SAVING ONE'S HOME: COLLATERAL CONSEQUENCES FOR INNOCENT FAMILY MEMBERS

Barbara Mulé* & Michael Yavinsky†·

INTRODUCTION

Mrs. Smith, a resident of public housing for 30 years, had eviction proceedings brought against her after her 16 year-old son was found in possession of cocaine several blocks from her apartment. Unable to afford or retain an attorney, Mrs. Smith appeared at her administrative hearing without counsel. Unaware of the law and administrative procedures, Mrs. Smith refused to sign a stipulation agreeing to probation and permanent exclusion of her son from her apartment. During the hearing, Mrs. Smith did not submit proof of the mitigating circumstances that would have established her eligibility to remain in her apartment. The Hearing Officer rendered a determination terminating Mrs. Smith's tenancy. Not knowing what to do, Mrs. Smith prepared to move herself, her children, and her three grandchildren out of the apartment with nowhere to go.

This scenario highlights one of the most severe collateral consequences of criminal activity: eviction of innocent family members from their federally-assisted housing. Routinely, eviction proceedings[1] are commenced against a tenant of record based upon the criminal (usually drug) activity of another household member or guest. The tenant of record often is a parent or grandparent who lacks knowledge of or the ability to control the criminal activity. Yet statutory provisions may subject the entire household—despite their innocence—to eviction proceedings and potential homelessness.

The harshness of these consequences is compounded by the fact that there is no right to counsel in housing matters in New York. These family members generally must attempt to defend the right to their homes without the benefit of counsel.[2] Given the scope and complexity of the applicable federal, state, and local laws, these tenants are placed in an untenable situation. They must fend for themselves in forums that have been designed by and for attorneys, in which the

* Executive Assistant, the Honorable Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives.

† Chief Court Attorney, Criminal Court of the City of New York.

1. These include both administrative and court proceedings.

2. Publicly-funded legal services programs exist throughout the State to provide legal representation to those financially eligible. However, due to limited resources, these programs are unable to serve the vast majority of individuals seeking assistance. *See, e.g.*, Legal Services Project, *Funding Civil Legal Services for the Poor: Report to the Chief Judge* 5–7 (1998) [hereinafter *Legal Services Project Report*]; N.Y. State Bar Ass'n, *The New York Legal Needs Study* 162, 162–63 (rev. 1993) [hereinafter *The New York Legal Needs Study*].

culture and language are alien to them, and where they face experienced counsel who represent the public housing authority or other landlords. Without the assistance of counsel, these tenants are unable to fully access the courts[3] and thus ensure their right to equal justice.

This article will examine the federal law that is the basis for eviction of family members for drug activity of a household member, the various procedures that tenants must pursue to defend their right to remain in their home, and why an attorney is necessary at each step of the process to address this vital unmet legal need.

I.
EVICTION AS A COLLATERAL CONSEQUENCE

In an effort to eradicate drugs from our society, the national public policy has been to wage a war on drugs through the enactment and enforcement of strict drug laws and policies. In the area of federally-subsidized housing, these laws seek to exclude or evict those involved in drug activity.[4] Beyond that, they also seek to evict innocent family members who lack fault or knowledge of the drug activity, or the ability to control it.[5] While purporting to serve the important government objective—to ensure a safe, peaceful environment for residents of federally-subsidized housing—these policies victimize innocent tenants by imposing collateral consequences upon them. These consequences may be even more severe than the criminal sentence imposed on the offending household member. Moreover, these consequences undermine the goals of public housing by having a devastating impact on poor communities who lack the resources to defend against evictions and are unlikely to find alternative housing if evicted.

Under federal housing law, criminal or drug-related activity[6] engaged in by a federally-subsidized housing tenant, a member of the tenant's household, a guest, or any other person under the tenant's control, is grounds for eviction

3. "Courts" refers to both administrative and judicial tribunals.

4. *See, e.g.*, 42 U.S.C. § 1361 (2000) (ineligibility for federally-subsidized housing if person engaging in illegal use of a drug or had engaged in past criminal drug-related activity); 42 U.S.C. § 1437d(l) (2000) (termination of tenancy of person engaging in illegal drug use).

