

From: RTC Coalition

Re: Pursuant to N.Y.C. Admin. Code § 26-1301 (“Right to Counsel Law”), the Housing Courts Must Adjourn All Eviction Proceedings Until Low-Income Tenants Retain Counsel.

Date: December, 2021

MEMORANDUM ON RIGHT TO COUNSEL IMPLEMENTATION

SUMMARY OF ARGUMENT

Evictions are violent and one alone can ruin a family’s future, destroy credit scores, exacerbate mental health issues, and prove fatal in a global pandemic. Presently, New York City Housing Courts are hearing eviction proceedings while COVID-19 and its variants continue to rampage the lives of our neighbors.

In response to COVID-19, the tenant movement fought for and won an accelerated implementation of New York City Administrative Code § 26-1301 (“Right to Counsel Law”), which guarantees all income eligible tenants the Right to Counsel when facing an eviction. This Law was originally scheduled to be fully implemented by July 2022. With the passage of Local Law 54, the Right to Counsel Law is in full effect as of June 1, 2021.

In addition, OCJ responded to COVID-19 by administratively expanding how Right to Counsel was implemented, recognizing that it would be unconscionable during a global pandemic to move some cases forward without an attorney. The city effectively lifted the income restrictions of Right to Counsel by granting a blanket income waiver to all cases allowing legal services providers to represent tenants regardless of income.

This model can and must continue. With the eviction protections set to expire on January 15, 2022, the federal funds for rent relief fully exhausted, and more than 225,000 cases filed since the pandemic began, we must ensure that Right to Counsel does not exist in name only. We cannot return to pre-pandemic norms of high court volume given all that’s at stake. COVID-19 continues to complicate the implementation of the right to counsel—the economic devastation of the pandemic will likely lead to a massive escalation in eviction cases, raising the possibility that existing right to counsel staffing will be insufficient to meet the legal need coming down the pike. This situation is not inevitable; in fact, courts can exercise discretion and utilize adjournments to alter case timelines. This additional time would allow tenants to connect with and properly work alongside their appointed counsel and would ensure that the volume of cases assigned to right to counsel providers keeps pace with their staff capacity.

The Office of Civil Justice (“OCJ”) works in partnership with many service providers to prevent eviction and maintain stable housing for all New Yorkers, and is aware of the many obstacles present in the current climate and the inability for providers to supply the number of attorneys required for all tenants to access their right to an attorney. As such, we call upon OCJ to work with the Office of Court Administration (OCA) to ensure that eviction case dockets are managed in whatever way is required to ensure that tenants can meaningfully access their right to counsel. This document outlines the power inherent with all judges to adjourn housing court

proceedings and calls on OCJ to utilize its powers to ensure right to counsel access for New York City tenants facing eviction.

I. The Creation of the Office of Civil Justice and Expansion of the Right to Counsel.

New York City's Office of Civil Justice ("OCJ") was created in 2015 after the passage of City Council Intro. 736-A. Among other things, OCJ is tasked with advising our mayor on various services among agencies, budget requests, and recommendations. As its central purpose, OCJ is tasked with partnering with civil legal service providers citywide to identify populations with the most unmet needs and connect them with adequate services. For many tenants in New York City, one of the greatest unmet needs was lack of counsel in Housing Court proceedings.

For decades, tenant leaders, tenant organizers and housing court practitioners drew attention to the affordable housing crisis in New York City and pushed for a universal right to access to counsel in eviction cases to slow down the rapid decline of affordable and safe homes for low income New Yorkers.¹ Three decades ago, in its report to the Chief Judge of the State of New York, the Committee to Improve the Availability of Legal Services wrote:

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.²

New York City celebrated its victory in 2017 as the first city in the country to pass a law creating a right to counsel for low income tenants facing eviction;³ and since its passage the housing courts have broadly construed this right to counsel.⁴ Housing court judges routinely recognize the importance of counsel for tenants and are known to vacate default judgments and stipulations entered against *pro se* litigants unaware of their rights, meritorious defenses, and

¹ Marika Dias & Ed Josephson, *New York City's Ever Worsening Housing Crisis and the Promise of Universal Access to Counsel*, Management Information Exchange Journal (Fall 2017).

² Committee to Improve the Availability of Legal Services, *Final Report to the Chief Judge of the State of New York*, 19 HOFSTRA L. REV. 755, 775 (1990).

³ NYC Administrative Code Section 26-1301.

