

New York County Lawyers' Association
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NEW YORK COUNTY LAWYERS' ASSOCIATION

RESOLUTION

This Resolution was adopted by the American Bar Association at its Annual Meeting on August 11, 2008.

RESOLVED, That the American Bar Association adopts the *Best Practices for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court*, dated August 2008, as guidelines for jurisdictions to adapt as needed for use in reviewing stipulations for the settlement of cases and for use in other proceedings to help ensure that unrepresented litigants have a meaningful understanding of the terms of a settlement or alternatives to settlement; and it is further

RESOLVED, That it is intended that these *Best Practices* be implemented within the discretion of each individual judge and to the extent possible given limits of existing resources; and it is further

RESOLVED, That these *Best Practices* are not intended to supersede efforts to promote and expand *pro bono* legal service programs and a funded right to counsel in Housing Court proceedings.

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**BEST PRACTICES FOR JUDGES IN THE SETTLEMENT AND
TRIAL OF CASES INVOLVING UNREPRESENTED LITIGANTS IN
HOUSING COURT**

This Report was adopted by the American Bar Association at its Annual Meeting on August 11, 2008.

This Report was approved by the Executive Committee of the New York County Lawyers' Association at its regular meeting on April 22, 2008.

Preamble

Court systems around the United States are faced with an increasing number of unrepresented litigants in civil cases. Often these litigants cannot afford to pay for legal representation, even though their cases may have serious economic and other consequences for themselves and their families. In Housing Court, unrepresented tenants may be evicted, a “devastating and traumatic experience, particularly for low-income tenants...who are displaced into a housing market that has virtually no housing that is affordable to them.”¹

Providing representation for people facing eviction, often called civil Gideon, would clearly benefit those who cannot afford an attorney to represent them in housing proceedings. Advocates seeking enactment of legislation providing a right to counsel, as well as funding for programs to support that right, argue that “[f]undamental fairness, the constitutional rights to due process and equal protection of the law, and sound policy all require recognition of a right to counsel...”²

¹ *Andrew Scherer, Why People Who Face Losing their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 *Cardozo Pub. L, Policy & Ethics J*, 591 (January 2006) at 702.

² *Id*

Until state and municipal legislatures enact a civil right to counsel and provide appropriations to finance it, court systems should develop mechanisms for promoting the fair, equitable and consistent treatment of unrepresented litigants. A substantial body of literature supports best practices to ensure that unrepresented litigants have a meaningful opportunity to be heard.³ There is a growing trend around the country toward a more active role for judges in cases involving unrepresented litigants. Many jurisdictions and associations of judges and court administrators have recommended an enhanced role for judges in dealing with unrepresented litigants, and have recognized that such a role is fully consistent with the canons of judicial ethics.

To provide a resource for the New York City Housing Courts, where 90 percent of the tenants appear without an attorney and the same percent of landlords are represented by counsel, the New York County Lawyers' Association's (NYCLA) Task Force on the Housing Court studied the problem, reviewed court procedures and directives from the administrative judge, surveyed Housing Court judges to obtain their views about unrepresented litigants' experiences, and produced a report.

These *Best Practices*, excerpted from the report, provide for an active role for judges, both in approving settlements and conducting trials, so that unrepresented litigants will better understand their rights, the court procedures and the results of the proceedings. These *Best Practices* have two parts, one for the allocation of stipulations (*Best Practices for Housing Court Judges for Allocation of Stipulations of Settlement Involving Unrepresented Litigants*) and one for trials/hearings (*Best Practices for Housing Court Judges for Motions and Trials/Hearings Involving Unrepresented Litigants*). In addition to the *Best Practices* submitted for adoption by the ABA, the report included a background memo on judicial ethics by Professors Russell Engler and Stephen Gillers.

The full report, along with other Task Force reports on the Housing Court, is available at http://www.nycla.org/siteFiles/News/News59_2.pdf.

