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Foreward to the Conference Report: The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?

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FOREWORD TO THE CONFERENCE REPORT:
THE NEW YORK CITY HOUSING COURT
IN THE 21ST CENTURY:
CAN IT BETTER ADDRESS THE
PROBLEMS BEFORE IT?

*Ellen Yaroshefsky and Marilyn J. Flood**

INTRODUCTION

On October 28-29, 2004, at a conference hosted by the Justice Center of the New York County Lawyers' Association (NYCLA), a diverse group of professionals gathered to consider how the New York City Housing Court is facing the many challenges of the coming decades (the "Conference"). Occasioned by the Court's thirtieth anniversary, the Conference participants examined not only the legal questions—housing conditions, holdovers, nonpayment of rent, and the proposed right to counsel in Housing Court—but the underlying and coexisting social and financial problems of those who appear in Housing Court. Such problems, left unaddressed, can and do lead to homelessness.

This Conference was an important first step in developing recommendations to improve the Housing Court, and this issue of the *Cardozo Public Law, Policy, and Ethics Journal* presents the reports of the Conference, the recommendations of the Working Groups, and significant articles authored by Conference participants. These articles, drafted in advance of the Conference, were distributed to all participants

* Ellen Yaroshefsky is a Clinical Professor of Law and the Executive Director of the Jacob Burns Ethics Center at the Benjamin N. Cardozo School of Law. She was on the planning committee for this conference. She extends gratitude to the other members of the planning committee and to all those who assisted in organizing this conference, to its many participants, and to those who authored articles for this issue of the Journal. The planning committee is especially grateful to Marilyn Flood, NYCLA conference chair, whose dedication and tireless efforts made this conference successful.

Marilyn Flood is the counsel to NYCLA and Executive Director of the NYCLA Foundation.

The conference was cosponsored by the Jacob Burns Ethics Center at Cardozo Law School, Columbia Law School, and the Louis Stein Center for Law and Ethics of Fordham University School of Law.

and discussed during the workshops. They provide an important context for the Conference's recommendations.

CONFERENCE PURPOSE AND FORMAT

The invitational Conference had eighty-two participants representing an array of experience and perspectives. The participants were drawn from both the landlord and tenants 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 meet its future challenges and address the legal and social issues that come before it.

The Conference began on the evening of October 28 with welcoming remarks from Norman Reimer, President of NYCLA, and a keynote speech 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. The welcoming remarks provided an important overview of the Housing Court, reflecting on its accomplishments and recent innovations while acknowledging that it faces significant challenges.

On October 29, Hon. Jonathan Lippman, Chief Administrative Judge of the Courts, gave remarks recognizing the significance of the Housing Court and the dedication and excellence of its judges. Afterwards, 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 Law School; Hon. Marcy S. Friedman, New York State Supreme Court; Maria Mottola, Executive Director, New York Foundation; Professor Conrad A. Johnson, Columbia Law School; and Jonathan Newman, Finkelstein Newman LLP.

Conference participants 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:

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

In a closing plenary session, the Working Groups reported their recommendations to other Conference participants.

SUMMARY OF THE WORKING GROUPS AND RECOMMENDATIONS

While each of the groups had a distinct mission, there were often common issues 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; to gather information and to improve data collection; to provide additional resources, especially for litigants of diminished capacity; and to 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.

WORKING GROUP I: PRE-ADJUDICATION STEPS IN THE HOUSING COURT

This Working Group examined the pre-adjudication process—the stages of a housing case from the first notice of a claim, up to, but not including, when the claim is formally presented to a judge or jury for adjudication. This process is crucial, since most cases in the Housing Court end with a default judgment or a stipulation of settlement, not formal adjudication. The time before adjudication 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 to help them navigate this important and complex process.

Working Group I recognized the need to implement a system to obtain quick access to identified categories of information. It made detailed proposals as to how the Court could assist in securing that information and how it could develop and distribute written materials to assist litigants. Its recommendations encompassed proposals to assist respondents who are in need of a guardian ad litem.