⁴ See *Diego Beekman Mut. Hous. Assoc. Hous. Dev. Fund Corp. v. McClain*, 2019 NY Slip Op 50580(U), 63 Misc. 3d 1218(A), 114 N.Y.S.3d 815 (Civ. Ct. Bx. Cty. 2019) (housing court has "a strong policy of providing attorneys to respondents in housing court"); see also, *2247 Webster Ave. HDFC v. Galarce*, 2019 NY Slip Op 29007, 62 Misc. 3d 1036, 1044-45, 90 N.Y.S.3d 872, 878 (Civ. Ct. Bx. Cty. 2019) (court vacates a stipulation entered into *pro se* because vacatur supports the integrity and balance that the Office of Civil Justice is charged by law with bringing to litigation in housing court).

counterclaims.⁵ In fact, housing court judges have routinely held that Local Law 136 grants tenants “the full benefit of counsel” and such right is not an “empty right” in name-only.⁶

As of June 1, 2021, City Council Intro. 2050 brought forward the full implementation of the right to counsel for tenants in eviction cases; and, thus, it is imperative that housing court judges fully exercise their discretion to adjourn cases to allow civil legal service providers via OCJ to create capacity to properly defend the many tenants in need. Unless and until a tenant has an opportunity to meaningfully meet with an attorney to fully investigate their case, prepare an adequate defense, and/or assess eligibility for other forms of assistance, the housing instability exacerbated by the COVID-19 pandemic will continue to fall upon those most vulnerable.

II. Housing Court Judges Possess Power to Adjourn Cases for Any Reason, At Any Time, for Any Length of Time.

Prior to passage of the Housing Stability and Tenant Protection Act of 2019⁷ (“HSTPA”), there was a burden placed on tenants seeking a second and subsequent adjournments that greatly disadvantaged unrepresented and represented tenants alike. Recognizing the unique importance of counsel for tenants in an eviction proceeding, the 2019 amendment to RPAPL § 745 removed timing restrictions and fees from “an adjournment requested by a respondent unrepresented by counsel for the purposes of securing counsel[.]”⁸

Housing Court judges have the discretion to adjourn: cases at any time, for any length of time, and for nearly any reason. There is one exception: when a tenant files an answer, an adjournment of at least 14 days is mandated by statute regardless of the requesting party; however, each following adjournment request is within the sole discretion of the presiding housing court judge.⁹ This discretion should be exercised to ensure that cases do not proceed until the tenant has access to counsel who has current and meaningful capacity to take on the tenant’s case.

Where a case is permitted to move forward without meaningful access to counsel for the tenant, the case often results in a judgment or stipulation prior to a hearing on the merits and without the tenant asserting meritorious defenses. When a tenant subsequently retains an attorney, the attorney then seeks to have the judgment and/or stipulation vacated which returns the proceeding to its starting place. Thus, if the judge were to exercise this discretion to adjourn

⁵ *McClain*, 63 Misc. 3d 1218(A), 114 N.Y.S.3d 815.

⁶ *3225 Holdings LLC v. Imeraj*, 2019 NY Slip Op 51763(U), ¶ 2 n.5, 5 Misc. 3d 1219(A), 119 N.Y.S.3d 392 (Civ. Ct.); *Ollie Assocs. LLC v. Santos*, 2019 NY Slip Op 51085(U), ¶ 3 n.10 (Civ. Ct. Bx. Cty. 2019).

⁷ Laws of 2019, Chapter 36.

⁸ *Id.*, Part M, § 17.

⁹ Real Property Actions and Proceedings Law (“RPAPL”) § 745(1).

cases until meaningful access to counsel is possible, it will undoubtedly prevent the need for extended motion practice at a later date.

Furthermore, adjournments to secure counsel with capacity to take on a tenant's case, are essential to ensure due process for each tenant. The right to counsel for those unable to afford an attorney on their own is recognized in many civil proceedings, particularly those that have especially grave consequences. For example, indigent parents are provided a court-appointed attorney in parental proceedings in Family Court and indigent elders are provided counsel when asked to involuntarily transfer nursing homes.¹⁰ Courts have reasoned that where an erroneous determination could have a substantial or life threatening impact on one's life, that person should not face the proceeding alone. In fact, some courts believe that their ability to properly function is obstructed where an attorney is not provided to a vulnerable person.¹¹ These civil courts routinely adjourn cases so that a person may retain and meaningfully engage with appointed counsel.