Judicial Ethics: Role of the Judge in Cases Involving Unrepresented Litigants

Because the *Best Practices* contemplate an active role for judges in dealing with unrepresented litigants, NYCLA asked two ethics experts, Russell Engler, Professor of Law

³ See, e.g., National Center for State Courts and State Justice Institute, *The Future of Self-Represented Litigants: Report from the March 2005 Summit, Proposed Best Practices for Cases Involving Self-Represented Litigants* in Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, American Judicature Society and State Justice Institute (2005)

and Director of Clinical Programs, New England School of Law in Boston, and Stephen Gillers, Vice Dean and Professor of Law, New York University School of Law in New York City, to examine the Canons of Judicial Ethics and case law applying the Canons, as well as law review articles and reports of national and state judicial organizations commenting on the proper role of judges in cases involving unrepresented litigants. In their report, Professors Engler and Gillers found that an active role for judges at trial and in the settlement process “is consistent not only with the growing body of scholarly opinion that has emerged over the past decade, but with recent Resolutions that generally call on the courts to insure meaningful access for unrepresented litigants in civil cases.”⁴ They concluded that there was “ample authority for the proposition that judges may play an active role in handling cases involving unrepresented litigants to avoid forfeiture of rights and allow unrepresented litigants meaningful access to the courts,”⁵ Their report also recognized the need, which we propose here, for guidelines to assist judges in playing an active role while avoiding the appearance of partiality or partisanship for one side.

Use of the Best Practices

The *Best Practices for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court* are guidelines that can be adapted and implemented by civil courts in any jurisdiction, regardless of whether there is one court handling all civil matters, including landlord-tenant disputes, or a separate Housing Court as there is in New York City within the Civil Court. Until the unrepresented are represented by attorneys, the *Best Practices* may be used by judges to improve access to justice for people who cannot afford an attorney and to enhance the administration of justice for court systems confronting the proliferation of litigation involving the unrepresented.

The *Best Practices* recommend that the judge in housing cases review all stipulations to which an unrepresented litigant is a party to try to ensure that the unrepresented litigant understands and agrees with the terms of the stipulation, and understands alternatives to settlement, including the right to a trial. The *Best Practices* are designed to assist the Housing Court judge in explaining the process in stipulations and other proceedings and to help ensure that the unrepresented litigant has the opportunity to be heard. These *Best Practices* are not a script that would limit the sound discretion of the judge. It is understood that there are concerns that limited resources may pose difficulties in implementing the *Best Practices*.

⁴ Russell Engler and Stephen Gillers, *Background Memo on Judicial Ethics: The Role of Judges in Settlement and Trial In Cases Involving Unrepresented Litigants*, New York County Lawyers’ Association Report on *Protocols for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court* (December 2006), Appendix A, at 9-11

⁵ *Id.* at 12

They are intended to be implemented within the discretion of each individual judge and to the extent possible given the limits of existing resources. Accordingly, the failure of a judge to comply with each specific in the suggested *Best Practices* shall not constitute independent grounds for the filing of an ethics complaint against that judge, whose actions remain subject to review pursuant to the canons and case determinations of the highest court in judge's state.

BEST PRACTICES FOR JUDGES IN THE SETTLEMENT AND TRIAL OF CASES INVOLVING UNREPRESENTED LITIGANTS IN HOUSING COURT

I. BEST PRACTICES FOR HOUSING COURT JUDGES FOR ALLOCUTION OF STIPULATIONS OF SETTLEMENT INVOLVING UNREPRESENTED LITIGANTS

These *Best Practices* are recommended to provide guidelines to assist Judges in reviewing stipulations that are entered into where at least one of the parties is unrepresented. The *Best Practices* recommend that the Judge review all stipulations to which an unrepresented litigant is a party to try to ensure that the unrepresented litigant understands and agrees with the terms of the stipulation, and understands the alternatives to settlement, including a right to trial. The *Best Practices* also recommend that prior to approval of a stipulation to which an unrepresented litigant is a party, the Judge should ascertain whether the unrepresented litigant's claims or defenses are adequately addressed. These *Best Practices* are not intended to be mandated detailed scripts or to limit judicial discretion to adapt allocutions to particular cases and litigants. Instead, they are intended to provide Judges with useful guidelines for conducting allocutions.

A. General Procedures

1. *Explain the Purpose of the Court Appearance:*

At the beginning of every allocution, the Judge should explain the purpose of the appearance before the Judge. The Judge may explain that:

- a. the Judge will review the proposed stipulation of settlement to try to make sure that the parties understand and voluntarily agree to its terms;
- b. a settlement is a voluntary agreement to resolve the case and, therefore, a party is not required to agree to settlement terms requested by the other party;
- c. if either party does not wish to agree to the terms of the settlement, the party has a right to trial at which a Judge (or a jury, if the parties have a right to a jury trial) will decide the parties' claims and defenses.

