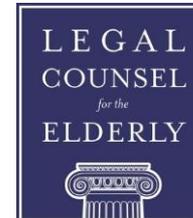


# Basic Housing Law Training - Session 3

June 18, 2020



Legal Aid Society  
OF THE DISTRICT OF COLUMBIA  
MAKING JUSTICE REAL



**RISING**  
FOR JUSTICE

# Working Up a Landlord-Tenant Case

Adam Marshall, Neighborhood Legal Services Program

# Tips for Initial Client Meeting

- Review retainer orally
- Go through interview checklist in Getting Started Guide
- Ask client to sign applicable releases
- Discuss plan for keeping in touch
- Discuss general schedule for case moving forward, what will happen when, which court dates client will have to attend
- Discuss your expectations – staying in touch, in-person meetings, court dates

# Examine the Papers

- **Notice**
  - Does it include details – who, what, when, where
  - Does it include specific cure provision
  - Was it provided in English and Spanish
  - Do the lease provisions cited line up with the violations, and are they correctly cited/quoted
  - Are technical requirements met – service on RAD (except nonpayment cases), rent control registration/exemption number listed, service on DCHA for voucher tenants
- **Affidavit of Service**
  - Are the dates and times appropriate
  - Any irregularities/mistakes in description
  - You can ask your clients for the actual papers (and envelopes) received if service is disputed

# Examine the Papers (cont.)

- Complaint
  - Review all paragraphs
    - Are all required details provided
    - Is waiver (nonpayment of rent only) or service of notice alleged
    - Are the details about subsidized housing completed, and are the details correct
    - For lease violation cases, are there detailed allegations on failure to cure

# Determine Client's Goals

- Discuss client's defenses and goals early and often
  - Dismissal – even if possible, still want to discuss with client
  - Repairs – list of all repairs needed, immediacy of repair needs, any access issues
  - Evidence – brainstorm about witnesses, documents
  - Settlement generally – process, timing, options
  - Moving/staying – and preservation of subsidy
- Involve caseworker, family members, or other third parties where appropriate/useful

# Analyze Options with Client

- Consider trial prospects
  - Theories, defenses, proof problems, credibility issues
- Do client's goals match practical realities
  - Protective order challenges
  - Likelihood of success
- Bench trial vs. jury trial
  - Protective order challenges or other need for speed
  - Need for discovery
  - Advantages of delaying
  - Advantages of automatic mediation
- Counterclaims/recoupment/setoff for nonpayment of rent cases
  - With counterclaim, risk of money judgment – lowered where income is judgment-proof or below minimum collection amount
  - Particular helpful where tenant has lived there for 3 years or more

# Investigation Steps

- Visit unit/building
- Take pictures and/or video if helpful
  - Use a legal assistant or other investigator if possible
- Collect any relevant documents from client
- Use discovery – and tailor to your case
- For voucher tenants, request tenant file from DCHA
- Subpoena other records (government agencies, third-party companies)
- Talk to potential witnesses
- Request government inspection (DCRA or DCHA) if useful
- Check court records for prior cases involving same parties (prior settlements?)

# Preparing for Bell Hearing

- Discuss finances with client – reality check
- Gather photos (and video) if useful
- Gather proof of notice, any inspection documents
- Determine whether access for repairs is an issue and talk to client about providing access
- Issue subpoenas if useful
  - DCHA, DCRA, DOEE
- Consider whether there are legal (or factual) arguments that should be briefed ahead of time
- Try to reach agreement with landlord's counsel
  - Be creative! All details are on the table

# Preparing for Mediation

- Check in with your mentor
  - Talk about the process, get tips on strategy and prep
- Meet with your client well in advance
  - Check in on client's goals
  - Discuss what is and is not realistic in terms of both settlement and trial
  - Tell your client about how the mediation session will be run and what they should expect
- Be prepared to discuss defenses in detail
  - If nonpayment of rent case, analyze the numbers
  - If housing code violations alleged, bring photos
  - Complete as much investigation as possible in advance and know the record
- Draft agreement terms in advance whenever possible

# Preparing for Trial

- Trial outline
  - Elements of landlord's claims and your client's
  - Evidence as you expect it to come in – both landlord's and your client's
- Develop a theme and theory of the case
  - Make these your organizing principles
  - Motives matter – do your theme and theory explain motives
  - Incorporate good evidence and account for bad evidence

