



COVID-19 RENT STRIKE LEGAL SUPPORT GUIDE



TABLE OF CONTENTS

Table of Contents	1
Scope of Legal Services for COVID-19 Rent Strike Support	2
Overarching Principles in Working with Organizers and as Part of a Movement	6
Important Ethical Considerations	10
Communications with Organizers, Tenants and Others Involved in the COVID-19 Rent Strike	15
Decision-Making Principles in a Tenant Association Context	17
Rent Strike Non-Pay Litigation Strategies	23
Media Strategies	31
Rent Strike Escrow Accounts	33
Do's and Don'ts for Attorneys Doing Rent Strikes.....	39
Acknowledgements	40

SCOPE OF LEGAL SERVICES FOR COVID-19 RENT STRIKE SUPPORT

The Right to Counsel Coalition and the Housing Justice For All Coalition have proposed a campaign of building-wide rent strikes to advance their demand that Governor Andrew Cuomo issue a sweeping order cancelling rents for tenants statewide.

The work of an attorney or law office representing a tenant association or group of tenants participating in this rent strike campaign fall into the following categories:

- **Initial Legal Advice & Litigation Preparation**
- **Campaign/Media Support**
- **Legal Representation of Nonpayment Proceedings**
- **Legal Support for Direct Action**
- **Other Potential Needs**

Some of this work could be done collaboratively across participating legal organizations (e.g., legal research), while other pieces of it falls within the responsibilities of particular law offices to their direct tenant association clients.

This scope does not address the services which might be provided to tenant associations on rent strike outside of the 10-15 coordinated strikes initiated and supported by RTC/HJ4A coalition members, or legal support for the legislative campaign more broadly.

INITIAL LEGAL ADVICE & LITIGATION PREPARATION

Timeline: April 2020 - July 2020

1. Provide legal advice to potential rent strike participants in coordination with the tenant organizers and tenant leaders.
 - a. Initially, this advice will be provided broadly to groups of potential participants at tenant association meetings.
 - b. Follow-up consultations can be scheduled to provide specific advice to potential participants with unusual situations.
 - c. Advice should include: explanation of the rent strike process and how it relates to the campaign goals; discussion of the risks associated with rent strikes and nonpayment proceedings; discussion regarding the need for a clear agreement between rent strike participants about collective goals, decision making procedures, and any necessary conflict waivers; and explanation of best practices for participants in any correspondence with the landlord and in collecting/retaining documents with evidentiary value.

2. Work with rent strike participants and the organizers to coordinate any pre-litigation actions. This could include:
 - a. Drafting or reviewing any correspondence to the landlord regarding the rent strike.
 - b. Working with participants to help draft internal agreements regarding group decision-making process.
 - c. Supporting efforts to open and manage a rent strike account, if any.
 - d. Working with participants to collect/retain any documents potentially relevant to nonpayment litigation, including proof of loss of income.
 - e. Helping tenants assess their own and each others' potential vulnerability to landlord retaliation.

3. Conduct factual and legal research in preparation for claims to be raised in defense of nonpayment proceedings.

4. Collect information and complete tasks as necessary for the administrative needs of the legal organization of the lawyer, such as completing intake forms.
5. Communicate regularly and intentionally with the organizer and tenant leaders throughout the campaign.

CAMPAIGN/MEDIA SUPPORT

Timeline: April 2020 - Unknown

1. Assist in any necessary legal research supporting advocacy for or defense of the campaign's goals.
2. Understanding that much of the value of the rent strike tactic here comes from visibility, organizers will likely actively cultivate media attention to rent strikes and will need attorney cooperation/coordination.
3. Helping tenants assert their rights to organize under Real Property Law § 230, by responding to and, where possible, deterring or neutralizing retaliatory actions and threats by landlords, including harassment, cease and desist letters, and misinformation.
4. Supporting the media engagement and messaging activities of the tenants and tenant organizers by:
 - a. Where an attorney's office has media/PR resources, work with the tenant association to develop print/digital/etc. stories that give voice to the tenants' concerns.
 - b. While attorneys should make themselves available to inform the legal understanding of these pieces, the tenants themselves should always be centered. This is a tenant-led effort.
 - c. Reviewing public statements and advising tenant leaders and organizers to mitigate the risk of retaliatory [SLAPP](#) (Strategic Lawsuits Against Public Participation) actions by landlords. Lawyers should not

- be dictating the content of statements, but should help tenants identify potential SLAPP risks and how to avoid them.
- d. To the extent possible, the demands articulated by the tenant association should be aligned with those of the campaign more broadly. Additionally, the attorney must be cautious of any legal/evidentiary risks associated with tenants' comments, and make sure to advise them of these risks beforehand.
 - e. Where an attorney's office has connections with local elected officials, unions, or other political/community groups, connect these third parties with the rent strike to further build visibility/political support through press conferences, etc. Attorneys might help make connections, but then should take a step back so that tenants and organizers can lead after that.

LEGAL REPRESENTATION OF NONPAYMENT PROCEEDINGS

Timeline: July 2020 - December 2020

1. Represent rent strike participants in any resulting nonpayment proceedings.
 - a. Defenses and counterclaims should be pleaded broadly and aggressively so as to build leverage. Consider including the following claims and defenses:
 - i. Warranty of habitability
 - ii. MDL 302-a rent impairing violations
 - iii. Defenses to collection of rent (lack of CO, failure to register with DHCR/HPD)
 - iv. Rent overcharge
 - b. Technical defenses including traverse should be raised.
 - c. Aggressive motion practice including motions for leave to conduct disclosure and motions to dismiss should be considered.
 - d. Creative defenses should also be considered in light of this unusual crisis, including force majeure, etc. The Coalition's legal support team is researching and developing template materials for many of these

defenses, and will make them available to lawyers working with rent strikers.

