

2018

The Right to Counsel for Tenants Who Faced Eviction

Andrew Scherer
New York Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_other_pubs



Part of the [Housing Law Commons](#)

Recommended Citation

Scherer, Andrew, "The Right to Counsel for Tenants Who Faced Eviction" (2018). *Other Publications*. 341.
https://digitalcommons.nyls.edu/fac_other_pubs/341

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.

The Right To Counsel For Tenants Who Face Eviction

CityLaw • Andrew Scherer

02/20/2018 • [Leave a Comment](#)



Photo Credit: Jeff Hopkins.

On August 11, 2017, New York City Mayor Bill de Blasio signed legislation, the first of its kind in the nation, which guarantees legal representation for low-income tenants who face eviction. The new law has two major innovations with respect to eviction petitions brought in Housing Court.

First, the new law guarantees legal representation in [Housing Court](#) for qualified low-income tenants who face eviction proceedings. The lawyers will be provided by nonprofit legal organizations with funding from the City.

Secondly, the new law guarantees individual consultations with lawyers for *all* tenants who face eviction in Housing Court, not just qualified low-income tenants.

Housing Court, while it may appear to be a somewhat casual environment, is a formal, limited jurisdiction court. Housing Court has an extensive and complex set of procedures that govern how the cases proceed, and applies laws that regulate many aspects of the landlord-tenant relationship, including housing standards, rent levels, government subsidies and the grounds on which landlords can legally evict.

Almost every landlord who brings an eviction proceeding in Housing Court hires a lawyer. Yet, until recently, well over ninety percent of tenants have appeared in Housing Court without counsel. Private lawyers are expensive and free legal assistance programs have had limited capacity to take cases. This disadvantage in court has consequences. Tenants lose their cases or agree to disadvantageous settlements. They are evicted or they give up and move out. And because New York City rents keep going higher and higher, it is close to impossible for tenants who lose their homes to find affordable places to live, so they often rent places beyond their means, double up with family or friends, or are forced into homeless shelters or onto the streets.

Citywide there are over 250,000 eviction proceedings on the docket of the Housing Courts each year. It is estimated that 82 percent of the tenants facing eviction in Housing Court are eligible under the guidelines for full representation under the new law. If the number of eviction cases brought by landlords stays the same, by the time the new law is fully funded tenants in over 200,000 cases each year will be provided representation.

How the New Law Works

The right to counsel law, Local Law 136 of 2017, amended the New York City Administrative Code. Admin. Code § 26-1301 et seq. The law requires New York City to build up the capacity of the City's nonprofit legal services organizations over a period of five years so that by July 31, 2022 the organizations will be able to provide attorney representation for every low-income household in New York City that is sued in Housing Court for eviction. The law's definition of low-income includes households with incomes at or below 200% of the federal poverty guidelines. This means that a family of four with income below \$49,200 a year, for example, will be provided free legal representation if their landlord sues them for eviction in Housing Court.

ELIGIBILITY LEVELS FOR 2017: At or below 200% of the 2017 Federal Poverty Guidelines

Persons in family/household	Poverty guideline
1	\$24,120
2	32,480
3	40,840
4	49,200
5	57,560
6	65,920
7	74,280
8	82,640

*For families/households with more than 8 persons, add \$4,180 for each additional person.

Starting in the fall of 2017, the City began guaranteeing legal assistance to eligible tenants in specific zip codes in each borough. The City will continue to expand the program geographically during the five years leading up to full implementation of the law. The City has also committed to expanding the guarantee of legal assistance to people who are elderly and disabled in the early phases of implementation; however, as of publication there was no plan in place to serve those vulnerable populations.

The legislation also commits New York City to ensuring that all tenants who face eviction proceedings in court, regardless of household income, receive access to what the law calls “brief legal assistance.” Like actual representation, this brief legal assistance, which is an individual consultation with an attorney, is supposed to be provided no later than the first scheduled appearance in Housing Court, or as soon after that as possible. New York City’s nonprofit legal services providers are being asked to contract with the City to provide these consultations to over-income individuals, as well as to provide the full representation to eligible low-income individuals. Like full representation, this service will be provided regardless of immigration status.