WORKING GROUP II: THE ADJUDICATIVE PROCESS AND THE ROLE OF THE COURT

Approximately 90% of tenants are unrepresented in Housing Court while about 85% of their adversaries have lawyers.¹ Recognizing the problems pro se litigants face, the Court, bar associations, and advocacy groups have helped unrepresented parties to understand their legal rights and negotiate fair settlements of their cases. Such settlements, however, 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 that if they choose to go to trial, the only assistance that the Court can or will provide is to explain the procedures. It cannot help them to establish claims or defenses.

This Working Group's focus was the appropriate role of the Housing Court judge in settlement and litigation. Professor Paris R. Baldacci's article, *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*,² provided a careful and complete analysis of the historical and current issues faced by pro se litigants, followed by proposals for workable reforms. The group considered these suggestions and asked if there were neutral techniques available for courts to provide a fair hearing without compromising impartiality. Should there be judicial intervention to help people understand the legal options of litigating or settling a case? Does intervention significantly and negatively alter the role of the judge as an impartial arbiter of the case?

Working Group II made a series of recommendations including: engage in systematic study of current judicial practices, articulate the best practices for active oversight of cases by judges, provide judicial training and continuing legal education, consider amendments to the Code of Judicial Conduct, provide a better mechanism for explaining Court procedures, insure that the Court reviews all stipulations of settlement and that there is heightened scrutiny of claims where an apartment is surrendered, make specific recommendations for the Court's role at trial, and develop a protocol for court attorneys. The group recommended a pilot study.

¹ Outside of Manhattan, a not insignificant number of landlords are unrepresented.

² 3 CARDOZO PUB. L., POL'Y & ETHICS J. 659 (2006).

WORKING GROUP III: RIGHT TO COUNSEL

The summary proceedings in Housing Court, which move faster than normal civil litigation, involve a complex web of procedural requirements and substantive law. The overwhelming number of pro se litigants in these cases who lose their homes have few, if any, choices. Low-income tenants are displaced into a housing market that has virtually no affordable private options and a dwindling stock of publicly subsidized housing with enormous waiting lists. Eviction continues to be a significant cause of homelessness, with all of its attendant costs shouldered by both homeless people and society. Against this backdrop, New York City's Housing Court is charged with adjudicating landlord-tenant disputes and assuring fundamental fairness and the constitutional guarantee of due process of law.

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. Andrew Scherer's article, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*,³ exploring the rationale for such a right and persuasively arguing for its establishment, provided the factual, historical, and legal context for the group's consideration. The focal points for discussion were whether a right to counsel would reduce homelessness and expenditures on a variety of housing and social service programs.

Working Group III examined the direct and indirect costs of the current system and compared them to the financial burden of establishing a right to counsel in cases where eviction is an option. It found that providing counsel is cost effective—producing a net savings to the City of New York; and it noted that federal and state constitutions supported such a right. The group recommended setting up a system to implement the right to counsel. It agreed that the appropriate mechanism to provide counsel should be developed through involvement of all represented constituencies: the courts, judges, legislative bodies, community and landlord representatives, government agencies, nonprofit legal organizations, bar associations, law schools, and the private bar.

WORKING GROUP IV: LITIGANTS OF DIMINISHED CAPACITY

The business of the residential part of Housing Court is dominated by summary eviction proceedings commenced by landlords alleging that

³ 3 CARDOZO PUB. L., POL'Y & ETHICS J. 699 (2006).

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 thirty 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. These sources include Supplemental Security Income, Social Security Disability, disability pensions, and 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. Jeanette Zelhof, Andrew Goldberg, and Hina Shamsi, in *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*,⁴ provided a significant overview of the law regarding persons with mental illness and the implementation and adequacy of the guardian ad litem provisions. Their exploration of issues and thoughtful recommendations formed the basis for discussion. The group considered the extent to which the Court has evolved to address the needs of these litigants and what happens to tenants who, because of advanced age, mental retardation, brain damage, mental illness, or other medical conditions do not have the capacity to defend their rights in summary proceedings.

The Group recognized that a significant goal was to create adequate information systems for the early identification of persons with diminished capacity. It echoed the need for a right to counsel and stressed the importance of educating court personnel to adequately assist such litigants. This education would encompass substantive and procedural matters as well as training in mental health issues.

Working Group IV recommended: the development of a protocol for judges who handle cases with a diminished-capacity litigant; providing additional onsite social services and related resources; and the strengthening of the successful guardian ad litem project.