5. *See infra* note 7 and accompanying text. *See, e.g.*, 42 U.S.C. § 1437d(l)(6) (2000). According to the Department of Housing and Urban Development ("HUD"), the rationale behind these policies is that the tenant of record should be able to control the drug and other criminal activities of household members. If the tenant is unable to do so, the tenant is deemed a threat to other residents. 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991), *cited in* Rucker v Department of Housing and Urban Development, 535 U.S. 125, 134 (2002).

6. "Drug-related criminal activity" is defined as "the illegal manufacture, sale, distribution, use[,] or possession with intent to manufacture, sell, distribute, or use, of a controlled substance" (as such term is defined in Section 802 of Title 21 of the United States Code). 42 U.S.C. § 1437a(b)(9) (2000). Neither an arrest nor conviction is necessary to terminate the tenancy; moreover, the standard of proof used for criminal convictions does not need to be satisfied. 24 C.F.R. § 966.4(l)(5)(iii)(A) (public housing); 24 C.F.R. § 982.553(c) (Section 8 housing).

from federally-assisted housing. Known as the "One Strike and You're Out" policy ("One Strike"),[7] the statutes[8] and implementing regulations[9] require that all federally-assisted housing leases contain a provision stating that any drug-related criminal activity is a cause for termination of a tenancy. Tenants who knowingly or unknowingly violate these provisions are subject to immediate lease cancellation and eviction from their homes. The implementing regulations, however, also emphasize the public housing authority's discretion to look to the circumstances surrounding each case and decide whether eviction of innocent tenants is appropriate.[10]

After the implementation of the One-Strike policy, courts were divided on whether the statutory provision for public housing imposed a standard of strict liability or permitted an innocent tenant exception for those tenants who either

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7. This policy was so-named by President Clinton in his 1996 State of the Union Address. Although introduced as "new," the legislation was first enacted in 1988 as part of the Anti-Drug Abuse Act. The statute was amended in 1990 (by the Cranston-Gonzalez National Affordable Housing Act) to expand the bases for eviction. Pub. L. 101–625, 104 Stat. 4079. In 1996, the statute was amended again (as part of the Housing Opportunity Extension Act) to further expand the scope of the criminal activity lease provisions to "on or off the premises." Pub. L. 104–120, 9(a)–(c), 110 Stat. 836, 837. *See generally* Barclay Thomas Johnson, *The Severest Justice is Not the Best Policy: The One-Strike Policy in Public Housing*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 234, 235–36 (2001) [hereinafter One Strike].

8. For public housing, the applicable statute is 42 U.S.C. § 1437d(l)(6) (2000) which provides:

> Each public housing authority shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

For Section 8 federally-subsidized housing, 42 U.S.C. § 1437f(d)(1)(B)(iii) (certificates) and 42 U.S.C. § 1437f(o)(7)(D) (vouchers) apply. They provide:

> [D]uring the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises [or any violent] or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

See 42 U.S.C. § 1437f(d)(1)(B)(iii); 42 U.S.C. § 1437f(o)(7)(D) (bracketed language only found in 42 U.S.C. § 1437f(o)(7)(D)).

9. For public housing, *see* 24 C.F.R. § 966.4(l)(5)(i)(B) (2004) ("The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the [public housing authority] to terminate the tenancy"). For Section 8 housing, *see* 24 C.F.R. §§ 880.607(b)(iii) and 247.3(a)(3) (certificates), and 24 C.F.R. § 982.310(c) (vouchers).

10. 24 C.F.R. § 966.4(l)(5)(vii)(B). The One Strike policy created a tension with the public housing authority's discretion because the former provides incentives for public housing authorities to evict tenants without regard to case-specific circumstances by tying the project's rating (and thus its level of federal funding) to the number of drug activity evictions. *See, e.g.*, E.J. Hurst II, *Rules, Regs and Removal: State Law, Foreseeability, and Fair Play in One Strike Terminations from Federally-Subsidized Public Housing*, 38 BRANDEIS L.J. 733, 741–42 (2000).

were not at fault or had no knowledge of the drug activity.[11] A number of courts reasoned that due process only permitted One Strike evictions when a tenant knew of the drug-related activity.[12] In 2002, the United States Supreme Court resolved this conflict with its decision in *Rucker v HUD*.[13] In that case, the Supreme Court unanimously held that the plain language of the One Strike provision unambiguously precludes any knowledge requirement and thus allows public housing authorities to evict tenants "whether or not the tenant knew, or should have known," about the drug-related activity of a household member or guest.[14] The Court reasoned that this sort of strict liability "maximizes deterrence and eases enforcement."[15] Yet the court also emphasized that the statute does not require the eviction of tenants that violatetheir lease. Rather, it entrusts that decision to the "discretion" of the public housing authorities, "who are in the best position" to take account of the specific factors of the situation.[16]