Nonprofit organizations, to qualify for a contract with the City to provide services under the statute, must show that they have the “capacity to provide legal services.” The City Office of Civil Justice, an office created by the City Council under a 2015 City Charter Amendment, oversees the program. The Civil Justice Coordinator, who is housed in the Human Resources Administration, will select the qualified organizations, known as “designated organizations” under the statute. While the legislation does not specify how providers can show the required capacity to provide legal services, it is safe to assume that experience and expertise in tenant representation, an adequate system of supervision and training, accessibility to tenants in low-income communities, an awareness and sensitivity to the needs of vulnerable clients who are elderly, disabled or have limited English capacity, and a well-managed organization would all, at minimum, be requirements. On the other side of the equation, the contracts will need to provide adequate compensation to the legal services providers so that they will be able to provide the highest quality assistance to clients and will not be saddled with unmanageable caseloads, inadequate space, or lack of supervision, training, clerical resources or the like.

The Council and Mayor’s legal staff inserted language in the legislation that provides for the possibility that the City’s commitment to guarantee counsel can be limited or withdrawn. Implementation of the program to “ensure” universal access to counsel is, in the language of the statute, “subject to appropriation.” However, in spite of this clause, all indications are that the current mayoral administration and the New York City Council are fully committed to implementing the legislation’s requirements.

Mayor Bill de Blasio will be in office until 2022, and the phase-in period set forth in the legislation is intended to be completed by that same year. As the program takes root throughout the City, having counsel in eviction cases will be seen by low-income tenants as a right and providing counsel for low-income tenants facing eviction should become a generally accepted governmental function and be able to compete for public money even in lean times.

Implementation

The legal assistance will initially be provided by existing nonprofit legal services organizations including [Legal Services NYC](#), the [NYC Legal Aid Society](#), the members of a coalition of smaller legal services organizations known as LEAP, as well as other civil legal services providers. The organizations under contract with the City will be expected to hire hundreds of new staff attorneys, as well as supervisors and other personnel to implement the statute.

When fully implemented in 2022, the City projects that it will be spending \$155 million a year on the program. To put this in perspective, that sum is almost half the size of the current annual budget of the federal Legal Services Corporation for all sorts of civil legal services in all of the 50 states. The expense to the City, however, will be offset by substantial savings for the City on shelter and other services to homeless New Yorkers. Estimates of potential savings to the City have been as high as \$320 million.

Making sure that tenants are aware of this new right and able to take advantage of it will also be a major undertaking. The City’s plan for providing tenant access to services will evolve over time, but initially at least, eligible tenants who are sued for eviction, and who live in the geographic areas where the program will be started, will be able to go to legal service organizations that serve their community when they first receive an eviction petition and before they go to court. They will also be able to access assistance in court. If they go to court without an attorney and are eligible for services, the court clerk should refer them to one of the legal services programs that will be stationed in the courthouse to assist. The City’s 311 telephone information system will direct eligible tenants to services as well. And, eventually, the availability of legal assistance will be publicized by the City on public transportation and through other means.

Tenants’ rights organizations and community organizations will also play an important role in spreading the news about the availability of this new right as the law gets implemented. Because they work with, are often situated in, and are trusted by the communities that will benefit from the new law, these organizations will be able to reach out to community residents and help them take advantage of this new right. They will also be able to help change the power relationships between landlords and tenants outside of court. Tenants, knowing that an attorney will be available if they end up in court, will more likely raise their voices against uninhabitable housing conditions, illegal rent increases, and harassment of all sorts.

Law schools will also need to do their part. They will be called upon to train a new generation of lawyers to take on these jobs and do the work of representing tenants zealously and effectively. The victory in securing representation for all low-income tenants can have enormous, transformative impact, but only if the attorneys who provide the services and implement the law have the skills and the passion to work with and for tenants and community organizations that are fighting to save their homes and preserve their communities, and to change the laws, policies and practices that lead to eviction and displacement.

Why a “right” is so important

A huge expansion of funding for legal assistance to people facing eviction preceded passage of the right to counsel law. This was enormously helpful because it significantly increased the representation of tenants in eviction cases. This funding provided

an important benefit, but was not accompanied by a legal commitment to ensure counsel for all low-income tenants. The benefit could easily be denied or terminated at will and with impunity. It was not enough to increase funding; it was necessary to pass a law and make access to counsel a *right*. A *right* protects right-holders against government error and unfairness and advances the rule of law. A *right* protects right-holders' well-being, security and stability. A *right* reinforces right-holders' dignity and respect. A *right* fosters equality. And perhaps most importantly, a *right* fundamentally shifts power to the right-holder.