⁴ 3 *CARDOZO PUB. L., POL'Y & ETHICS J.* 733 (2006).

WORKING GROUP V: PRESERVING THE HOUSING STOCK:
ARE THERE NEW WAYS TO APPROACH HOUSING ISSUES AND
MEASURE RESULTS?

The Housing Court was created in 1972 as an experimental Court, in part, to preserve the housing stock of the City of New York.⁵ This challenging mandate added to the already difficult task of seeking justice for the parties before the Court.

The Housing Court Act created the Housing Part (commonly called the “HP”) in which, for the first time, tenants, rather than a city agency, could initiate proceedings to address code violations.⁶ Further, the new Court came into existence at the dawn of a new legal doctrine, the implied “warranty of habitability.” The Court was given the power to employ “any program” and join additional parties to a case to prevent decay of the housing stock.⁷

This Working Group assessed how the Court has responded to these challenges and considered what changes might align the workings of the Court with its broad mission. It acknowledged that the Department of Housing Preservation & Development (HPD) could not adequately fulfill its critical role in the preservation of housing stock because the overloaded docket left little time to focus on preservation issues. The group proposed workable solutions for HPD to carry out its special responsibility. Relying upon the thorough, creative proposals set forth in Professor Mary Zulack’s article, *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*,⁸ the Working Group made numerous recommendations for improved data-management, retrieval and information-sharing systems, and the training and education of court personnel.

Working Group V concluded that adopting such recommendations for availability of data could trigger more action to preserve the housing

⁵ See N.Y. CITY CIV. ACT § 110(a) (McKinney’s 2005) (establishing a “part of the court . . . devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards.”). For an explanation of the experimental nature of Housing Court, see Mary Zulack, *The Housing Court Act (1972) and Computer Technology (2005): How the Ambitious Mission of Housing Court to Protect the Housing Stock of New York City May Finally Be Achieved*, 3 CARDOZO PUB. L., POL’Y & ETHICS J. 773 (2006).

⁶ § 110(d) (allowing the court to join any party or city department to effectuate its mandate).

⁷ *Id.*

⁸ 3 CARDOZO PUB. L., POL’Y & ETHICS J. 773 (2006).

stock. However, record sharing presents serious privacy issues in need of further study.

WORKING GROUP VI: SOCIAL SERVICES AND VOLUNTEER PROGRAMS IN THE COURT

Currently, the New York City Housing Court provides space in the courthouse for the Department of Social Services, allowing easy access to those who need their help. Judges refer tenants to the Housing Court liaison's offices. Personnel from these offices often provide the court with information about the tenant to assist in resolution of the case.

Most judges rely upon this system, which has been in place for approximately ten years. The Housing Court also provides resource assistants in the four larger boroughs who make home visits, investigate social issues, and report back to the Court. Additionally, the Court has encouraged volunteer programs for lawyers to serve as guardians or otherwise assist tenants with special needs.

This Working Group analyzed the social service issues in Housing Court, the effectiveness of the current programs in and by the Court, and whether supportive programs should be expanded.

Working Group VI acknowledged that, despite the lack of existing data about who appears in Housing Court, the broadly held view is that the litigants were overwhelmingly poor, the working poor, and non-English speakers. These indigent litigants have need for mental health, substance abuse, and domestic violence services. Even where such services are available, they are not known or accessible to those in need. Significantly, this Working Group focused on diverting cases from Housing Court. It concluded that a large proportion of the cases in Housing Court, which are uncontested rent proceedings, should be managed by a government or nonprofit agency prior to Court intervention. It made specific recommendations to improve the processing of financial assistance by administrative agencies. Such recommendations, which require systemic change, would not only assist the litigants, but reduce the unnecessary burden that these cases place upon the Housing Court.

CONFERENCE FOLLOWUP

All Conference participants acknowledged that implementation of the detailed recommendations from this Conference was the key to improving the Housing Court. NYCLA will establish a task force to foster

implementation of these recommendations and to work cooperatively with court administrators. NYCLA established a similar mechanism after its initial conference on the Criminal Courts.⁹ The Housing Court 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, 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.

⁹ See Martha Rayner, *Special Features: A Conference on New York City's Criminal Courts: Conference Report: New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORD. URBAN L.J. 1023 (2004).