- e. Seek consolidation/joint trial for the proceedings to highlight common campaign, provide cover for participants with fewer defenses, and conserve resources for attorneys.
 - f. In the absence of a settlement consistent with the goals of the campaign and the agreement of the participants, cases should be taken through traverse and trial rather than settled. Lengthy evidentiary hearings take time and resources for the courts and the landlord, building leverage for the campaign.
 - g. Following any final decision/order, work to keep participants in their homes by pursuing appeals, seeking stays, and assisting tenants in obtaining financial assistance to satisfy any resulting judgment.
2. Work with the organizers to ensure that they and the tenants are able to use all court appearances for political action, media, etc., based on what will be most strategic for the campaign.

LEGAL SUPPORT FOR DIRECT ACTION

Timeline: Unknown

1. This campaign seeks radical relief, and may decide to employ radical tactics in pursuit thereof. Attorneys representing striking tenant associations should support such tactics to the extent consistent with their professional/ethical obligations.
2. Tactics may include civil-disobedient demonstrations/occupations targeting government actors or the courts or eviction blockades, and may require legal observation or referral for criminal defense.
3. The Right to Counsel Coalition has organized a legal support team in order to provide additional assistance in this area.

OVERARCHING PRINCIPLES IN WORKING WITH ORGANIZERS AND AS PART OF A MOVEMENT

Sustainable social change occurs when directly-impacted individuals take collective action, lead their own struggles, and gain power to change conditions of oppression. This is enabled through community organizing, which is the process of supporting a constituency to:

- Build power;
- Develop leadership;
- Change systems, including laws, administrative practices, economic conditions and social mores; and,
- Further a social movement.

Why is community organizing so important?

- Enables the people who need/want the change to be authors of the change;
- Addresses the root causes of a problem (powerlessness), not only the symptoms;
- Builds deeper capacity to take on future problems.

Right now, the movement to #CancelRent due to the COVID-19 public health crisis is being led and organized by a number of tenant coalitions and organizations. Among them are the Right to Counsel Coalition and Housing Justice for All, incredible groups of tenants and community members that have pushed hard for and won major tenant rights and protections, like the Right to Counsel, the Housing Safety and Tenant Protection Act, and the current eviction moratorium. Some key information about the COVID-19 rent strike includes:

- Millions of people have lost their jobs or income. Faced with other necessities, like food and medical care, the eviction moratorium has allowed tenants to worry about housing costs later.

- By putting economic pressure on landlords, tenants can create a crisis for real estate, which is the most politically influential industry in New York, and win legislative or policy relief.
- Although it is unclear when housing court will reopen, it is clear that unless tenants take collective action to #CancelRent now, housing court will reopen with a surge of non-payment cases and evictions.
- Collective rent strikes can help build the power necessary to win the tenant coalitions and organizations' demands.

What is our role as attorneys? **SUPPORT.**

Community, or movement, lawyering is supportive of grassroots organizing and mobilization for social justice. We can do this by using our legal knowledge, skills, and resources to support the various aspects of organizers' and tenants' work as they determine what is necessary or helpful. Below is a simple breakdown of how community lawyers can work together with organizers and tenants:

COMMUNITY ORGANIZING	COMMUNITY LAWYERING
<p>Purpose: Community builds power to advance their own interests</p>	<p>Purpose: Lawyers can increase the capacity of the community to advance its interests by removing legal barriers and improving strategic positions through legal strategy</p>
<p>Role of the organizer: Identify and develop community leaders, define the issue, develop an organizing strategy, etc.</p>	<p>Role of the lawyer: Act as legal consultant, provide legal defense for members, advise on legal implications of a strategy, open doors so community members can lead</p>
<p>Tools: Public demonstration, political engagement, media advocacy</p>	<p>Tools: Legal advocacy, legal education, technical assistance in drafting legislation</p>

OVERARCHING PRINCIPLES:

- Understand our role as supporters
 - Respect the knowledge and leadership of the community organizations we work with
 - Prioritize their concerns and goals
- Dedication to building the capacity and power of the community we are supporting
 - Recognize that strategies and tactics should serve the principal goals of helping oppressed communities become stronger
 - Respect the decision-making and right to self-determination of the community we are serving
- Willingness to address the root causes of structural disempowerment and oppression
 - Our legal training, and a lot of our practice, emphasize individual cases
 - However, we need to be aware of the structural and systemic factors that produce these individual cases, and oppression more broadly
 - This includes challenging our understanding of the systems we operate in daily and recognizing the barriers that inhibit full and equal participation in society
- Use of knowledge, skills, and connections to support community organizing and movement building
 - Make technical and legal information broadly accessible:
 - Know your rights trainings and workshops with data and relevant information
 - Written materials that meet the language needs of the community
 - Legal representation and advocacy that prioritizes community participation and decision-making
- Professional humility
 - Recognize our privilege
 - Step away from our cynicism/risk-aversion

IMPORTANT ETHICAL CONSIDERATIONS

Lawyers with working groups of individuals in organizing contexts can face certain ethical challenges. The objective is to approach our ethical obligations in a way that is consistent with our and our clients' broader goals. Below is an outline on some of those issues and best practices:

Goals of Group Representation:

- To provide representation that achieves justice for our clients
- To provide the kind of legal representation that honors the power and dignity of the people we represent
- To help build community/collective power
- To deter bad actors and those who harm and oppress our client for their own personal enrichment

COMMUNICATION IN A GROUP CONTEXT

As lawyers, we are required to communicate with our clients in a timely manner about matters such as settlement and other material developments; reasonably consult with our clients about strategy; and keep our client reasonably informed about the status of their case. In a group context, there are important considerations about communication:

- Each represented person should be able to meaningfully participate in their representation.
- The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of

representation.

- Given our goal of empowerment, the clients' requirement for the "character of representation" when we represent a group of active tenants led by a tenant organizer may require a higher level of communication.
- We should use interpreters where it is required for effective communication. However, we should be cautious about using group members to interpret in situations where that would breach our duty of confidentiality.