# Preparing for Trial (cont.)

- Think about who your witnesses will be
  - Talk to client
  - Interview possible witnesses by phone or in person, including landlord's witnesses (where possible)
  - Consider whether to ask for signed witness statements
- Consider whether to subpoena witnesses
  - Seek client input for friends, family members, neighbors
  - Witness fees are generally required but are waived if tenant is IFP

# Preparing for Trial (cont.)

- Think about potential exhibits
  - Review discovery and all other documents
  - Consider another inspection, especially if housing code violations persist
- Consider whether you will need documents from third parties like DCHA and DCRA
  - Subpoena both the documents and someone to authenticate them
  - Request a business records declaration and keep witness on call

# Preparing for Trial (cont.)

- Prepare all elements ahead of time
  - Opening, closing, witness directs, witness cross-examinations
  - Label all exhibits and prepare exhibit list for clerks (even for bench trials)
  - Exhibit binders help, especially for bench trials
  - Consider using blow-ups, video, other courtroom technology
- Practice, practice, practice
  - Practice your opening and closing ahead of time, especially for a jury trial – and invite non-lawyers to get their feedback
  - Practice with all witnesses whenever possible (multiple times for client) – review exhibits to be introduced, questions as you will ask them, potential cross-examination

# Settling Landlord-Tenant Cases

**Nate Aquino, Legal Counsel for the Elderly**

**Beth Mellen Harrison, Legal Aid Society of the District of Columbia**

## **Negotiation & Mediation**

Key Concepts & Typical Settlement Terms

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# Opportunities to Negotiate

- On date of initial hearing or further initial hearing – though not recommended in general (least amount of leverage, likely before merits of case are very clear)
- In resolving motions – particularly motions for Protective Order/*Bell* hearing, motions for sanctions, and motions to enforce court orders or agreements
- At mediation (in bench trial or jury trial cases)
- At pre-trial conference (in jury trial cases) – at Rule 16 meet/confer meeting, or at pre-trial itself
- Ongoing, throughout litigation

# Mediating a Bench Trial Case

- Case is called for trial status at 10:30 AM
- Parties are “encouraged” to mediate; mediators are available without advance notice – and many judges will order parties to mediate before trial
- Consider setting an earlier status hearing date for the purpose of mediation
  - Settlement dynamics and bargaining power the day of trial can be good or bad

# Mediating a Jury Trial Case

- Mediation is scheduled several months after jury demand is filed, typically following close of discovery
- Must submit confidential settlement statement in advance on a court form
  - Plaintiff describes in detail the facts of the case and the claims being raised
  - Plaintiff also describes the type and scope of injuries and any monetary and/or equitable relief being sought
  - Defendant describes the facts and defenses being raised as well as any counterclaims
  - Both parties are asked to assess the value of the case

**BREAK**

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# Key Concept: Redeemable vs. Non-Redeemable Judgments

- **Redeemable judgments:** in non-payment of rent cases, tenant can redeem tenancy or “*Trans-lux*” by paying the entire amount due plus court costs to stay housed
  - Also appropriate if case is about money, even if filed as a lease violation case, e.g., claims for damages or utility fees
- **Non-redeemable judgments:** in breach of lease cases, where rent is not at issue, tenant cannot redeem tenancy
  - This type of judgment is irreversible

## Key Concept: Redeemable vs. Non-Redeemable Judgments (cont.)

- **Caution:** non-redeemable judgment as a penalty for breaching a settlement agreement guarantees a judgment and eviction as long as the housing provider can prove a breach occurred
- *Especially* in nonpayment of rent cases, a non-redeemable judgment should almost never be a penalty in the settlement agreement, unless the tenant is agreeing to vacate

# Typical Settlement Terms in Nonpayment of Rent Cases

- Most nonpayment of rent cases are settled with abatement or waiver of outstanding nonpayment of rent claims
  - Prepare calculations in advance, taking account of alleged nonpayment of rent and value of counterclaim, e.g. 10, 20, 30, or 40 percent abatement over relevant time period
    - Include full counterclaim period and remember that recoupment has no time limit; also remember to account for any prior judgments and subtract those months
  - What abatement is required for your client to owe zero? To owe zero and keep all funds in the registry?
  - Keep in mind that landlord may be more willing to waive rent and/or let go of funds in the registry – money not in their pocket yet