In the aftermath of *Rucker*, the Department of Housing and Urban Development ("HUD") reiterated its position that the public housing authorities have the authority to evict any tenant, no matter how innocent, for a violation of the lease provision. Implicitly recognizing that this position could lead to harmful consequences, HUD urged the public housing authorities to use their discretion "responsibly" with regard to innocent tenants by balancing all of the competing interests before deciding to evict.[17]

Despite HUD's exhortation regarding public housing authorities' discretion,

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11. *See generally* Johnson, *supra* note 7 (analyzing the courts' debate over the One Strike policy). One New York case squarely illustrates the divide: *Syracuse Hous. Auth. v Boule*, 172 Misc.2d 254 (Syracuse City Ct. 1996) (no good cause for termination of tenancy where tenant had no knowledge of, did not consent to, and could not foresee the drug activity by her babysitter), *aff'd* 177 Misc.2d 400 (Onondaga County Ct. 1998), *rev'd*, 265 A.D.2d 832 (4th Dept. 1999) (applying strict liability standard).

12. *See* Johnson, *supra* note 7.

13. 535 U.S. 125 (2002). In *Rucker*, the local housing authority evicted a number of innocent tenants, including two elderly tenants whose grandsons were caught in the apartment complex parking lot with marijuana, a woman whose mentally disabled daughter was found with cocaine three blocks from the apartment, and a man whose caregiver was found with cocaine in the tenant's apartment.

14. *Id.* at 130.

15. *Id.* at 134.

16. *Id.* at 133–134. While the *Rucker* court recognized the discretion of public housing authorities to determine the appropriateness of eviction, it did not address what standards, if any, should govern the exercise of that discretion.

17. *See* Letter from Michael Liu, Assistant Secretary of HUD, to Public Housing Directors (June 6, 2002), www.nhlp.org.html/pubhsg/Lis%206-6-02&201ltr.pdf (last visited Apr. 25, 2006); Letter from Mel Martinez, Secretary of HUD, to Public Housing Directors (Apr. 25, 2002), www.nhlp.org/html/pubhsg/Maritinez%204-16-02%201ltr.pdf (last visited Apr. 25, 2006). The Assistant Secretary specifically stated that after *Rucker*, public housing authorities remained free to consider a wide range of factors—including the seriousness of the violation, the effect that eviction of the entire household would have on the innocent family members, and the willingness of the primary tenant to exclude the wrongdoing household member—in deciding whether and whom to evict as a consequence of such a lease violation.

innocent tenants are still facing eviction proceedings.[18] Following *Rucker*, the courts generally will uphold the public housing authority's decision because the public housing authority has the discretion to consider—or not to consider—the factors that weigh against eviction of an entire household.[19] In light of the limited review power of the courts, it is essential that innocent tenants faced with eviction have all resources available to them to ensure that the public housing authority uses its discretionary authority to elect not to evict. To accomplish this, it is more imperative than ever to ensure the availability of representation for innocent federally-subsidized housing tenants, particularly at the earliest stages of the eviction process.

II.
EVICTION PROCESS FOR FEDERALLY-SUBSIDIZED HOUSING

A. Administrative Procedures for Public Housing

Local housing authorities have established administrative procedures, pursuant to either HUD guidelines and regulations or consent decrees,[20] that purport to provide tenants with substantive and procedural protections when faced with eviction from federally subsidized housing. However, these protections are largely nullified if the tenant is not represented by counsel.

While the administrative proceedings are more informal than judicial proceedings, they still require a familiarity with the law and trial practice. At each stage of the process, tenants must put forth evidence and advocate for their position. They are expected to submit appropriate evidence, make informed and strategic decisions, and establish weaknesses or deficiencies in the public

18. This may largely be due to HUD's assessment criteria, which undermines any assertions by HUD that public housing authorities balance all factors before deciding to evict. *See* Hurst, *supra* note 10; *You Call That A Strike? A Post-Rucker Examination of Eviction from Public Housing Due to Drug-Related Criminal Activity of a Third Party*, 37 GA. L. REV. 1435 (Summer 2003).