2. *Explain the Process:*

- a. At the beginning of every allocution, the Judge should also explain that the Judge will hear first from the petitioner (or, if the petitioner is represented, the lawyer for the petitioner), because the usual practice is to hear first from the party who brought the case, and the Judge will then hear from the respondent. The Judge should further explain that each party will have the opportunity to bring to the Judge's attention any problems with the stipulation or any claims, defenses or other issues that the party wishes to address, and that each party will also have the opportunity to ask questions.
- b. If the other side is represented by an attorney, the Judge should explain the adversarial nature of the proceeding. In particular, the Judge should explain that the attorney for the opposing party does not work for the Court and is responsible for representing the interests of the party that the attorney represents, not the interests of the unrepresented litigant. The Judge should explain that the lawyer for the other side may not advise the unrepresented litigant, other than to suggest that the unrepresented litigant secure independent counsel. The Judge should also explain that the unrepresented litigant is not required to agree to the terms suggested by the lawyer for the other side.

3. *Use Plain Language:*

The Judge should conduct the allocution in plain language and explain, in plain language, the meaning of the terms that are included in the stipulation.

4. *Invite Narrative:*

In order to ascertain whether the unrepresented litigant understands and agrees to the terms of the stipulation, and whether the claims or defenses of the unrepresented litigant are adequately addressed, the Judge should not merely ask questions that call for a yes or no answer. Rather, the Judge should ask open-ended questions and invite the unrepresented litigant to speak in narrative form. The Judge should ask the unrepresented litigant to explain the substance of the stipulation in her/his own words.

5. *Provide a Reasonable Opportunity to Obtain Counsel:*

At the first court appearance in the proceeding, the Judge should confirm that the unrepresented litigant understands the right to seek to retain an attorney. The Judge should insure that the unrepresented litigant understands her/his right to request an adjournment to seek an attorney and, if an adjournment is requested for this purpose, should provide the litigant with a list of free legal services, if needed.

If a litigant proceeds without counsel and it appears at any point during an allocution that the litigant wishes to obtain counsel, the court should give the litigant an opportunity to do so if the court appearance is the first in the case or if the litigant has not previously requested an adjournment; otherwise, the Judge should determine whether the request is reasonable, taking into account the number of prior appearances, the complexity and/or seriousness of the claims or defenses, and any prior requests for adjournments to obtain counsel,

6. *Address Language Barriers:*

The Judge should be attentive to language barriers experienced by unrepresented litigants and should provide qualified interpreters for unrepresented litigants who are not fully fluent in English or who are hearing impaired,

7. *Address Mental Incapacity:*

If the Judge has reason to believe that the unrepresented litigant may be suffering from a mental impairment, the Judge should take appropriate steps to determine whether such an impairment exists and, if so, to obtain appropriate assistance for the litigant. The Judge should not allocute a stipulation until the appropriate assistance is obtained.

8. *Maintain Courtroom Decorum:*

The Judge should maintain courtroom decorum, taking account of the effect it will have on everyone in the courtroom, including unrepresented litigants. The Judge should ensure that proceedings are conducted in a manner that is respectful of all participants, including unrepresented litigants.

9. *Explain the Alternatives:*

The Judge should insure that the unrepresented litigant understands the alternatives to signing a particular agreement suggested by the opposing party and the alternatives to signing any agreement, (i.e., the unrepresented litigant understands that (s)he is not required to agree to the term(s) proposed by the opposing party, and that (s)he has a right to trial if (s)he does not wish to sign an agreement).

B. Allocuting the Particular Provisions of the Stipulation

1. *Ascertain Whether the Unrepresented Litigant Understands and Agrees to the Stipulation:*

- a. In determining whether the unrepresented litigant understands and agrees to the terms of the stipulation, the Judge should not merely ask a general question to this effect, but should ascertain whether the litigant understands her/his specific obligations under the stipulation, as well as the consequences of failure to meet such obligations..

Another way to inquire as to the unrepresented litigant's understanding of the stipulation is for the Judge to summarize the unrepresented litigant's specific obligations under the stipulation and to ask the litigant whether s/he understands that this is what the stipulation provides for. If this approach is used, the Judge should still ask open-ended questions in order to determine whether the unrepresented litigant understands and agrees to the terms of the stipulation.

- b. Whatever approach is used, the Judge should explain in plain language the meaning and effect of legal terms in the stipulation, including enforcement remedies such as the judgment and warrant, and other provisions that may have a significant impact on substantive rights, such as waiver of claims or defenses and provisions involving attorney's fees.
- c. In order to determine whether the stipulation is voluntary, the Judge should ask whether the unrepresented litigant is agreeing to the stipulation of her/his own free will, and/or whether anyone has forced

or pressured the unrepresented litigant to agree to the stipulation.

