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RTCNYC Tool 5.5
Memo of Support

**REPORT ON LEGISLATION BY THE
PRO BONO AND LEGAL SERVICES COMMITTEE AND
HOUSING COURT COMMITTEE**

Int. 0214-2014 Council Members Levine, Gibson, Barron, Chin, Dickens, Eugene, Ferreras, Johnson, Lander, Mendez, Wills, Treyger, Rodriguez, Kallos, Koslowitz, King, Rosenthal, Cornegy, Cohen, Reynoso, Torres, Palma, Levin, Richards, Espinal, Miller, Mealy, Gentile, Maisel, Koo, Van Bramer, Cumbo, Williams, Constantinides, Rose and the Public Advocate (Ms. James)

A Local Law to amend the administrative code of the city of New York, in relation to providing legal counsel for low-income tenants who are subject to eviction, ejectment or foreclosure proceedings.

THIS BILL IS APPROVED WITH RECOMMENDATIONS

There are currently four bills pending before the New York City Council related to providing the right to counsel in eviction, foreclosure and/or ejectment cases in New York City which can result in the litigant's loss of shelter. In summary, the four bills each seek to provide a right to counsel to different segments of the population: (1) low-income litigants, defined as any litigant with income at or below 125% of the federal poverty level (Int. 0214-2014); (2) parents who have "minor children"; minor children is an undefined term, and the bill does not place an income limitation on the parents who would be able to access free legal services (Int. 0221-2014); (3) senior citizens, defined as anyone 62 years of age or older, and whose income, aggregated by household, does not exceed \$50,000 (Int. 0096-2014); and (4) disabled individuals, defined by the New York City Administrative Code, which provides a definition similar to the definition in the federal Americans With Disabilities Act (Int. 0501-2014); this bill is similar to the one that would cover parents with minors to the extent that it does not place an income limitation on anyone who might otherwise qualify under the bill for representation.

The Pro Bono and Legal Services Committee and Housing Court Committee (the Committees) of the New York City Bar Association support the enactment of Int. 0214-2014, which seeks to provide all tenant-respondents in Housing Court, or in other courts where litigants are defending against ejectment or foreclosure proceedings, and who qualify financially with a

right to counsel. We recommend that the economic level for accessing counsel be increased to include any individual or family whose income is at or below 200% of the federal poverty level. This change is necessary because of the inability of most of such litigants to access counsel in the present legal framework and the significant increase in likelihood of successfully averting an eviction or loss of shelter if legal representation is available. Moreover, the bill will result in a significant cost savings to the New York City government (or at least be cost neutral) because more people would not be left homeless as a result of the absence of representation in Housing Court or other courts where such proceedings take place. And, we believe that it is important for the New York City Bar Association to inform the City Council, as a corollary to this recommendation, that pro bono legal services should never be viewed as a substitute for government funded legal aid, but should serve to fill the gaps that such legal representation cannot provide and/or assist the legal services providers with such representation. We also suggest that this recommendation be subject to modification pending further consolidation of the pending four bills, additional information provided by the Independent Budget Office, and input from the advocacy community.

General Background Regarding the Current Legal Landscape and the Right to Counsel

It has long been recognized that less than twenty percent (20%) of low-income people in New York City (and the United States as a whole) have access to legal counsel in civil cases. This statistic has been recognized recently by the Task Force to Expand Access to Civil Legal Services established by and reporting to New York State's Chief Justice, the Honorable Jonathan Lippman:

[A]t best, 20 percent of low-income New Yorkers have a lawyer to assist them in responding to matters involving life's most basic necessities, such as food, shelter, clothing, health care, subsistence income, education, and family safety and stability. As a result, Office of Court Administration data shows that some 2.3 million litigants in civil matters in courts in every region of New York State are unrepresented, and most of these unrepresented New Yorkers are low-income families and individuals. ... The Task Force has documented that when New Yorkers appear in civil matters in court without representation, litigation and other costs are higher and the opportunity to resolve disputes without litigation or to settle cases expeditiously is lost.¹