Similarly, Criminal Courts value the importance of effective assistance of counsel in criminal proceedings where a person's liberty is at stake. In New York, the right to counsel is grounded on State constitutional and statutory guarantees of the privilege against self-incrimination, the right to the assistance of counsel, and due process of law; it extends well beyond the right to counsel afforded by the Sixth Amendment of the United States Constitution and other State Constitutions.¹² In fact, New York criminal courts find the need for counsel so essential that it is a right provided to a defendant at every stage of the case and will often adjourn for the purpose of obtaining and/or meeting with counsel to adequately prepare a defense.¹³

Now that Local Law 136 is fully implemented, guaranteeing an attorney to all eligible tenants in Housing Court, tenants have due process rights to obtain an attorney before their case proceeds. The Court must prohibit eviction cases from moving forward where an eligible tenant has not yet been referred to a legal services office that has capacity to represent the tenant. Requiring a tenant to face eviction before they have secured a free attorney deprives them of fundamental due process under the New York State Constitution and United States Constitution. Tenants' right to counsel can only be meaningfully exercised, and the tenants' due process rights protected, if the Court adjourns a summary eviction proceeding until the tenant can retain a

¹⁰ *Trent v. Loru*, 57 Misc. 2d 382, 292 N.Y.S.2d 524 (Fam. Ct. Bx. Cty. 1968); *In re St. Luke's-Roosevelt Hosp. Ctr.*, 159 Misc. 2d 932, 607 N.Y.S.2d 574 (Sup. Ct. N.Y. Cty. 1993).

¹¹ *N.Y. County Lawyers' Ass'n v. State*, 196 Misc. 2d 761, 763 N.Y.S.2d 397 (Sup. Ct. N.Y. Cty. 2003).

¹² *People v. O'Neil*, 43 Misc.3d 693, 986 N.Y.S.2d 302 (Dist. Ct. Nassau Cty. 2014).

¹³ Criminal Procedure Law § 210.15.

qualified attorney with capacity to undertake representation in their case. Where a tenant's case proceeds before that can happen, due process has not been afforded.¹⁴

As such, Housing Court judges must utilize their inherent power to adjourn cases for as long as is necessary so that tenants may avail themselves of effective assistance of counsel.

III. The Confusion Caused by COVID-19 in Eviction Proceedings and its Impact on Tenants, Has Made Meaningful Access to Counsel Essential.

Even before the COVID-19 pandemic, the complexities of New York's landlord-tenant law put unrepresented tenants at a tremendous disadvantage compared to landlords, who are almost always represented by counsel. The various statutory and regulatory schemes affecting New York's housing stock have been referred to as an "impenetrable thicket" confusing to lawyers and lay people alike.¹⁵ Navigating housing court can be intimidating and dehumanizing for tenants to do alone.¹⁶

COVID-19 has only exacerbated these issues. A rapidly changing patchwork of Federal and State statutes, orders, and directives have been issued to deal with the pandemic.¹⁷ In particular, recently enacted State laws have created new rights and defenses for tenants in housing court. These laws disrupt pre-pandemic assumptions for how cases may progress through housing court and the terms on which cases may be fairly settled. For example, the Tenant Safe Harbor Act ("TSHA") provides New York tenants a defense from an eviction if rent

¹⁴ *People v. Grice*, 100 N.Y.2d 318, 320-21, 763 N.Y.S.2d 227, 229 (2003) (discussing the "indelible right to counsel" in criminal cases that "guarantees due process of law" attaches as soon as an accusatory instrument is filed or when an individual requests an attorney, which prohibits further proceedings against a defendant, including interrogations without the presence of counsel); *N.Y. County Lawyers' Ass'n v. State*, 196 Misc. 2d at 779, 763 N.Y.S.2d at 410-11 (observing that criminal defendants and family court litigants are entitled to "meaningful and effective legal representation at every critical stage of a proceeding").

¹⁵ *89 Christopher, Inc. v. Joy*, 35 N.Y.2d 213, 220, 360 N.Y.S.2d 612, 618 (1974).

¹⁶ N.R. Kleinfield, *Where Brooklyn Tenants Plead the Case for Keeping Their Homes*, N.Y. Times (May 20, 2018), <https://nyti.ms/2TUeCUm> (detailing complexity of housing court proceedings and poor outcomes for unrepresented tenants).

