Housing Court. It recommended that methods be implemented to identify such cases and take action to funnel them away from courtrooms. Once identified, financial cases might be addressed by, for example, providing a "one-stop shop" for financial assistance within the Court where eligibility could be determined, benefits approved, administrative errors undone and checks issued. This "diversion" of tenants from the courtroom would require close and accurate coordination with Housing Court processes.

The group concluded that the second group of financial cases—those involving tenants who are not eligible for financial assistance—need nothing short of a general, broad-based rental allowance across the population until enough affordable housing is built. The group saw no other short-term solutions to address the intractable political and economic realities raised in such cases.

Efforts to divert the first class of financial cases would help the Housing Court by freeing up resources needed to accomplish the primary missions of the Court, which is now overwhelmed by cases whose proper resolution is within neither its control nor competency. It would spare some families and individuals from the reality or risk of eviction and homelessness. And, finally, it would reduce the population of tenants being sued, making limited legal and social

services available to those tenants that remain before the Court.

The group was careful to note that some financial cases also involve a need for repairs, abatements or judicial resolution of legal and factual disputes. Thus, any system developed to identify and deal with financial cases should avoid funneling factual and legal disputes away from the Court. The financial and legal aspects of such cases should be handled concurrently, independently and in a coordinated way by the Housing Courts and the responsible administrative agencies.

Moving on from the issues presented by financial cases, the group addressed the question of providing non-financial social services. Some members wondered whether questions of social service delivery have any place at all in the context of Housing Court proceedings. Others saw a pressing need to deliver social services to tenants who would otherwise end up in homeless shelters. The group enunciated two cautionary principles in the course of this discussion. First, it noted that the delivery of social services is not a part of the core competency of the Housing Court. The Court was developed as a court of law to resolve landlord and tenant disputes in summary proceedings and to protect the housing stock of New York City. The group found no reason to expand court responsibilities to encompass the delivery of social services in its core competencies. Second, the group concluded that any social service screening and delivery mechanisms that are introduced into, or run parallel with, the operations of the Housing Court must be informed by the over-arching values of tenants' rights to confidentiality, respect and autonomy. It also concluded that social service screening and delivery should be the task of individuals whose core competencies do include such screening and delivery.

The group recognized that non-payment and holdover cases may present opportunities for different approaches to social service delivery. Some holdovers may be financial cases in disguise and others may present issues that are not resolvable without adjudication. However, some holdover cases involve tenants whose social service needs stand starkly at the center of the proceeding.

The group agreed that separate thought should be given to the ways in which tenants might have the benefit of social service delivery to ameliorate the underlying causes of holdovers. It also noted that because such issues may become clear only in the courtroom, judges should be able to call upon social service providers to work with the tenant to assess the need for and provision of social services. Where social services are found to be necessary and are agreed to by the tenant,<sup>54</sup> the providers should follow a case to resolution in conjunction with the Court.

The group agreed that social service resources should be identified, publicized and made more easily available to tenants in their community in order to prevent the need for Housing Court proceedings. Cases reaching the Court that may present social service needs should be identified as early as possible in the Court process. When they arrive in court, tenants should be offered an opportunity to have their social service needs assessed. A protocol should be developed that helps social service providers identify those cases that may present the need for more than Court intervention in order to prevent eviction.

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<sup>54</sup> The group did not address the needs of tenants who may not be competent to handle their cases.

The group recognized that such identification and service provision would alleviate some of the burden on available legal services, enabling lawyers to focus on cases needing the resolution of legal and factual disputes. The group recommended that information about best practices be collected from ongoing projects such as community courts, law/social service pilot projects in the Bronx and other boroughs, and work in other jurisdictions.

As to how social service delivery might be structured in the Housing Court, the group raised questions about the point at which assessment should be provided to tenants who seek help with social service needs. The group discussed the possibility of creating a unit of social service providers in the courthouse to do intake, assessment and triage for tenants seeking to access social services. Some members wondered whether adding “steps” to the Housing Court process might pose the danger that tenants would simply be burdened with more hurdles, might simply face more “hoops” through which they would be forced to jump. The group wondered how long a meaningful assessment might take and whether the timetable of assessment could work with the timetable under which the Housing Court operates. The group believed that concentrated attention to the structures that might be used to make social services available to tenants would be worthwhile.

Finally, the group moved on to the provision of *pro bono* services in the Housing Court. The group agreed that the government should bear primary responsibility for legal services to prevent the eviction of those unable to afford counsel. In the meantime, efforts must be made to increase relationships among available legal services providers and the Courts and potential sources of *pro bono* assistance for those unable to afford counsel.

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## **Conference Follow Up**

This was the second major conference sponsored by NYCLA's Justice Center. The first, held in October 2003, examined the work of the New York City Criminal Courts. A NYCLA Task Force on the Criminal Courts was established to foster implementation of recommendations generated by conference participants and to work cooperatively with court administrators to improve the Criminal Court system.

NYCLA will establish a similar mechanism for follow up on the Housing Court Conference. This Task Force, comprised of conference participants and other experts on and advocates for Housing Court issues, will review the recommendations of the Working Groups, establish appropriate committees, maintain a dialogue with the Office of Court Administration and the Housing Court judges, and produce reports, develop pilot projects and, in general, focus on making the Housing Court more effective in administering justice for the people of New York City.