- d. In order to determine whether an agreement is understood, the Judge should also undertake specific questioning on issues that commonly arise, such as the amount of rent owed or the deadlines for payment.

2. *Ascertain Whether the Unrepresented Litigant's Claims or Defenses Have Been*

Adequately Addressed by the Stipulation:

- a. The Judge should ask an open-ended question, calling for a brief narrative, to ascertain whether the unrepresented litigant has any claims or defenses that have not been addressed by the stipulation, or any questions about the stipulation or other matters relevant to the case.
- b. In all cases, prior to “so ordering” a stipulation, the Judge should determine whether a hazardous violation exists at the premises; if such violation exists, the Court should require that the stipulation provide for correction of the violation and for an enforcement remedy in the event of non-compliance.

II. BEST PRACTICES FOR HOUSING COURT JUDGES FOR MOTIONS AND TRIALS/HEARINGS INVOLVING UNREPRESENTED LITIGANTS

These *Best Practices* are not intended to be mandated detailed scripts or to limit judicial discretion to adapt practices during motions and trials/hearings to particular cases or litigants. Instead, the *Best Practices* are intended to provide Judges with useful guidelines,

A. General Procedures

- 1 Use plain English and minimize the use of complex legal terms in written materials, when conducting court proceedings, and when explaining court procedures and the other matters described below.
- 2 Be attentive to language barriers experienced by unrepresented litigants. Judges should take the necessary steps to provide qualified interpreters to

unrepresented litigants who are not fully fluent in English or who are hearing impaired.

- 3 Where possible, give all instructions and explanations to unrepresented litigants in writing as well as orally, as oral instructions may not be remembered when the litigant leaves the courtroom.
- 4 Verify that the party is not an attorney and that the party understands that s/he has a right to be represented by an attorney if s/he can retain one. Provide information regarding possible attorney representation by Legal Services, Legal Aid or other pro bono representation to litigants who cannot afford an attorney.
- 5 Determine whether the unrepresented litigant is opting to proceed without an attorney because s/he chooses to proceed unrepresented or because s/he has not been able to retain counsel from Legal Services, Legal Aid or other pro bono entities. Explain the risks and difficulty of self-representation to an unrepresented litigant who is able to retain counsel, but chooses to proceed unrepresented.

B. Motions

- 1 Whenever possible, provide the unrepresented litigant with a copy of the Judge's written motion rules and procedures sufficiently in advance of argument on a motion so the unrepresented litigant has an opportunity to review them prior to oral argument on the motion
- 2 Ask the unrepresented litigant about her/his understanding of the issue(s) before the Court, particularly if the unrepresented litigant is the movant, rather than relying solely on the represented party's articulation of the issue(s) and facts.
- 3 Explain the process that will be followed in hearing the motion and confirm that each side understands the process.
- 4 Unless undue prejudice will result that cannot otherwise be mitigated, or unless otherwise prohibited by law, permit the unrepresented litigant to interpose oral, rather than written, opposition to the other side's motion.

- 5 Explain the elements that the person making the motion must meet in order to get the relief s/he seeks and the elements that the person opposing the motion may have to meet to avoid an order in the movant's favor, and confirm that each side understands the elements and burdens.

If possible, the list of elements should be provided in advance in writing in a check-list format given by the Judge or the court attorney, or by directing the unrepresented litigant to a resource center, if available.

- 6 Explain that the Judge may ask each side some questions during argument, but that such questioning should not be interpreted to indicate that the Judge agrees with either party.
- 7 Questioning by the Judge during argument should be directed at obtaining information from each side necessary for the Judge to decide the motion and should be done in a way that does not create an appearance of partiality or of advocacy for one side.
- 8 Whenever possible, the motion should be decided and an order prepared immediately upon the conclusion of the motion so that the order can be served on the parties while they are still in Court and its terms explained to the unrepresented litigant, including what, if anything, the order requires her/him to do, when, the consequences of not doing those things, and what the unrepresented litigant may be able to do if s/he cannot comply with Court's order.