19. *See, e.g.*, City Hous. Auth. of Joliet v. Chapman, 780 N.E.2d 1106 (Ill. App. Ct. 2002); Delvalle v. New York City Hous. Auth., 6 Misc.3d 1010(A)(Sup. Ct. N.Y. County 2004); Hous. Auth. of the City of Pittsburgh v. Fields, 572 Pa. 415, 816 A.2d 1099 (Pa. 2003). *See also* New York City Hous. Auth. v Taylor, 6 Misc.3d 135(A)(App. Term. 2d & 11th Jud. Dists. 2005); B & L Assoc. v. Wakefield, 6 Misc.3d 388 (Civil Ct. Kings County 2004). *But see* Oakwood Plaza Apts. v. Smith, 352 N.J. Super. 467, 800 A.2d 265 (N.J. Super. Ct. App. Div. 2002); Hampton Houses, Inc. v. Smith, N.Y.L.J., Mar. 13, 2003, at 23 [hereinafter Hampton Houses, Inc.]. It is HUD's position that courts can no longer decide whether the eviction was reasonable or whether the public housing authority balanced factors when deciding to evict. *See* Letter from Carole W. Wilson, HUD Associate General Counsel for Litigation, to Charles J. Macellaro, P.C. (Aug. 15, 2002), http://www.nhlp.org/htm/pubhsg/HUD%20Rucker%20Legal%20Opinion%20Yonkers%20 15aug2002.pdf (last visited Apr. 11, 2006). *But see Oakwood*, 352 N.J. Super. at 467, 800 A.2d. at 265.

20. 24 C.F.R. §§ 966.4(l)(4), 966.56 (2006); Escalera v. New York City Hous. Auth., 425 F.2d 853 (2d Cir. 1970).

housing authority's case through objections to evidence,[21] cross-examination of witnesses, and introduction of evidence in rebuttal.[22] Most importantly, the housing authority is always represented by counsel with expertise in eviction proceedings. With this imbalance of knowledge and resources, the tenant is not likely to prevail at the administrative level.

The procedures employed by the New York City Housing Authority ("NYCHA")[23] demonstrate what a tenant must overcome at each step of the administrative process to preserve her tenancy. The termination process begins informally, with the project manager calling in the tenant when criminal drug activity has been discovered.[24] At this stage, the tenant is interviewed in order to ascertain the facts involved.[25] While it may appear innocuous to the tenant, any information she provides at this stage can be used against her at a subsequent hearing. It can also be used in any pending criminal proceeding.

If the project manager determines that termination of tenancy is appropriate, the tenant's file is sent to the Tenancy Administrator and, if appropriate, to NYCHA's Law Department for preparation of a Notice of Charges. The Notice of Charges sets forth the charges against the tenant and the facts underlying the charges, and informs the tenant of her right to bring witnesses and to appear with counsel. A copy of NYCHA's Termination Procedures[26] is attached. The tenant is requested to answer the charges in writing.[27]

On the hearing date, except for the most serious of cases, a representative of NYCHA will seek to settle the matter by stipulation. Generally, the stipulations contain provisions allowing for the continuation of the tenancy upon the

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21. It is important to note that the rules of evidence are not strictly applied in these proceedings. While this might assist the tenant in some regards, it also places the tenant at a great disadvantage, as the tenant lacks the expertise to counter the public housing authority's experienced advocate. This leaves the tenant without the protections of a set of rules that are intended to protect both sides from potentially problematic evidence (*e.g.*, hearsay evidence).

22. Tenants also must consider the implications for any related criminal matter that may be pending.

23. These procedures were established pursuant to a consent decree entered in *Escalera*, 425 F.2d at 853 [New York City Housing Authority, hereinafter NYCHA]. Given that decree, it is likely that the NYCHA's procedures provide greater rights and protections to tenants than the procedures employed by other public housing authorities in the State.

24. The public housing authority receives police reports from the local precincts about crimes committed in or near its projects.

25. At this stage, the project manager is assessing, pursuant to her discretionary authority, whether termination of the tenancy is the appropriate course of action. Factors taken into consideration include the extent of the impact of the activity upon the project.

26. The Procedures document is a five-page, single-spaced document that details the steps of the administrative proceeding, from the initial informal interview through eviction. While the document contains useful information for the tenant, it is not easily comprehensible for the average person (*i.e.*, one who reads at a sixth to eighth grade reading level).