¹⁷ See, e.g., Tenant Safe Harbor Act ("TSHA"), Law of 2020, Chapter 227 (providing a defense from eviction for arrears accrued during the COVID-19 emergency period); COVID-19 Emergency Eviction and Foreclosure Prevention Act ("CEEFP"), Laws of 2020, Chapter 381, amended by Laws of 2021, Chapter 104 (staying most housing court proceedings through August 31, 2021); *Chrysaful v. Marks*, 594 U.S. ____ (2021) (enjoining CEEFP as it pertains to housing court proceedings); Laws of 2021, Chapter 417 (staying most eviction proceedings through January 15, 2021) Administrative Order ("AO") 245/21; Civil Court Directive and Procedure ("DRP") 217; Centers for Disease Control and Prevention, *Temporary Halt in Residential Evictions in Communities with Substantial or High Levels of Community Transmission of COVID-19 to Prevent the Further Spread of COVID-19* (Aug. 3, 2021).

arrears accrued due to a financial hardship during the COVID-19 emergency.¹⁸ Qualifying tenants would be unwise to settle an eviction case by consenting to a judgment of possession in exchange for time to pay their arrears—as was common before the pandemic—since this is a relief landlords may not be entitled to even after a trial.

Additionally, at the time of writing this memorandum, many tenants and landlords await the issuance of funds from the Office of Temporary and Disability Assistance (“OTDA”) Emergency Rental Assistance Program (“ERAP”) which will provide over \$2.4 billion in rent relief for arrears accrued by qualifying tenants.¹⁹ The program will cover up to 15 months of arrears and a landlords’ receipt of funds from ERAP means that it cannot increase the rent or evict a tenant for expiration of a lease for a period of one year.²⁰ Landlords who refuse to accept ERAP funds within twelve months of a provisional approval by OTDA are deemed to have waived their right to a judgment for the nonpayment of rent.²¹

Tenants are likely to continue to need the assistance of counsel in receiving assistance from ERAP, including appealing any erroneous denials from the program, and in enforcing landlord’s compliance with the terms of the program. Tenants also require legal support in defending challenges to hardship declarations filed in order to stay pending eviction cases.²² Tenants will also need legal assistance in mounting defenses under TSHA for arrears that may not be covered by ERAP. Given the substantive and procedural changes effected by legislative and administrative response to the pandemic, tenants’ housing court cases should be adjourned until tenants are able to retain counsel to successfully access these programs. Court staff cannot assist unrepresented tenants in negotiating just settlements and judges cannot approve such settlements using pre-pandemic norms. Only counsel for tenants can effectively investigate tenant defenses under the new statutory schemes and ensure tenants are not waiving the protections afforded them by the New York State Legislature.

The eviction crisis which now threatens to make tens of thousands of New Yorkers homeless as a result of the pandemic does not exist in a vacuum. Even prior to the COVID pandemic, in 2018, tenants of over 18,000 apartments were evicted, and in 2019 the figure was near 6,000.²³ Tenants facing eviction risk more than their homes—their health, and their loved ones’ health, are on the line. Research already demonstrates the stark consequences of eviction on health outcomes and during a pandemic evictions can be deadly.²⁴ Lawmakers enacted Right to Counsel to grapple with a pre-pandemic eviction crisis. Those issues have only grown because

¹⁸ TSHA, Laws of 2020, Chapter 227.

¹⁹ Laws of 2021, Chapter 56, Part BB, Subpart A.

²⁰ *Id.*, § 9(2)(D).

²¹ *Id.*, § 9(2)(C).

²² Laws of 2021, Chapter 417, Part C, Subpart A, § 10.

²³ New York City Council, *Evictions*, <https://council.nyc.gov/data/evictions/> (last visited Aug. 17, 2021) (residential eviction data tool).

²⁴ See Matthew Desmond, M. & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 Soc. Forces 295–324 (2015) (detailing the physical and mental health consequences of eviction).

of COVID-19, as demonstrated by the multiple laws and regulations passed to protect renters. Fidelity in implementing the Right to Counsel law's purpose means capitalizing on its existence to cope with emergency conditions. We must do better.

IV. The Office of Civil Justice is an Important Leader in Protecting Tenants from Eviction And Should Take All Possible Steps to Ensure Court Dockets Match Legal Provider Capacity.

The Right to Counsel Law creates a statutory right to counsel for low-income tenants at-risk of eviction; a law OCJ is tasked with implementing in accordance with the legislative intent and statute's purpose of preventing unnecessary evictions where tenants were unaware of their rights and inadvisably entered into impossible agreements with their landlord's lawyers. The power imbalance felt in housing courts throughout New York City persists in remote appearances and magnified by the ongoing COVID-19 global health pandemic.

OCJ can take affirmative steps now to meet its responsibility to ensure universal access to counsel for all eligible tenants; a program OCJ is tasked with implementing by law.²⁵ One such step well within reach is for OCJ to work with the courts to maintain a court calendar that adequately reflects legal service provider capacity so that all representation and access to counsel may be meaningful.