C. Prior to Trials/Hearings

- 1 Inquire whether the unrepresented litigant understands the issues that will be involved at the trial/hearing and what s/he will have to demonstrate in order for the landlord to get a judgment or for the tenant to avoid a judgment.
- 2 Provide the unrepresented litigant with trial preparation materials prepared and/or distributed by the Court or posted on its website or refer the unrepresented litigant to a resource center, if available.
- 3 Inquire whether the unrepresented litigant has the evidence s/he will need for

the trial/hearing and, if not, explain to her/him how to obtain such evidence. If production of evidence requires a judicial subpoena, refer the unrepresented litigant to the court attorney for assistance in having the subpoena issued and for an explanation regarding the process for service of the subpoena and how documents will be produced pursuant to the subpoena.

- 4 Unless undue prejudice to the other side will result that cannot otherwise be mitigated, adjourn the trial/hearing to a date sufficient for the unrepresented litigant to obtain necessary evidence and witnesses, and to review trial preparation materials.
- 5 If possible, provide the unrepresented litigant with a copy of the written trial/hearing rules and procedures of the Judge to whom the case will be referred for trial/hearing.

D. Trials and Hearings

- 1 Inquire regarding the matters set forth above at C, 3-5, and take appropriate action unless undue prejudice to the other side will result that cannot otherwise be mitigated.
- 2 Explain the process that will be followed in the trial/hearing and verify that each side understands the process. If possible, the list of elements should be provided in advance in writing in a check-list format given by the Judge or the court attorney, or by directing litigants to a resource center, if available.
- 3 Explain the elements of the case and verify that each side understands the elements. Elements that have been stipulated to or not raised in a pleading (where required to be so raised) may be omitted.
- 4 Explain that the party bringing the case has the burden to present evidence in support of the relief s/he seeks and verify that the parties understand the burdens.
- 5 Explain that the Judge may ask each side some questions during the trial/hearing, but that such questioning should not be interpreted as indicating that the Judge agrees with either party

- 6 The Judge should encourage the parties to conduct the trial/hearing in as informal a manner as possible to facilitate the unrepresented's ability to participate fully in the proceeding. The Judge should follow the rules of evidence that go to reliability, but use discretion and overrule objections on technical matters, such as establishing a foundation for introducing documents and exhibits and the form of questions or testimony. However, the Judge should explain that some evidence may be given greater weight and that evidence that is not based on direct personal knowledge or is in some other manner determined to be unreliable may be given lesser or no weight.

If evidentiary objections are not waived:

- a. Explain the kinds of evidence that may be presented and the procedure for admitting exhibits and inquire whether the parties understand the kinds of evidence that can be admitted.
 - b. Explain the limits on the kind of evidence that can be considered and inquire whether the parties understand the limits.
 - c. Require that the objector provide the unrepresented litigant with sufficient information regarding the grounds of her/his objections so that the unrepresented litigant can cure the defect, if possible.
 - d. Explain the foundational facts that must be established by the unrepresented litigant in order to make her/his evidence admissible.
 - e. Ask questions of the unrepresented litigant or her/his witness to determine whether the evidentiary defect can be cured.
 - f. Explain the reason for any evidentiary ruling.
 - g. Take measures to avoid undue prejudice to the unrepresented litigant from otherwise inadmissible evidence regarding the essential elements of the case.
- 7 Allow the unrepresented litigant to testify in narrative and limit as much as possible evidentiary objections during the narrative unless undue prejudice to the rights of the other party would result. Under FRE 611(a), adopted in many

state jurisdictions, narrative testimony is permitted as a means of making “the presentation effective for the ascertainment of the truth.”

- 8 Questioning by the Judge during the trial/hearing should be directed at obtaining information from each side necessary for the Judge to decide the issue(s) raised at the trial/hearing and should be done in a way that does not create an appearance of partiality or of advocacy for one side. Asking an unrepresented litigant what s/he wants to tell the court about the landlord’s claims is generally inadequate to elicit sufficient information. Accordingly, it may be necessary for the Judge to ask open-ended questions regarding specific elements of the landlord’s claims or the unrepresented tenant’s defenses or counterclaims to assist the unrepresented litigant in articulating the elements of her/his claims, defenses or counterclaims.

- 9 Whenever possible, the trial/hearing should be decided and a judgment/decision prepared immediately upon the conclusion of the trial/hearing so that the judgment/decision can be served on the parties while they are still in Court and its terms explained to the unrepresented litigant, including what, if anything, the judgment/decision requires her/him to do and when, the consequences of not doing those things, and what the unrepresented litigant may be able to do if s/he cannot comply with the Court’s judgment