# Typical Settlement Terms in Nonpayment of Rent Cases (cont.)

- If tenant still owes rent, then include a reasonable payment plan
  - Be creative: e.g., tenant will apply for emergency rental assistance, but landlord agrees to cooperate with the application process and accept reasonable payment plan if assistance is denied
  - In public housing and site-based section 8, any repayment agreement should be limited to 10% of tenant's adjusted household income – see HUD PIH Notice PIH 2010 – 19 (public housing), *Multi-Family Guidebook* (for site-based section 8)

# Typical Settlement Terms in Nonpayment of Rent Cases (cont.)

- Include list of repairs for any remaining issues
  - Discuss with your client and ensure client will provide reasonable access to the premises for repairs
  - May want to specify dates and times for repairs and process for landlord providing notice to your client
  - Specify all repairs must be workmanlike – and may want to require inspection by the parties or trusted third-party or DCRA to verify repairs were completed
  - How to come up with list?
    - Remember that you are not strictly limited to Housing Code violations, other items can be included if all parties agree, e.g. replace carpet, repaint entire unit – and your client may value these items even more

# Typical Settlement Terms in Nonpayment of Rent Cases (cont.)

- Enforcement mechanisms
  - For repayment agreement provisions:
    - It is typical for landlord to be able to file a motion seeking a redeemable judgment for missed repayment plan payments (and, often, missed ongoing rent as well)
    - Consider building in terms that X number of late payments are excused before landlord can file motion
    - Request longer notice period for motion – e.g., 15 business days rather than 7-10 calendar days for motions under the LT Rules, plus requirement that attorney fax or email copy of motion to counsel immediately

# Typical Settlement Terms in Nonpayment of Rent Cases (cont.)

- Enforcement mechanisms (cont.)
  - For repair provisions:
    - It is typical for tenant to be able to file a motion seeking specific performance, i.e. an order to compel repairs
    - Consider provision that tenant will continue to pay to court registry until parties agree or court finds that all repairs have been completed – and that tenant can demand hearing re: abatement of those funds if repairs are not timely completed
    - Alternatively, consider provision that tenant can re-start paying to court registry once a motion to enforce repairs has been filed, again with right to hearing re: those funds
    - Also can build in specific penalties, e.g. rent is abated by X% each month or is reduced by \$X per day for each day past deadline that repairs are not completed

# Typical Settlement Terms in Lease Violation Cases

- Most lease violation cases are settled with dismissal of claims or “good-conduct” agreement – or, where necessary, a vacate agreement
- Is dismissal possible?
  - Dismissal makes more sense if landlord does not have evidence either of violation itself or failure to cure, or if tenant has reasonable accommodation or other complete defense, or if tenant is willing to bar person who is the problem
  - Carefully review discovery in advance and evaluate strength of LL’s case, also consider whether you can file a motion for summary judgment
- Is good-conduct agreement possible?
  - Have an early, frank discussion with your client about his/her ability to comply, including conduct by other household members and guests

# Typical Settlement Terms in Lease Violation Cases (cont.)

- Important considerations for good-conduct agreement
  - Time period – 6 months to 1 year typical, longer is onerous and risky
    - Limit the time period as much as possible!
    - 5-year agreements in one-strike public housing cases are more common
  - Define the behavior
    - Be very specific – instead of “no noise” say “no music after 10 p.m.”
    - Consider how broad or general, how difficult for landlord to prove breach and/or for tenant to defend against alleged breach
      - Describe the promised good conduct as narrowly as possible!
      - Define how landlord can prove breach

# Typical Settlement Terms in Lease Violation Cases (cont.)

- Important considerations for good-conduct agreement
  - Enforcement mechanisms
    - It is typical for landlord to be able to file a motion seeking a non-redeemable judgment for alleged breach
    - Request longer notice period for motion – e.g., 15 business days rather than 7-10 calendar days for motions under the LT Rules, plus requirement that attorney fax or email copy of motion to counsel immediately
    - Request informal discovery as part of motions process, e.g. landlord must list all witnesses, produce any evidence it will use at hearing, and describe the alleged breach with specificity
    - If possible, build in notice and a short opportunity to cure before landlord can file motion