¹ TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *Report to the Chief Judge of the State of New York* 2 (2013), available at http://www.nycourts.gov/IP/access-civil-legal-services/PDF/CLS-TaskForceReport_2013.pdf; see, also LEGAL SERVS. CORP., *Documenting the Justice Gap in America: The Current Unmet Civil Needs of Low Income Americans* 1 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

The lack of legal representation dramatically affects the ability of low-income people to effectively navigate the court system and obtain successful outcomes.² Represented parties benefit from statistically more favorable results in Housing Court, among other fora.³ And, in New York City Housing Court, the vast majority of litigants without representation are racial minorities.⁴

Therefore, the access to justice gap is disproportionately affecting those who are already most vulnerable in our society, with the fewest resources to vindicate their fundamental human rights.

Further aggravating this problem is the fact that a significant percentage of people who are unrepresented in fact qualify for governmentally funded legal representation but do not receive it due to the limited resources of the legal services organizations representing low income people.⁵ And, it must be noted that many low-income people in need of assistance are ineligible for services because they do not meet the extremely low threshold for legal services eligibility – the same figure used in the current City Council bill that provides the otherwise most expansive access to counsel of the four pending bills.⁶

The benefits of having a right to counsel in housing cases are particularly compelling. While preventing evictions and saving city/taxpayer money is certainly important, a stable housing environment is highly correlated with children's better educational outcomes, a sense of belonging in the community at large, higher levels of employment, better mental and physical health, improved family relationships, lower crime, and a better support system.

Importantly, the evidence also shows that by providing a right to counsel in eviction cases, the New York City Council would potentially reduce costs associated with evictions and homelessness by millions, if not tens of millions of dollars on an annual basis.⁷ This figure may

² *Id.* at 2.

³ Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 46-51 (2010).

⁴ See TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *Report to the Chief Judge of the State of New York* 11-12 (2010), available at <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>.

⁵ See LSC, *Documenting the Justice Gap*, *supra*, at 1-2, 11 (finding that “roughly one-half of the people who seek help from LSC-funded legal aid providers,” such as Legal Services NYC, “are being denied service because of insufficient program resources”).

⁶ LSC-funded services are presumptively available to those at or below 125 percent of the federal poverty line but in many if not most cases are available to those at or below 200 percent of the federal poverty level. See 45 C.F.R. pt. 1611. In 2014, this cutoff translates to no more than \$47,700 in gross income for a family of four.

⁷ See, e.g., TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *Report to the Chief Judge of the State of New York* 3 (2014) (“nationally recognized experts, commissioned by the Task Force on a pro bono basis over the past three years, have determined that investing in civil legal services provides substantial economic benefits to our State—specifically, more than six dollars for every one dollar of funding for civil legal services. For example, using conservative estimates, the 2011 Task Force Report ... documented that anti-eviction legal services programs funded by IOLA have saved approximately \$116 million annually in averted shelter costs for government”);

be near or equal to the cost of providing the right to counsel in the first place. The cost savings results from the positive impact that lawyers would have for clients facing eviction, foreclosure or ejection. By obtaining more successful outcomes, and preventing many more individuals and families from entering the homeless shelter system which is very expensive, not to mention collateral economic savings, such as increased public school attendance due to families having stable living conditions, and the attendance-associated state reimbursements, New York City would likely receive a positive return on its investment in the right to counsel.⁸

Against this background, it is perhaps not surprising to learn that New York City (and the United States as a whole) is out of step with norms around the world relating to the right to counsel in cases where fundamental human rights, such as the right to shelter, are at stake. The United Nations Committee on the Elimination of Racial Discrimination (the “CERD Committee”) has expressed concern with the United States’ human rights record in this regard, calling particular attention to the “disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities, and calling on the United States to provide the resources to ensure these individuals have access to counsel where basic human needs are at issue.”⁹ The CERD Committee has further elaborated these rights and has called for states to recognize a civil right to counsel and to implement measures to guarantee access to justice in civil matters. In General Recommendation No. 29, the CERD Committee recommended that States “[t]ake the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid.”¹⁰ The Committee also recommended that State Parties “[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of ... housing.”¹¹