DECISION-MAKING

As we know, clients determine the objectives of representation and settlement decisions. Lawyers can determine the legal strategy and tactics, in consultation and communication with the client. In a group context, there are important considerations about decision-making:

- We have a duty of competent and diligent representation of each individual in the group.
- If group decision-making results in a decision that is harmful to some group members, then we, as lawyers, will need to navigate our duties to our individual clients and the group.
- Further, any advance agreement regarding decision-making processes in a legal case is subject to our ethical responsibilities.
- If an agreement involves advance conflict waivers, it will require informed consent from each individual in the group.
- Therefore, any decision-making agreement should include clear information about the potential consequences of an advance conflict waiver.

The representation we will be providing in the COVID-19 rent strike is firmly rooted in a broader political campaign. Therefore, we will be required to engage in a much higher degree of consultation with the tenant group regarding the legal strategies and tactics than might ordinarily be the case. Something like filing certain procedural motions or adjourning to a later date might be decisions a lawyer would expect to make. However, in this context, we will need to carefully consider these choices in terms of the broader campaign and consult with the tenant group.

CONFLICTS OF INTEREST

It is important to navigate the various relationships that arise from working with tenants/clients and organizers, and to weigh priorities to find workable solutions compatible with our duty to our clients. In a group context, there are important considerations about communication:

- The fact that clients have differing interests does not necessarily mean that there is a conflict of interest between them.
- However, a conflict can arise at some point in the case because of those different interests.
- For a client to consent to waive a conflict of interest, the consent must be informed consent and confirmed in writing.
- As mentioned earlier, advance waivers are possible, but there still needs to be informed consent.
- The effectiveness of the advance waiver will depend on the extent to which the client understands the material risks involved. So, the more comprehensive the explanation and disclosure of the range of possible risks, the more effective the waiver.
- If a conflict does arise, even with an advance waiver, the lawyer must assess whether the actual conflict is materially different from conflict that was

waived. If it is a conflict that was not contemplated when the waiver was made, the advance consent won't be effective.

These rules of professional responsibility are something we will have to navigate during the course of the legal representation of the rent strike.

PRIVILEGE

When representing a group of people, there is no attorney-client privilege between the attorney and each client. Rather the group is treated as a whole—each with access to privileged information. If in the future there is litigation between those represented as a group, attorney-client privilege does not attach and the clients should be informed of this risk.

Please be aware, in most cases the organizers in the rent strike will not be our clients. This means that communications between us and the organizers regarding strategy and other aspects of the case will not be privileged, and the common legal interest doctrine will not apply. Thus, we might need to disclose these communications in discovery. In our experience, it is better to communicate as much as possible verbally (phone, unrecorded Zoom, etc.) rather than having long email or text chains that potentially reveal a lot of information we would not want our opponents to see.

CONFIDENTIALITY:

Lawyers must keep client information confidential from outside parties and entities. In regards to group representation, the lawyer has a duty of equal representation of all parties and cannot necessarily keep information from one client confidential from another client. Clients should be informed of this and receive each client's informed consent to disclose information as necessary for the group representation.

Lawyers may disclose information that is impliedly authorized by all clients and in the best interest of the clients, or where it is reasonable or customary in the given

circumstances. Where this does not apply, information should not be revealed without the client's informed consent. Lawyers should never use a client's information to the disadvantage of the client or for the benefit of the lawyer or a third person.

Confidential information includes:

- Privileged communications
- Embarrassing or detrimental information
- Information the client wants confidential
- Information that could reasonably lead to the discovery of confidential information
- This includes information verbally provided by the client, as well as written and physical information

Where a lawyer finds it reasonably necessary, disclosures are permissible under the following circumstances outlined below. Such disclosure, however, should be limited as much as possible to only reveal what is necessary.

Permissible Disclosures:

- Where a client has diminished capacity, disclosures may be made to protect the client's interest
- To prevent a reasonable certainty of death or grievous bodily harm
- To prevent a crime
- To withdraw information reasonably believed to be relied on by a third party where the lawyer has discovered the information was materially inaccurate and being used to further a crime or fraud
- To secure advice about compliance with confidentiality rules
- To defend against accusations of wrongful conduct
- To comply with court rules, laws, or a court order

COMMUNICATIONS WITH ORGANIZERS, TENANTS & OTHERS INVOLVED IN THE COVID- 19 RENT STRIKE

Clear and regular communications between organizers, tenants, and their legal support teams will be essential in the COVID-19 Rent Strike.

Legal support teams need to be aware that their work is part of a broader political action and be prepared for a lot of communications that will ensure that the legal strategy and actions consistently serve the broader campaign goals.

Attorneys and advocates working within this campaign need to be prepared for:

- Frequent communications via email, phone, text
- Urgent communications outside of regular office hours at times
- Communications that travel across and within many layers of the people involved in the campaign, so that everyone who needs to be informed or consulted is kept in the loop.

As noted above, if you are the attorney working with a building, you should always be mindful of what might be discoverable before you put things in writing. In particular, be careful of email chains with tenants that include non-clients where you might inadvertently be waiving privilege.

Attorneys and advocates should follow the lead of the organizers and tenants regarding when and how communications happen. But also, attorneys/advocates need to make sure that they are sharing information they receive in a timely manner.