The right to counsel is a "civil right" in the sense that it is a right that pertains to an aspect of our justice system that is understood to be "civil" as opposed to "criminal." It is also a "civil right" in the sense that it is a right deeply connected to the movement for civil rights, equality and human dignity. A right not to be deprived of a meaningful opportunity to defend one's home in the courts because of one's poverty fosters equality. And, in protecting the ability to have a home, the right to counsel in eviction cases protects the ability to exercise many other of the important civil rights, such as the right to vote and the right to equal opportunity in work and education.

When tenants appear in court without counsel, they generally do not have the capacity to convey sufficient and relevant information in an acceptable form to enable the court to make a fair decision on the law and the facts. Thus, the right to counsel is a right that checks the power of government by assuring that government has relevant and sufficient information on which to make a decision. Rights therefore cause government to act in a manner that is more deliberative, less arbitrary, more thoughtful, and more likely to achieve a just result. In so doing, rights foster the rule of law.

Due to their common nature and reordering of power relations, rights also affect others as well as those who benefit directly from the right. This disruption of the status of things will certainly be true with the introduction of the right to counsel in eviction proceedings. In Housing Court, there are many regular players who interact on a daily basis in a relatively closed environment – judges, court officers, clerks, housing agency and other city and state government representatives, landlords, landlord's lawyers, unrepresented tenants and tenant lawyers. This environment is not only closed, it is relatively static, with patterns of behavior and mutual understandings that have evolved over decades. The ecology of this environment will be greatly disrupted with the introduction of a right to counsel and a cadre of tenant lawyers who will be there to implement the right. This disruption will inevitably lead to changed expectations and understandings.

The right to counsel in eviction cases will make an important contribution to the well-being and sense of security and stability of low-income tenants in New York City. Professor [Matthew Desmond](#) of Harvard University in his recent book, [Evicted: Poverty, and Profit in the American City](#), described in great detail the impact eviction had on low-income households in Milwaukee – homeless shelters and the streets, dilapidated housing and dangerous neighborhoods, depression and illness, and long term developmental consequences for traumatized children. While the right to counsel will not extinguish evictions, it will reduce them significantly and create a buffer of protection for tenants between having and not having a home. For low-income people, the awareness of that protection will no doubt be a relief and foster their sense of security, stability and well-being.

What can we expect going forward?

While there are many reasons for eviction and the right to counsel will not stop all evictions, we know that evictions will decrease. A 2016 report by the City Civil Justice Coordinator's office found that with the pre-statute buildup of City funding for tenant representation, 27 percent of the tenants in Housing Court were already being represented, as opposed to a mere one percent a few years prior. This same report found that increased representation had already reduced evictions by 24 percent.

And, as Professor Desmond's research demonstrated, by helping keep people in their homes and avoiding the trauma of eviction, the new program of universal representation will help stabilize families, keep children in school, avoid job loss and help stem the growing tide of homelessness.

We can also assume that, with greater representation of tenants, there will be more opportunities for judges to engage in the traditional judge's role of applying and interpreting the law, rather than presiding over lopsided negotiations. This will, in turn, result in developments in the body of the law that applies to landlord tenant relations and to the eviction process. We can speculate that as people begin to view the Housing Court as a more balanced forum that dispenses justice rather than a forum that issues and enforces judgments based on one-sided negotiations, landlords will bring fewer frivolous proceedings, there will be less need to bring emergency "orders to show cause" to stay imminent evictions, fewer settlements will need to be reopened, and fewer cases will return to court presenting repeating issues.

New York City's right to counsel for low-income tenants in eviction proceedings is a breakthrough in access to justice that is likely to have a profound and lasting effect.

Andrew Scherer (ascherer@nyls.edu; 212-431-2144) is the Policy Director of the Impact Center for Public Interest Law at New York Law School, a Distinguished Adjunct Professor at the law school and the Director of the Impact Center's Right to Counsel Project. He is also the author of [Residential Landlord-Tenant Law in New York](#).