# Move-out Agreements

- Move-outs should be a last resort for all cases
  - Do not agree to a move-out before fully assessing, through discovery and other fact-gathering, the case merits
  - Do not agree to a move-out, even if your client expresses a gut reaction to leave the apartment, until assessing feasibility – how long will it take, what will it cost, where will client go, what is the back-up plan?
  - It is critical that you understand whether the tenant will lose his/her subsidy by moving out (i.e. public and site-based housing) and that you explain the consequences to your client
- Remember that expiration of the lease is not grounds for recovering possession – this is a bogus justification if landlord raises it
- Be realistic – with yourself and your client – about the actual costs and timing of moving

# Move-out Agreements (cont.)

- Form of agreement
  - Landlords often will request a consent judgment with a stay (meaning judgment is entered now with a stay until the vacate date) – you should fight this and only agree as a last resort
  - Ideally, require landlord to file motion seeking nonredeemable judgment, with special notice provisions so you get it right away
  - Alternatively, schedule a status hearing several days or a week after tenant is supposed to vacate – if tenant has vacated, then claims are dismissed; if tenant has not vacated, then landlord receives non-redeemable judgment for possession
  - Never agree to any process where judgment is entered or a writ is issued automatically – you always want a chance to raise any defenses at a hearing and for landlord to have to prove that tenant has not in fact vacated
  - Note: a judgment is a large obstacle to accessing other housing opportunities, your client will benefit from having a settlement agreement entered rather than a consent judgment with a stay

# Move-out Agreements (cont.)

- Other terms to include in move-out agreement
  - Waiver of any and all rent, late fees, and all other charges
  - Return of security deposit and/or other pre-moving payment to help with first month's rent and security deposit at new unit
    - Can funds in the court registry be released now for this purpose?
    - If landlord will not make payment, can landlord waive client's share of rent until he/she vacates?
  - Neutral rent reference – confirm dates of tenancy, that tenant vacated voluntarily, that no amounts were owed
  - Specifics on how and when client will surrender keys to landlord

**BREAK**

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# Form of the Agreement: Your Own Agreement

- Write your own agreement (***recommended***)
  - The parties always are free to write their own agreements, rather than using court forms
  - It is always a good idea to be the drafter
  - When preparing for mediation, if possible draft agreement in advance and bring it with you, even if you have blanks to fill in
    - This will give you time to work through issues in advance, carefully choose your language, and have someone else review it without time pressure – and you can check in with your mentor!

# Form of the Agreement: Court Forms 4(a) (Consent Judgment Form) & 4(b) (Settlement Agreement)

- Use the court forms: **NOT OPTIMAL**
  - Court provides a Consent Judgment Form 4(a) (**avoid if you can!**) or a Settlement Agreement Form 4(b)
  - Understand the difference between these two forms (more on that below)
  - Always remember that the entry of judgment, which a Consent Judgment Form 4(a) does, can be harmful to your client's credit and rental history – a consent judgment always should give you pause

## Form of the Agreement: Court Form 4(a): Judgment for Possession by Consent

- Court enters judgment with execution stayed per agreement terms
- Tenant's Obligations:
  - Schedule of payments that includes regular monthly rent plus scheduled payments toward arrearage
  - Identify where rent to be paid; if repairs pending, may want to require payments be made to the court registry until proof of repairs shown
- Landlord's Obligations:
  - List repairs and deadlines on Addendum A
- Remedies
  - For failure to make rental/arrearage payments – application to terminate stay
  - For failure to make repairs – motion to show cause to compel repairs

## Court Form 4(a): Remedies for Violation

If the Tenant fails to make any payment as agreed, the Landlord shall be entitled to resume the process which will lead to an eviction. Before the Landlord is allowed to file the writ of restitution (the order which allows an eviction to occur), the Landlord must file an Application for Termination of Stay (FORM 5). A copy must be mailed or hand delivered to the Tenant. Whether the Form 5 is mailed or hand delivered, the FORM 5 may be presented for filing on or after the 5<sup>th</sup> day after mailing or hand delivered (not counting the day of service, Saturdays, Sundays and holidays). If the Tenant **TIMELY** pays all the above payments, the Tenant cannot be evicted in this case and a permanent stay of execution on the judgment will automatically be entered.