SOME KEY THINGS WE EXPECT OF LEGAL SUPPORT TEAMS DURING THE COVID-19 RENT STRIKE:

- Regular check-ins with organizers and tenants. Attorneys/advocates should be having regular (probably weekly) check-ins with the organizers in the buildings they are supporting. Legal support teams should also be keeping in regular contact with the tenants involved in the action to provide them with support, but should discuss this with the organizer to decide the best frequency and method for these regular communications. In some cases, it might be good for attorneys to check-in with each tenant one-on-one periodically. At other times, an organizer might prefer that the attorney do that by being at group meetings. The attorney also needs to balance this with the ethical duty to keep each tenant informed of developments in the case in a timely manner.
- Legal support teams need to be responsive to organizers and tenants as quickly as possible. Because this legal support is part of a time-sensitive political campaign, the pace and volume of communications will likely be a lot greater than you might ordinarily experience.
- Build in time for consultation and feedback. For tenants to lead decision-making and be centered in all aspects of this campaign, organizers will often need to discuss things with tenants before being able to respond to a given question, concern, or idea. Legal support teams need to factor that in and make your best efforts to allow time for that process to take place.
- Be mindful that folks have varied access to technology and don't assume that email will work for everyone. This is something you should discuss with the building organizer at the outset and with the tenants you are representing. You need to ensure that when you are communicating something you are actually reaching everyone who needs to be reached and in a timely, convenient way for them.

- Don't make assumptions about what the plan is. Have a conversation about it in advance and ask for direction. A high level of consultation and discussion will be required of legal support teams so that organizers and tenants can be in the driver's seat. We cannot emphasize enough the importance of advance conversations and consultation with organizers and tenants. Your regular meetings will go a long way to achieving this, but you should also be proactive in communicating in-between meetings as needed. And if you're not sure if a communication is needed, better to err on the side of over-communicating. The organizers will let you know if there are certain communications they don't need.
- You don't always have to be the messenger. Sometimes it is important that organizers communicate information to the tenant group, even if it first came from you or might be considered part of the legal support. Be prepared to take a backseat on communications when necessary.
- Ensure language justice in your communications. Work with the organizer in your building to determine what this will require of you.

There are times when we will need you to be in communication with the legal support teams and organizers from other buildings that are part of the campaign for the purposes of coordination and advancing the broader campaign strategy. Follow your organizer's lead on this and be ready for these communications to be part of your role.

There will also be some building legal support teams that consist of more than one legal services organization. It is critical to maintain all necessary communications with your co-counsel in the building so that tenants and organizers can be confident that their attorneys are all operating in coordination and strategic collaboration.

DECISION-MAKING PRINCIPLES **IN A TENANT ASSOCIATION CONTEXT**

THE TENANT ASSOCIATION IS THE CLIENT AND DECISION-MAKER—NOT THE INDIVIDUAL MEMBERS

In working with a tenant association engaged in a rent strike, it is important to remember that the association itself is the client and decision-maker. Because of this, a tenant association meeting is different from a know-your-rights workshop. Though both settings involve discussion of tenants' legal rights in a group context, and while both settings may involve specific explanation of the rights, obligations, risks and benefits as they apply to certain individuals within the group, at the end of the day, a tenant association must come to a single decision regarding how they intend to proceed in a given circumstance.

THE STRENGTH OF A TENANT ASSOCIATION IS A PRODUCT OF THE UNITY OF ITS MEMBERSHIP

Tenants form associations because they know that a group of people acting together are stronger than one person acting alone. A unified tenant association can exert financial power through the collective withholding of rent; political pressure through constituent advocacy to elected officials and public protest; and can benefit logistically through the broad distribution of information, centralized coordination of repair complaints, etc.

But a group benefits in the manner above only to the extent that they actually act in a unified manner. If a landlord knows he can divide a tenant association's members according to their individual interests, the landlord need not fear the group as a whole. And if an elected official knows that the association does not meaningfully represent the interests of its members, their complaints will carry less weight.

Tenant organizers are critical in helping the association to build and maintain this unity. Organizers typically have extensive experience working with groups of tenants and guiding them through the process of identifying their common interests, moving past individual concerns or disagreements, and acting collectively to assert their rights.

MEMBERS OF THE TENANT ASSOCIATION AGREE AT THE OUTSET TO ACT IN ACCORDANCE WITH ANY DECISIONS OF THE ASSOCIATION

For a tenant association to be meaningfully unified, the individual members must agree to abide with the decisions of the group as a whole. This means that if the association decides that its members will begin withholding rent, all members must withhold rent, and if the association decides to pay, all must be willing to pay. This applies equally to questions of litigation strategy: all members must agree that any individual legal proceedings arising from the tenant association activity will be litigated consistently with the decisions of the group as a whole.

CONFLICTS OF INTEREST THAT MIGHT ARISE FROM DIVERGENT INDIVIDUAL INTERESTS

Since attorneys may not represent parties whose interests—with respect to the matters of representation—conflict, tenant association members must understand that their legal representation is wholly contingent upon their agreement to act in accordance with the group’s decisions. When a member refuses to comply with the group’s decisions, and the dispute cannot be cooperatively resolved within the association, the representing attorney may need to navigate thorny ethical issues.

TRUST AND TRANSPARENCY ARE CRITICAL FOR A FUNCTIONAL TENANT ASSOCIATION

As a general rule, all business of the tenant association, including legal advice, should be conducted at regular meetings whose time and place have been publicized in advance. In this way, the association's members can fully participate in decisions regarding the association's activities.

Where a tenant association is holding members' funds in relation to a rent strike, all financial business should be conducted at the regular meetings as well, including the collection of rent money from the tenants and the drafting of any checks. Financial reports of the money held by the association should be distributed to the members at regular intervals, or ideally at each regular meeting.

Often, an individual's desire for privacy may lead them to try to consult privately with an association's organizer or attorney regarding matters relevant to the group. This should generally be discouraged.

If contacted by a group member outside the context of a regular meeting on an issue of group concern, the first response should be to defer the question to the next meeting. Remind the individual that you represent the group, and that the question may be of general interest to the rest of the group as well—suggest that it could be added to the next meeting's agenda.

If the issue is pressing and requires immediate response or presents especially significant privacy concerns, the attorney may agree to communicate with the individual in private, but must remain cognizant of the obligation to keep the association and its other members apprised of facts that will affect their cases and collective goals.