Other international bodies have reached similar conclusions concerning the importance of civil legal representation to fundamental fairness and protection of human rights. For example, the United Nations Human Rights Committee, which oversees compliance with the International Covenant for Civil and Political Rights, has observed that “[a]ccess to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice The availability or absence of legal

Housing Court, Evictions and Homelessness: The Costs and Benefits of Establishing a Right To Counsel, Community Training and Resource Ctr. & City-Wide Task Force on Housing Court, Inc. at ii-iv (June 1993) (advocacy report prepared to contribute to the public debate on the right to counsel in Housing Court for eviction cases, and concluding that “[e]xtending a right to counsel to 70,000 tenants would save money” and that the study “demonstrates that protecting people before they become homeless is far more sound and humane social and fiscal policy than attempting to address the problem after people have become homeless”).

⁸ *Id.*

⁹ Comm. on the Elimination of Racial Discrimination, *Concluding Observations – United States of America*, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

¹⁰ CERD Comm., General Recommendation No. 29, Article 1, Paragraph 1, of the Convention (Descent), ¶ 5(u), U.N. Doc. A/57/18 at 111 (2002).

¹¹ CERD Comm., General Recommendation No. 30: Discrimination Against Non-Citizens, ¶ 7(29), U.N. Doc. A/59/18 at 93 (2004).

assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way States are encouraged to provide free legal aid in [non-criminal cases], for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.”¹²

Numerous U.N. special rapporteurs and independent experts have likewise emphasized the importance of ensuring access to counsel in civil cases, particularly where counsel is necessary to secure basic human rights, and these sources have singled out housing in particular. The Special Rapporteur on Adequate Housing has noted that legal remedies are an important procedural protection against forced evictions but that such remedies are only effective where provision is made for the supply of legal representation.¹³ The Special Rapporteur on Extreme Poverty has similarly commented that the “[l]ack of legal aid for civil matters can seriously prejudice the rights and interests of persons ... for example when they are unable to contest tenancy disputes [and] eviction decisions.”¹⁴

New York City’s (and the United States’) failure to ensure meaningful access to counsel in housing cases is also out of step with international consensus. For example, the European Court of Human Rights has articulated the obligations of the state to provide counsel in civil cases. In 1979, the Court in *Airey v. Ireland* ruled that the right to a fair trial may demand that a state provide free legal assistance to those unable to obtain it when that assistance is necessary to provide effective access to the court.¹⁵ Explaining its reasoning, the Court stated that the European Convention on Human Rights “is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly true of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.”¹⁶ The Court later expanded on this holding, emphasizing that legal aid may be required depending on the particular circumstances of a case, including “the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent him or herself effectively.”¹⁷ It surely cannot be disputed that the housing laws in New York City are complex, that the right to housing is as fundamental as any other right, and that individuals in Housing Court (or defending in other fora against ejection or foreclosure proceedings) without a lawyer are unable to represent themselves effectively as borne out by the statistics cited above.

¹² Human Rights Comm., General Comment No. 32: Article 14, Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶¶ 9-10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

¹³ Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, ¶ 69, U.N. Doc. A/HRC/22/46 (Dec. 24, 2012).

¹⁴ Human Rights Council, *Special Rapporteur on Extreme Poverty and Human Rights*, Report of the Special Rapporteur on Extreme Poverty and Human Rights ¶ 62, U.N. Doc. A/67/278 (Aug. 9, 2012).

¹⁵ 2 Eur. Ct. H.R. 305, ¶ 26 (1979).

¹⁶ *Id.* at ¶ 24.

¹⁷ See *Steel & Morris v. United Kingdom*, 22 Eur. Ct. H.R. 403 (2005).

Recommendations

Against this background, the Committees endorse (subject to modification pending additional input from the New York City Council, the Independent Budget Office and the advocacy community) New York City Council Bill Int. No. 0214-2014 that provides access to counsel to the greatest number of people who are facing eviction or foreclosure of the four pending bills. This bill applies generally to all individuals who are at or below 125% of the federal poverty level. Each of the other pending bills is limited to a narrower population and therefore does not close the access to justice gap as much as Int. No. 0214-2014. And, given the above analysis, it is clear that the right to counsel in Housing Court (and in other fora with respect to ejection or foreclosure proceedings) likely will deliver economic return, as well as dignity and hope to the clients, and correspondingly better results in the courtroom for these litigants seeking to retain their fundamental right to shelter.