27. Prior to the hearing, the tenant or her representative is permitted to examine any materials in the tenant's folder that relate to the issues in the eviction proceeding. NYCHA is precluded from relying on any material at the hearing that was not provided to the tenant after a proper request.

imposition of certain conditions such as probation, permanent exclusion of the offending family member, and a right to inspect the premises. A tenant, unaware of the law and the penalties that can be imposed following a hearing, will not be able to assess if the stipulation is in her best interest.[28] She may agree to terms that place her at great risk of termination or eviction in the future.[29] Further, the stipulations are offered immediately prior to the hearing, depriving the tenant of the opportunity to consult with an attorney before signing.[30]

If the tenant does not agree to settle the matter, a hearing is held before an independent hearing officer. At the hearing, NYCHA is represented by an attorney. NYCHA puts forth evidence to prove the grounds for eviction, including calling witnesses such as police officers. The tenant has the right to object to evidence and cross-examine NYCHA's witnesses, as well as the right to offer a rebuttal case, including proof of mitigating circumstances. If the termination is based upon the activity of a third party, NYCHA must establish that the third party occupied the premises at the time of the offense. If NYCHA makes this showing, the tenant can avoid termination of her tenancy if she asserts that the third party has left her apartment permanently and presents evidence to support this assertion.[31]

Following the hearing, the hearing officer renders a decision, which is reviewed by the NYCHA Board. Upon the Board's determination, the tenant is notified of the Board's determination.

B. Court Proceedings Following An Administrative Proceeding

If NYCHA's determination is unfavorable to the tenant, the tenant generally will be faced with three options: to voluntarily vacate the apartment; to challenge the determination through an Article 78 proceeding in Supreme Court; or to

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28. By signing the stipulation, the tenant avoids the risk that the tenancy will be terminated after a hearing. However, the terms of the stipulation (generally a form stipulation) may be harsher than the penalties that can be imposed by the hearing officer after a hearing. For example, if the offending household member no longer resides in the household, the only dispositions that can be imposed by the hearing officer are eligible, probation (up to 12 months with various conditions attached) or eligible subject to permanent exclusion. However, the NYCHA attorney may seek a settlement that includes a longer term of probation and a permanent ban on visitation to the apartment or elsewhere on the premises.

29. *See, e.g.*, Robinson v. Martinez, 308 A.D.2d 355 (N.Y. App. Div. 1st Dept. 2003); Patrick v. Hernandez, 309 A.D.2d 566 (N.Y. App. Div. 1st Dept. 2003); Holiday v. Franco, 268 A.D.2d 138 (N.Y. App. Div. 1st Dept. 2000).

30. According to Ricardo Morales, General Counsel of NYCHA, a majority of the administrative proceedings are settled pursuant to stipulations. The high number of settlements illustrates the need for an attorney at this stage of the administrative proceeding. Interview with Ricardo Morales, General Counsel, New York City Hous. Auth. (Mar. 17, 2005) (on file with authors) [hereinafter Morales Interview].

31. *Id. See also* Abney v. Popolizo, 182 A.D.2d 815 (N.Y. App. Div. 2d Dept. 1992) (explaining that tenancy cannot be terminated under NYCHA's procedures absent substantial evidence that the third party continued to reside with the tenant at the time of the administrative hearing).

appear in Housing Court upon the commencement of a summary holdover proceeding against her.

If the tenant chooses to pursue an Article 78 proceeding, there will be numerous hurdles, as Supreme Court practice and procedures are complex and generally difficult for the self-represented litigant to understand.[32] Initiating and pursuing such a proceeding requires knowledge of the law and civil procedure. Generally, the tenant will be required to seek poor person's relief to commence the action,[33] prepare the pleadings (which might include writing a legal brief), and secure the transcript from the administrative proceeding. In certain circumstances, the Supreme Court will not have jurisdiction, and the case will be transferred to the Appellate Division for resolution, placing additional burdens upon the tenant.

If the tenant chooses to appear in Housing Court, there is little that the tenant can do, as the Housing Court has no authority other than to order the eviction upon a finding that the tenancy has been terminated by NYCHA; it cannot review the prior administrative proceedings. However, if the tenant has any procedural defenses, such as sufficiency of service of process, these can be raised.