ADVANCE AGREEMENT ON A DECISION-MAKING PROCESS IS ESSENTIAL

Fairness and consistency require that the group identify and adhere to the rules by which the group will make decisions. The following are procedural elements or issues to consider as the group establishes these rules.

A. How will the group make decisions?

Options range from true consensus—where 100% of members must either agree or consent, and where one member can block a course of action—to a simple majority of 50% + 1. Any arrangement comes with advantages and disadvantages.

Where more support is required for a decision to be made, there will be more buy-in regarding the resulting decisions, but each decision will require more time and effort to achieve, and the inability to agree upon a decision may force the group to abide by an undesirable status quo. Processes requiring less support may be easier to make, but could leave a significant part of the group feeling disempowered.

B. Under what circumstances can decisions be made?

Are all decisions to be made at a meeting, or can they be made by email? What about by individual calls to an organizer registering votes? If decisions are to be made at meetings, what quorum is required, and are any accommodations extended to those not present to vote by proxy or by phone? If decisions are generally made at meetings, is there a possibility that an urgent situation could arise requiring quick action, and if so, how would any necessary decision be made?

C. Should the decision-making process include consensus-building procedures?

Even where the decisions themselves may not be made unanimously, a group could still elect to include procedural rules intended to build consensus before taking any necessary votes. Procedural elements like minimum discussion time, hearing from all participants, etc., can serve to give members voice and increase buy-in even where a decision is ultimately made by simple majority.

D. Should certain matters be carved out of the group's decision-making purview and reserved for individual members or delegated to representatives?

A group may decide at the outset or in the course of its efforts that certain things can be left to the personal decisions of the group members, or assigned to specified representatives. For example, a group may adopt a decision in favor of civilly disobedient direct action, but allow individual members the ability to opt out, or it may authorize one member to be responsible for the group's logistical coordination with a superintendent.

Not all of these choices need to be made at the very outset. A nascent tenant association will likely not yet know the full range of decisions that may ultimately need to be made, and potential members may be turned away by an hour-long conversation on parliamentary procedure. Nevertheless, the group should decide at an early date at least a general framework for how they'll make decisions—including the decision-making process itself—going forward. Tenant organizers often have extensive experience in working with tenant associations to build functional decision-making processes, and may have procedures that they promote or prefer. As with all decisions of the tenant association, the nature of the decision-making process should be determined by the tenant leaders themselves with the guidance of the tenant organizer—not by the attorney.

RENT STRIKE NON-PAY LITIGATION STRATEGIES

Representing tenants who are on a rent strike as part of the statewide campaign to #CancelRent is different than representing individual tenants in nonpayment proceedings in some critical ways that are important for advocates to understand. Litigation strategy in these proceedings must be closely aligned with the campaign strategy. While ethical guidelines for lawyers provide that attorneys have discretion on matters of litigation strategy, rent strike litigation must take its direction from the political goals and tactics determined by the tenant leaders and organizers. Below are suggestions for how that legal strategy might proceed in coordination with tenants and tenant organizers.

GOALS

The fundamental objective in representing a striking tenant association as part of the #CancelRent campaign is to support the political goals of the association and the broader campaign. For this reason, the litigation tactics employed in representing a rent strike will differ from those used in an ordinary individual nonpayment proceeding. While an individual tenant facing eviction may simply want their case to be over and the rent to be paid, rent striking tenants deliberately provoke nonpayment litigation in part to use that litigation as an affirmative means of building power. While housing court clearly lacks the authority to cancel rent directly, some goals that tenants and tenant organizers could have for litigation may be:

- Generating visibility for the campaign and its demands from from media and elected officials;
- Increasing political pressure upon relevant elected officials by imposing economic pressure—through nonpayment of rent and attorneys fees—upon the politically influential real estate industry;

- Protecting vulnerable tenants by delaying any potential evictions until the campaign secures the relief it seeks, including the prolonging of the litigation of represented tenants through vigorous advocacy of all available defenses, and, relatedly, by exhausting the capacity of the relevant court systems to delay the eviction of unrepresented tenants;
- Using the litigation as a focal point to support further tenant and campaign organizing.

The above goals, and others identified by tenants and tenant organizers, should be at the center of the discussion of litigation strategy.

DEFENSES

The following are kinds of defenses to be raised in these proceedings. While most of the defenses themselves are familiar to any tenant attorney, the strategy for how and why to assert them should be discussed with tenants and tenant organizers. Note especially those circumstances where a defense is only available (or viable) for some of an association's tenants. While the delay and expense of having even some nonpayment proceedings dismissed will often justify raising different defenses for different tenants, these different defenses can sometimes impact a group's solidarity or split up proceedings in ways that are undesirable. These possible consequences should be discussed with the tenants in advance.

Traverse Defenses:

Traverse defenses, relating to improper service of the pleadings or predicate notices, are often waived in the course of typical nonpayment proceedings in order to advance more quickly to the so-called "merits" of the dispute. In rent strike litigation, these defenses should be clearly asserted and vigorously protected. Though any resulting dismissal will be without prejudice to the landlord's recommencement of the case, it will buy valuable time for the campaign's organizing to continue.

Habitability Defenses:

Raising defenses based on the landlord's failure to make repairs has the benefit of completely defeating the landlord's case or reducing the amount of a money judgment by highlighting landlord negligence and indifference, and may assist in defeating any separate SLAPP litigation. These defenses include:

1. Failure to correct rent-impairing violations under RPL 302-a
2. Breach of the Warranty of Habitability
3. Harassment

In addition, these are often fact-intensive inquiries which may necessitate lengthy evidentiary hearings that might support other campaign goals.

Inability Collect Rent/Registration Defenses:

Raising defenses regarding the landlord's right to collect rent has the possible benefit of defeating all proceedings at once. These defenses can include:

1. No valid Certificate of Occupancy
2. No valid Multiple Dwelling registration

COVID-19 Related Defenses:

If the goal of the strike is to force action from the state on cancelling rent due to COVID-19, asserting defenses that arise from this context may benefit the campaign by highlighting the purpose for the rent strike. For this purpose, the ultimate determination of a fact finder on the merits of these defenses may be less important than the fact of asserting them (non-frivolously). Creative and unexpected defenses also have the advantage of putting landlords' attorneys in unfamiliar territory.