# Form of the Agreement: Court Form 4(b) (Consent Settlement Agreement)

- Judgment not entered
- Tenant's Obligations:
  - Schedule of payments that includes regular monthly rent plus scheduled payments toward arrearage
  - Identify where rent to be paid; if repairs pending, may want to require payments be made to the court registry until proof of repairs shown
- Landlord's Obligations:
  - List repairs and deadlines on Addendum A
- Remedies
  - For failure to make rental/arrearage payments – motion for judgment
  - For failure to make repairs – motion to show cause to compel repairs

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# Be Creative

- Are there pretexts/agendas behind other party's actions? Can your client resolve that issue?
- Are there remedies that either party desires and which the Court cannot order at the end of trial?
- Can you create additional opportunities if your client makes a mistake or has difficulty complying with the settlement?
- Other considerations?

# Some Ideas

- Consider entering a conditional agreement or one that offers two options
  - Tenants get emergency rental assistance by “X” date or a reasonable payment plan kicks in
- Build in second (and third) chances
  - Where landlord alleges housekeeping violations, weave in a test period; schedule inspections and require tenant to correct identified issues within “X” days or the landlord will file a motion for judgment
- If there is an outstanding transfer request (i.e. based on reasonable accommodation or safety), include reasonable accommodation provision requiring landlord to cover moving costs if transfer occurs

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# General Practice Tips

- The earlier you discuss possible settlement, the less likely you and your client will have to settle under pressure
- Ask your mentor for help in considering settlement options and for draft agreements
- Draft your proposed settlement agreement and review with your client before court or mediation
- Have someone else review your draft agreement

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# Special Considerations for Tenants with Vouchers

- Prepare for settlement as early as possible in the case
- Be realistic about the process/timelines if your client is considering vacating and moving with his/her voucher
  - Obtain transfer voucher as early as possible in the case process, valid for 180 days, can be renewed by DCHA for additional time
  - New unit must pass inspection and new landlord and client must lease-up with HCVP – this process can take several months, even once client has found new place
  - Client may find it difficult to find a new place
- Consider timing of inviting DCHA or other subsidy provider into the case
- Aging and Disability Resource Center, Bread for the City, LIFT-DC, and other social service providers *may* help with housing search

## Special Considerations for All Subsidized Tenants: Risk of Loss of Subsidy

- **Very important to consider whether settlement terms will result in loss or risk to subsidy itself**
  - For public housing or site-based section 8: vacating the property means losing the subsidy!
- On the other hand, a judgment/eviction carries its own risks
  - For all programs: eviction for drug-related criminal activity creates a bar to readmission to any federally-subsidized housing program for 3 years
  - For HCVP: judgment/eviction can result in voucher termination; eviction for a serious lease violation is a mandatory (no discretion) basis for termination, *see* 24 C.F.R. § 982.552(b)(2)
- Counsel your client about this and any alternatives
  - Make sure client understands both the risks and the fact that he/she is unlikely to regain a subsidy once lost

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**Post Judgment Issues**

# Post-Judgment Proceedings

- When the landlord claims a violation:
  - Typical settlement provision will require landlord to file a motion
    - All such motions are scheduled for an evidentiary hearing in Landlord Tenant Court
    - You remain counsel of record
- When the tenant claims a violation:
  - Again, a typical settlement provision will require you to file a motion to show cause, may require a longer notice period, and the motion will be set for a hearing
  - Before filing a motion, consider whether informal resolution is possible

# Your Trainers

**Melanie Acuña** – [macuña@aarpp.org](mailto:macuña@aarpp.org)

**Celina Aldape** – [caldape@risingforjustice.org](mailto:caldape@risingforjustice.org)

**Nate Aquino** – [naquino@aarpp.org](mailto:naquino@aarpp.org)

**Sam Beckett** – [sbeckett@breadforthecity.org](mailto:sbeckett@breadforthecity.org)

**Beth Mellen Harrison** – [bharrison@legalaiddc.org](mailto:bharrison@legalaiddc.org)

**Lori Leibowitz** – [lleibowitz@nlsp.org](mailto:lleibowitz@nlsp.org)

**Lauren King** – [lking@dcbar.org](mailto:lking@dcbar.org)

**Adam Marshall** – [amarshall@nlsp.org](mailto:amarshall@nlsp.org)