It is well known and accepted that criminal public defenders carry extraordinarily high caseloads often riddled with pitfalls that ultimately land on indigent clients and commonly lead to burnout and a departure by advocates from the practice.²⁶ Through no fault of the defendant, it is incredibly difficult to establish ineffective assistance of counsel and litigants bear the heavy burden to mount these claims on appeal.²⁷ The same is true for civil right to counsel cases where

²⁵ NYC Admin. Code § 26-1301.

²⁶ See, e.g., Chris Gelardi, *New York City Public Defenders Oppose Resuming In-Person Court Appearances*, The Appeal (July 23, 2020), <https://theappeal.org/new-york-city-public-defenders-courts-in-person-hearings/> (discussing the swollen backlog of criminal cases in NYC since the pandemic); see also, Debra Cassens Weiss, *This Public Defender Was Juggling 195 Felony Cases at Once*, Am. B Ass'n. J. (Feb. 1, 2019, 2:45 PM), <https://www.abajournal.com/news/article/this-public-defender-was-juggling-195-felony-cases-at-once-the-workload-can-be-overwhelming>; see also, Toni Messina, *Vicarious Post-Traumatic Stress—Or Why There's Such A High Rate of Burnout Among Criminal Defense Attorneys*, Above the L. (Nov. 5, 2019, 12:12 PM), <https://abovethelaw.com/2019/11/vicarious-post-traumatic-stress-or-why-theres-such-a-high-rate-of-burnout-among-criminal-defense-attorneys/>.

²⁷ See Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals*, Innocence Project (Sept. 2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf.

an “effective” assistance of counsel is defined as a meeting—however short—prior to termination.²⁸

Where caseloads are high, appointed counsel becomes “functionally walking violations of the Sixth Amendment” and nearly equivalent to “no counsel at all.”²⁹ Presently, legal service providers throughout the City are engaged in hiring the next class of right to counsel attorneys while their current employees continue to work from home. These challenges to offering effective assistance of counsel are particularly felt where attorneys and clients cannot meet safely in real time nor can they meet for any real duration of time with the proper resources to fully investigate and prepare a defense to an eviction proceeding.

OCJ is in the unique position to prevent the same fate for the right to counsel attorneys in New York City as that felt by many criminal public defenders. In fact, as the agency mandated to implement NYC's Right to Counsel Law, OCJ should ensure that the assignment of counsel to tenants facing eviction is a timely and substantively helpful intervention to ensure that each tenant is best able to defend their home. As such, OCJ should closely monitor the court calendars on a weekly basis and ensure that the volume of cases being allocated to legal services providers matches the weekly staff capacity available for right to counsel. Where the volume of right to counsel cases flowing through the court system exceeds the week-to-week capacity of legal services organizations, OCJ needs to intervene to ensure that the court adjusts the flow of cases to match the actual capacity of the legal services providers. Obviously, this will require cooperation from the OCA who should prioritize ensuring due process for litigants, when determining the volume of cases on court dockets. We are aware that OCJ currently does coordinate with OCA around the extent to which court operations enable right to counsel. Given the dire circumstances due to the pandemic and the prospect of a significant escalation in the number of eviction cases, OCJ should amplify its advocacy around these issues with OCA and also the frequency of its coordination. The current moment calls on OCJ to play a more hands-on role in ensuring that the right to counsel is provided to all eligible tenants by legal organizations that are not overwhelmed and can provide the highest quality representation to every tenant facing the loss of their home.

CONCLUSION

Our City is far from free of COVID-19 and its variants; and their impact on the lives of our neighbors cannot go unnoticed. As a true partner in the implementation of the City's right to counsel program, now fully in effect due to Local Law 54, OCJ has a moral and legal responsibility to guarantee each tenant the best opportunity to stay housed. “[C]ourts can do little to improve the New York housing market or public assistance programs, but they can

²⁸ See *State v. Miller*, 76 A.3d 1250, 1254 (N.J. 2013).

²⁹ Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 40 Clearinghouse Rev. J. Poverty L. & Pol'y 271, 274 (2006).

demonstrate their commitment and obligation to preserve due process of law by providing counsel for tenants facing eviction.”³⁰ As such, OCA judges should exercise discretion to adjourn cases in order to ensure due process, including meaningful access to the right to counsel. And OCJ must also do its part. Given the economic devastation caused by the COVID-19 pandemic, now more than ever before, OCJ should honor its commitment to preserve the rights of NYC tenants through robust and meaningful implementation of the right to counsel initiative.

³⁰ Karas, 24 Colum. J. L. & Soc. Probs. at 543