These can include:

1. Impossibility of performance

2. Unconscionability
3. Force Majeure
4. Economic Infeasibility
5. Unjust enrichment
6. Long-term or permanent stays of judgments in the interest of justice

In raising these defenses, it is critical to remind the court (and oneself) that the COVID-19 crisis is one literally unprecedented in our lifetimes. By the time the initial wave has passed, more than one in five workers may have lost their jobs, including many of the most economically vulnerable and rent-burdened New Yorkers. Defenses that may have struck the court as baseless in February may find new purchase in July.

Other Defenses:

Other kinds of defenses typical in nonpayment proceedings may be asserted depending on the goals of the tenants and organizers, since many may not apply to units. These include:

1. RPAPL 741 Failure to Plead defenses
2. Defective Rent Demands
3. Failure to provide RPL 235-e certified mail reminders of rent due.
 - a. This is a relatively new defense under the HSTPA that may be worth exploring.
4. Overcharge/Rent-Regulatory Status
 - a. This may have the advantage of shifting the burden onto the landlord to produce documents and records.
5. Laches

EARLY PROCEDURAL STEPS

Consolidate cases:

It is important to consolidate all of the cases in a building on a rent strike as soon as possible so that tenants can stand together on the same court dates in front of the same judge, demonstrate their collective power, and allow each court day to be a day of action to show solidarity and strength. Some judges find issue with the word “consolidation” in this context, but will nevertheless allow proceedings to be “joined” for resolution and trial.

Any case brought against a tenant on a rent strike can be consolidated with all others under CPLR 602(a) and NYC Civ. Ct. Act 110(b). The Civil Court Act *requires* consolidation of actions in the same building upon application of any party “unless good cause is shown.” In addition, Civil Court Directive DRP 150-A provides specifically that proceedings arising from a common rent strike should be assigned to a common part. This can be effectuated at the time of answering by including the following language in each answer:

PLEASE TAKE FURTHER NOTICE that this proceeding arises out of a collective rent strike including the participation of several other tenants at the subject building. The Clerk is therefore directed, pursuant to Civil Court Directive DRP 150-A (“Housing Court Initiative,” available at: <https://www.nycourts.gov/courts/nyc/SSI/directives/DRP/dr150a.pdf>), to override the court computer and assign this proceeding along with all other proceedings arising from the same rent strike to a single resolution part for consolidation and joint disposition. The proceedings arising from the same rent strike include:

- *Landlord v. Tenant 1, et al.*, Index No. 11111 / 2020;
- *Landlord v. Tenant 2, et al.*, Index No. 22222 / 2020;

Consider Making a Jury Demand if Possible:

In some boroughs, it may make sense to discuss with the tenants and tenant organizers the strategy of demanding a jury. The benefits of this strategy may be to: increase the chance of success (or nullification) at trial; prolong the proceedings (as there will likely be litigation around striking the demand); put the landlord attorney in likely more unfamiliar and hostile territory which usually improves your bargaining position; and increase the tension and drama of the proceedings.

Although most, if not all, leases will have an enforceable jury waiver clause, situations where you can demand a jury include: where there is no lease agreement; or there is a HOME Agreement or HUD lease that may prohibit and void any jury-waiver provisions.

If it's desirable and possible to demand a jury, it should be done at the same time the Answer is filed (along with an 1101(e) Fee Waiver) to avoid any possible argument that the demand is untimely.

RPAPL 745 RENT DEPOSITS

Because much of the power of a rent strike comes from the length of time over which nonpayment is sustained, interim court orders directing the payment of rent can deny rent strikers much of their leverage. Be wary of applications for rent deposits or the payment of interim use and occupancy under RPAPL 745 and related case law. Familiarize yourself with the state of the law around such deposits (modified by the HSTPA), and oppose any motions or applications vigorously.

MOTION PRACTICE

Bill of Particulars and Discovery:

If the campaign strategy involves prolonging the length of the strike and forestalling and judgment and collection, it may make sense to assert defenses in the answer that have a greater likelihood of requiring a bill of particulars or discovery responses, or at least non-frivolous litigation over whether they should be required to comply with the demands.

Motions Disposing of Case:

One litigation strategy to consider with the tenant association and organizer is bringing motions to dismiss or motions for summary judgment in all cases. These can focus on the specific COVID-related defenses, which would have the benefit of both highlighting the nature of the current crisis, and also applying to every tenant on strike. Bringing motions based on a lack of C of O or multiple dwelling registration may also have the same benefit of applying to the entire building.

COURT APPEARANCES

Each court appearance is an opportunity for its own action and to draw attention to the larger campaign. Before every court appearance there should be communication with the building tenants and tenant leaders to coordinate on media strategy and any demonstrations done on the day of the appearance.

For example, in coordinating with the tenants and tenant organizers, it may make sense to send a message of solidarity and strength by:

1. All tenants arrive together, and go with the lawyers into the courtroom with the tenants leading the way. Transportation can be provided by the lawyer, the organizer, or the TA.

2. All tenants sit together in the courtroom as close to the front as possible.
3. Tenants carry coordinated signs or shirts with planned messaging.
4. For virtual court appearances, consider requesting that tenants be allowed to appear by phone and/or Skype, and help coordinate each tenant's virtual appearance. A virtual call with many participants will demand the attention of the Judge.

SETTLEMENT VS. TRIAL

While the vast majority of individual nonpayment proceedings settle, in the context of the rent strike campaign to #CancelRent, there may be additional value in proceeding to trial. Trials give tenants the opportunity to go on the record to discuss the issues relevant to the rent strike and nonpayment proceeding. They also take considerable time and resources to litigate, and a packed court calendar may mean that a trial could be adjourned months in the future.