C. Initial Court Proceedings for Federally-Subsidized Housing

In certain case types, the administrative process does not need to be exhausted before proceeding into court to evict a federally-subsidized housing tenant. These cases, known as "Bawdy House" cases, generally involve a private landlord or a public housing authority seeking to evict a Section 8 or public housing tenant who has used the premises for an illegal trade or business.[34] Because these cases involve matters of public policy for the "protection of the safety and welfare of neighboring tenants and

32. Offices for the Self-Represented have been established in some of the Supreme Courts to assist the self-represented by providing procedural and legal information. While these offices provide a great service, they cannot assist the self-represented in drafting pleadings or give them legal advice as to how best to proceed with their case.

33. Pursuant to Civil Practice Laws and Rules Section 1102(a), the court has discretionary authority to appoint counsel for an indigent litigant. However, because the statute does not allow for compensation of counsel, very few courts invoke their authority under this provision and appoint counsel.

34. These cases generally are brought pursuant to Real Property Actions and Proceedings Law Section 711(1) (grounds where landlord tenant relationship exists) [hereinafter RPAPL], RPAPL Section 711(5) (grounds and procedure where use or occupancy is illegal), and Real Property Law Section 231(1) (describing liability of landlord where premises are occupied for unlawful purpose). They are brought in either the Civil Court of the City of New York (in New York City), a City Court (in the 62 cities outside New York City), a District Court (in Nassau and Suffolk Counties), or a Town and Village Court (outside New York City).

A private landlord can also bring a summary holdover proceeding against a Section 8 tenant pursuant to RPAPL Section 715 for violating the lease based upon drug-related criminal activity. Following *Rucker*, it appears that courts are applying a strict liability standard in such cases. *See e.g., B & L Assoc.*, 6 Misc. 3d at 388. *But see* Hampton Houses Inc., *supra* note 19, at 23.

the community,"[35] these matters are prosecuted fully, generally requiring a trial on the merits.[36] Given the complexity of the legal issues and the nuances in the law, a tenant without representation in these matters is unlikely to defeat the eviction.

In these cases, the petitioner landlord has the burden of proof, by a preponderance of the evidence, to show that the leased premises were used for illegal purposes. In so doing, the landlord must show: the existence of a sufficient nexus between the alleged illegal activity and the premises in question; that the tenant's alleged illegal use of the premises is customary and habitual; that the alleged illegal use is ongoing and not just an isolated incident; and that the tenant, if not involved in the alleged illegal activity, had knowledge of the activity and acquiesced to the commission of it.[37] To prove the case, the landlord generally will call police officers and other expert witnesses to testify about the drug activity, which, if counsel were available, would be subject to cross-examination.

As in an administrative hearing the tenant must submit appropriate evidence, make informed and strategic decisions, and establish weaknesses or deficiencies in the landlord's case in order to prevail. The tenant also may be required to participate in motion practice. The proceeding can have serious implications for any related criminal case that is pending, as the Housing Court matter will examine the underlying facts of the criminal case.

A troubling example of how the absence of representation can create a severe disadvantage is seen in two cases where the public housing authority worked in conjunction with the District Attorney's office to obtain sealed criminal records for use in the Housing Court proceeding.[38] In both cases, the sealed records had been disseminated without a court order. If not for the respondents-tenants' knowledgeable attorney, the issue of the unlawful dissemination would not have been raised or addressed.[39] Clearly, a self-

35. Hudsonview Co. v. Jenkins, 169 Misc.2d 389, 393 (Civ. Ct. N.Y. County 1996).

36. In certain circumstances, the District Attorney requires the landlord to commence the proceeding. In these cases, the District Attorney's office remains the driving force behind the case and is involved in its prosecution.

37. The holding in *Rucker* is not applicable to Bawdy House cases. However, at least one court has applied the strict liability standard to a Bawdy House case involving federally subsidized tenants. *Taylor*, 6 Misc.3d at 135(A).

38. *See* People v. Canales, 174 Misc.2d 387 (Sup. Ct. Bronx County 1997); In re People of the State of New York v. Manauri R., N.Y.L.J., Oct. 22, 2004, at 21.

39. There is significant anecdotal evidence that, despite the statutory sealing of certain criminal records, public housing authorities continue to obtain and use sealed records to prosecute eviction proceedings. Such actions by public housing authorities appear to contravene the legislative intent behind the sealing of criminal records. Most commonly, criminal records are sealed when a case is terminated in favor of the accused (Criminal Procedure Law Section 160.50 [hereinafter C.P.L.]) and when an eligible youth has a conviction replaced with a youthful offender adjudication (C.P.L. Section 720.20). Under C.P.L. Section 160.50, the sealing deems the arrest and prosecution a nullity, and restores the accused, in contemplation of law, to the status occupied before the arrest and prosecution. The statute specifically states that "the arrest or prosecution

represented tenant would not be aware of the issue and even more unlikely to know how to address it.