By passing this legislation, but increasing the financial eligibility cut-off to individuals at or below 200% of the federal poverty level, the New York City Council would be utilizing the financial criteria that the New York State Office of Court Administration uses to fund legal services in each county (*e.g.*, based on the proportion of the population living at or below 200% of the federal poverty line),¹⁸ and how the Legal Services Corporation of America permits grantees, including those in New York City, to serve and count clients in many and even most cases.¹⁹ Consistent with this framework, the Chief Judge's Task Force to Expand Access to Civil Legal Services has specifically recommended that government funded legal service cover all low-income individuals who are at or below 200 percent of the federal poverty level because it is virtually impossible for such individuals to otherwise access counsel.²⁰ By enacting this legislation with this modification, New York would stand as a model for other jurisdictions to fund right to counsel programs that are the only meaningful way to bridge the long-standing access to justice gulf. Perhaps most important, a right to counsel for low income tenants will help make one of the most critical parts of our system of justice, primarily the Housing Court, functional and something that we can be proud of.

Furthermore, for this right to counsel legislation to be meaningful it needs to be understood by all parties that (i) funding must be adequate to provide full representation, and (ii) representation must be provided by competent, experienced, qualified attorneys with workable caseloads and sufficient social services and related support to effectively achieve the ultimate goal of averting evictions and enabling tenants to pay and landlords to receive their legally due rents. It is our recommendation, therefore, that the delivery system for this representation be by approved, institutional, non-profit providers who demonstrate adequate experience and capacity for comprehensive support to clients in order to achieve these requisite goals, and that the

¹⁸ See <http://www.nycourts.gov/admin/bids/PDFs/JCLS-RFP-2013.pdf>.

¹⁹ See 45 C.F.R. § 1611.5.

²⁰ See TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *Report to the Chief Judge of the State of New York* 19 (2014) (recommending that “the most vulnerable families and individuals who receive funded civil legal assistance should continue to include those living” at or “below 200 percent of the federal poverty level”).

funding to implement this legislation be sufficient. Such representation is also expressly called for by New York’s Task Force to Expand Access to Civil Legal Services:

“[The] Task Force again concludes that the most urgent unmet legal needs for which the proposed funding should be directed are civil legal services in matters involving “the essentials of life”— [e.g.] housing (including evictions, foreclosures, and homelessness) Moreover, the Task Force continues to recommend that prevention efforts and early intervention be prioritized, and continues to find that well-trained and seasoned experts are necessary to address the complex legal problems that low-income clients frequently face.”²¹

Finally, it must be noted that pro bono legal services should not be seen as a suitable replacement or alternative to legal aid services for the poor, including but not limited to the housing context. While the delivery of pro bono services over the last decade in particular has become more sophisticated and arguably more effective, given the rise of a specialized group of lawyers at large, private law firms running pro bono programs, studies continue to show that pro bono help offers only a scant fraction of the legal resources necessary to serve low-income clients in eviction proceedings, and that law firms with pro bono programs face challenges in representing tenants and defendants in foreclosure actions, given conflict issues.

Therefore, through this legislation, the City Council should encourage all private lawyers in New York City to devote more resources to low-income clients in Housing Court and otherwise. However, the types of cases that are best suited for pro bono attorneys who are generally not experts and do not have the training or experience to represent the clients in the difficult eviction and foreclosure cases (and may even be conflicted from doing so given the paying clients that many large law firms represent), are those that would not be covered by the pending bills. This includes housing repair (“HP”) cases and Article 7A proceedings, the latter where an administrator is sought to be appointed to remedy hazardous housing conditions, long term neglect and/or harassment. In addition, pro bono resources could be devoted to clients who fall outside the 200% income limit that is recommended.

February 2015

²¹ TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *Report to the Chief Judge of the State of New York* 18-19 (2014) (emphasis added).