POST-JUDGMENT PRACTICE

In the event that a possessory judgment is issued against some or all of the rent striking tenants, the following post-judgment practice often closely resembles that of standard nonpayment litigation, involving efforts to seek additional time to make payment or stay any eviction, and to help the tenants secure any necessary financial assistance.

In some cases, tenants may wish to go further in their campaign, continuing to resist payment even under threat of eviction. They may collaborate on related direct actions like eviction blockades. Although these plans may fall clearly outside the realm of typical nonpayment practice, and while they may not be

best calculated to preserve a particular tenancy, the group may nevertheless determine the course of action to be warranted in light of the goal of supporting the broader campaign. As an attorney, one must, of course, inform the tenant association of the risks associated with a tactic like this, but upon their informed decision, the attorney should support and advance the group's chosen course of action.

MEDIA STRATEGIES

To the extent that the CV-19 rent strike is a coordinated political action that is led by tenants and organizers, decisions regarding media will be principally made by tenants and organizers. Media regarding a legal action that is part of a broader political campaign serves to shape the narrative, create broader interest and support for the goals of the campaign, democratize information, and apply pressure to the campaign's targets and our adversaries in the legal case.

As with all aspects of the COVID-19 rent strike legal support, media strategy will be decided upon through clear communications and following the decision-making protocols described in this Guide. There are certain key guidelines that attorneys and legal advocates should follow when it comes to media:

- In general, decisions about whether to seek media coverage, when and how to do media events, and the messaging for media will be made by tenants and organizers.
- Legal support teams can expect to be kept in the loop about any plans for media coverage and consulted about whether media plans might impact the legal side of the action in some way. The legal support team should carefully think through potential legal and strategic impacts media might have and clearly communicate that information to the organizers and tenants. Ultimately, however, the decisions regarding the media plan will be made by the organizers and tenants.
- Media coverage should center tenants and organizers, not attorneys. Media coverage should strategically focus on the political action and the messaging of the campaign, rather than the legal action. To achieve this, attorneys providing COVID-19 rent strike support need to actively work to counteract mainstream media's tendency to focus on lawyers, professionals and the legal sphere, by doing the following:

- Attorneys/advocates should always follow the lead of organizers and tenants when media is planned and executed.
- Attorneys/advocates who are contacted by the press should direct media inquiries to the designated organizer/tenant point person.
- Attorneys/advocates should only give quotes/interviews to press after prior agreement with the tenants and organizers
- Any quotes or interviews given by attorneys/advocates should center tenants rather than the attorney, and should be consistent with agreed upon messaging and media strategy
- Attorneys/advocates should also try to counter dominant tendencies in mainstream media, which for the attorney/advocate can include: emphasizing the systemic nature of issues rather than individualizing them; emphasizing political rather than individual solutions; countering racist, sexist, elitist, and other oppressive characterizations; challenging the normalization of the legal system's violence; exposing the power and wealth imbalance between landlords and tenants more broadly, and more.
- During media events, attorneys/advocates should not occupy center stage and should be guided by tenants and organizers to determine their participation. This is something that the legal support team should proactively consult with the organizers about prior to any event, in order to clearly understand how the organizers would like them to participate. For some media events, tenants and organizers might decide that it is better not to have attorney participation at all.

Press advisories, releases, and other press materials will generally be prepared by the organizers. However, attorneys will generally be asked for their feedback and may be asked to either contribute quotes or help with the drafting of these documents. At different times, media activity in this campaign may relate to specific buildings, particular neighborhoods or boroughs, or it may involve the whole campaign. Legal support teams need to be prepared to be nimble and to expand/contract their communications and consultation depending on the organizers' media strategy.

RENT STRIKE ESCROW ACCOUNTS

In a “traditional” rent strike, wherein the tenants of a single building or portfolio collectively withhold rental payments in order to extract concessions from a particular landlord, it is essential that the withheld money actually be *held*.

The promise of prompt payment of any agreed upon sum from all tenants is a significant factor in why the landlord might come to the table and negotiate seriously with the tenant association.

Rent strike escrow accounts—either true escrow accounts held by attorneys, or other tenant association bank accounts—are a common practice to ensure that tenants’ withheld rents can be securely held, accounted for, and promptly paid out when and where appropriate.

During the COVID-19 rent strike campaign, the simple reality is that not all rent will be or can be held. Much of the impetus for the campaign comes from the fact that massive numbers of tenants simply don’t have the money to pay.

For this reason it is not clear what role, if any, escrow accounts will play in the rent strikes commenced as part of the campaign. Nevertheless, this document is a resource for any group which does wish to establish an escrow account.

TENANT ASSOCIATION BANK ACCOUNT

Most major banks will (or should) allow a tenant association to open up an unincorporated business checking account in its own name.¹ In order to do so, the tenant association will need a few different documents:

1. Employer Identification Number

To open a bank account, a tenant association will need to generate an EIN for itself on the website of the Internal Revenue Service. This can

¹ See, for example, [this information sheet](#) from JPMorgan Chase Bank.

be done [here](#). A member of the tenant association will need to volunteer as the “responsible party” and use their personal social security number to generate the EIN. The IRS will also ask what kind of entity the EIN is for—there is an option for Block/Tenant Association.

2. Meeting minutes/resolution

Next, the association will need "meeting minutes" from a meeting identifying and signed by officers of the association (including the president and secretary) and authorizing the officers to open an account with the banking institution. These are short letters on association letterhead, explaining that the association met and voted to allow certain people to open a bank account on behalf of the organization. The minutes should be signed by president and secretary. Often tenant associations don't have permanent officers, but the group can designate individuals to these roles temporarily in order to satisfy the banks' requirements.

3. Proof of identity for signers

Finally, the bank will require adequate proof of identity for the designated signers on the bank account. It may be wise to contact the bank branch in advance to determine how many identifying documents are necessary, and what forms are acceptable.