CONCLUSION: NECESSITY OF ATTORNEY REPRESENTATION

The above discussion of the legal and procedural requirements necessary to evict a federally-subsidized housing tenant make clear that attorney representation is essential to fully access the adjudicatory process and thus avoid eviction. At every stage of the eviction proceeding—from the initial interview by the project manager, to the settlement negotiations, to the hearing or trial—an attorney can and will make a difference.[40]

Yet under our civil justice system, most tenants cannot access the services of an attorney.[41] For low-income tenants who cannot afford to pay for an attorney, generally their only chance for representation is through a legal services program or a pro bono attorney.[42] At best, these resources leave a very

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shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling." C.P.L. § 160.60. It is hard to see how the accused could be restored to the status before an arrest if she faces losing federally-subsidized housing as a result of the sealed events.

Similarly, when records are sealed due to a youthful offender adjudication, "all official records and papers, whether on file with the court, a police agency or the division of criminal justice services . . . are confidential and may not be made available to any person or public or private agency." C.P.L. § 720.35(2). In addition, C.P.L. Section 720.35(1) states that "[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority." This again evinces the legislative intent that such records should not be used to prosecute eviction proceedings.

40. Research confirms that the availability of attorney representation significantly impacts the outcomes of judicial proceedings. *See, e.g.*, Carol Seron, Gregg Van Ryzin, Martin Frankel & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 426–428 (2001) (noting that represented tenants were significantly more likely to achieve a successful outcome); Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 413 (1995) (noting that tenants represented by legal services programs are more than three times as likely to avoid eviction as were unrepresented tenants in New Haven eviction actions); *The New York Legal Needs Study*, *supra* note 2, at 31 (noting the results of a pilot housing program funded by the New York City Human Resources Administration in which represented tenants avoided eviction in over ninety percent of the cases and retained their original apartments over seventy-five percent of the time; if not represented, tenants would have been evicted in eighty-five percent of those cases). *See also* Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board*, 26 LAW & SOC'Y REV. 627, 645–53 (1992) (reporting that in a study of Hawaiian public housing eviction proceedings, represented tenants had a one percent probability of eviction for financial nonperformance and a twenty-nine percent probably of eviction for behavioral violations, while unrepresented tenants had a fifty-one percent and twenty-nine percent probability of eviction for the same respective violations, during one out of six time periods studied).

41. Approximately ten percent of tenants are represented in judicial eviction proceedings statewide. *See The New York Legal Needs Study*, *supra* note 2, at 39, 40–41. The same statistic applies to tenants appearing at administrative hearings at the NYCHA. Morales Interview, *supra* note 30.

42. While there are at least six law school clinics statewide that handle housing matters, these

large number of low-income New Yorkers without representation.[43] In light of the stakes involved for innocent tenants, steps should be taken to ensure the availability of legal representation from the earliest stages of federally-subsidized housing eviction proceedings.[44]

programs can only assist a small number of tenants due to their pedagogical focus.

43. *See, e.g.*, The New York Legal Needs Study, *supra* note 2. *The New York Legal Needs Study* found that only fourteen percent of the civil legal needs of New York's poor were being met and that funding for legal services programs in New York was inadequate to serve more than four percent of those needs. *Id.* at 159–160, 162–163. *See also* NEW YORK STATE UNIF. CT. SYS., REPORT ON THE 2002 PRO BONO ACTIVITIES OF THE NEW YORK STATE BAR, at 7–9 (Jan. 2004) (finding that *pro bono* services to poor persons has remained fairly static; however the provision of direct *pro bono* services to poor persons in civil matters [such as housing representation] has undergone a substantial decline).

44. Such representation will not only benefit innocent tenants but the larger society as well. Studies have determined that the provision of civil legal services is highly cost-effective and results in the significant savings to the State. *See, e.g.*, *Legal Services Project Report*, *supra* note 2, at 7–9 (outlining three lawyer representation projects which have resulted in savings for the State. One of the projects, the Homelessness Prevention Program, was found to result in savings of approximately four dollars for every dollar of cost).