Note also that many banks are unaccustomed to opening accounts for tenant associations, and may raise baseless concerns or additional procedural hurdles. Tenant associations who encounter difficulty opening accounts may benefit from additional advocacy from the attorney.

When holding rent strike money in a tenant association bank account, the biggest concerns are security and accuracy of records.

First: Before they will feel comfortable depositing their own funds into the common account, tenants must be certain that their money will be secure there, and free from embezzlement or mismanagement.

Tenant association accounts are secured through a “separation of powers” approach which distributes signing authority and possession of the checks and records widely.

As an initial matter, it is essential that there be multiple signers for the account. There should be at least three signers registered with the bank, and at least two signatures should be required for any check or withdrawal from the account.

Additionally, the checkbook and the account records should not be held by any of the individuals with signing authority.

Often, a best practice is to have these documents held by the tenant organizer, who is not established as an authorized signer. This way, funds may only be drawn from the account when at least three people come together, including two tenants and the tenant organizer.

Ideally, all deposits should be accepted and all checks should be drafted at regular meetings of the tenant association, in full view of all members.

Second: it is critical that the account’s records are up-to-date, accurate, and regularly circulated among the association members. These records should reflect clearly the dates and amounts of each deposit made by each tenant, along with information about the tenant’s monthly rental obligations in order to discern whether a tenant is “falling behind” in their deposits.

Additionally, it should reflect any disbursement from the account, and whose money that disbursement was drawn from. An example of rent strike record-keeping is available [here](#).

ATTORNEY-HELD ESCROW ACCOUNT

Where amenable to the tenant association and the attorney’s law firm, rent strike funds may be held in escrow by an attorney. Most law offices have existing escrow accounts and established recordkeeping procedures for client deposits in order to ensure that firms comply with relevant laws and regulations, including Judiciary Law

§ 497 and Rule 1.15 of the Rules of Professional Conduct. Attorneys should consult with their firm’s management for more information about these specific procedures.

Where an attorney escrow account is used, the attorney or their firm must assume several of the logistical responsibilities that otherwise might be within the purview of the tenants or organizers. These include arranging for the deposit of tenants’ funds; drafting checks; and documenting account balances and producing reports for the tenant association.

One practical difference between an attorney escrow account and an account held by a tenant association is that a court may feel more comfortable placing restrictions upon attorney-escrowed funds.

Where a court restricts the use of escrowed funds during litigation, this may reduce the flexibility of an association to use these funds for emergency needs, to “repair and deduct”, etc.

RENT OBLIGATION MONITORING ABSENT RENT COLLECTION

Even where a tenant association participating in a COVID-19 rent strike decides against collectively depositing withheld funds, they should still be deliberate in tracking the amounts of money owed by individual tenants and the association as a whole. These records will keep members of the association apprised of relevant facts (and risks) as the strike continues, and may be useful data to share with the media. An example of a spreadsheet for keeping these records is available [here](#).

DO'S AND DON'TS FOR ATTORNEYS

In summary, here is a quick guide of what to do and what not to do as an attorney representing tenants in a rent strike:

DO

- Listen to the rent strike participants, foster group decision making, and take your lead from them.
- Contact the rent strike participants regularly to update them on the case, so they are aware of the posture of the case and are empowered to take an active role in their litigation.
- Consult the tenant group regarding legal strategy as well as broader objectives.
- Explain all the risks and benefits of any strategy or decision, but understand the final decision of what route to take is determined collectively by the rent strike participants.
- Adhere to all legal ethics in your practice.
- Follow the lead of the organizers to support pre-litigation actions and organizing, such as developing collective decision making procedures, conflict waivers, managing a rent strike account, etc.
- Be aware of any conflicts of interests between tenants and make sure you have their informed consent and waiver where necessary.
- Research all relevant laws and facts.
- Be creative and aggressive in your litigation strategy.
- Ensure litigation strategies, decisions, and public statements are closely aligned with the campaign's goals.
- Help rent strike participants with non-legal direction action.
- Ensure tenants who speak a different language receive translated information and you speak using an interpreter.

DO NOT

- Take the spotlight! Rather, the tenants should be the focus in any media engagement and public space.
- Make assumptions. Instead, always have regular and clear communications with organizers and tenants. If you're not sure, ask!
- Work for the benefit of only one tenant or a few tenants who may be able to get a better outcome.
- Expose any confidential information or details of political strategy to the judge, opposing counsel, or outside individuals and groups, without the consent of the rent strike participants.
- Make assumptions about how the tenants want to move forward with their case.
- Feel the need to dominate every conversation. Rather, let the tenant organizers and leaders communicate with members and provide context to the legal elements.
- Make any decisions without the informed consent of the tenant association as a whole. Do not make group decisions based on the desire of one tenant.

And the final DO is - be a movement lawyer. By working together to build community power we will fight for and win a better world.

Thank you for stepping up to support the tenant movement!

Acknowledgements

In preparing this Guide, we drew from various resources prepared by fellow movement lawyers and organizers. We are thankful for the contribution the following work made to our Guide:

- *Advocacy for Tenant and Community Empowerment: Reflections on My First Year in Practice* by Shekar Krishnan
- *Community Lawyering*, a presentation by Zoe Cronin & Lambreni Waddell
- *Community Lawyering - The Role of Lawyers in the Social Justice Movement* by Charles Elsesser
- *Ethics and Group Representation*, a presentation by Marika Dias
- *Lawyers as Resource Allies in Workers' Struggles for Social Change* by E. Tammy Kim.
- *Power Shift: Sharpening Our Theory, Deepening Our Practice*, a presentation by Purvi Shah
- *Right to Counsel NYC & Housing Justice for All: Going on Rent Strike in New York During COVID-19: Guide and Resources.*
- *Supporting Social Movements: A Brief Guide for Lawyers and Law Students* by Jim Freeman

