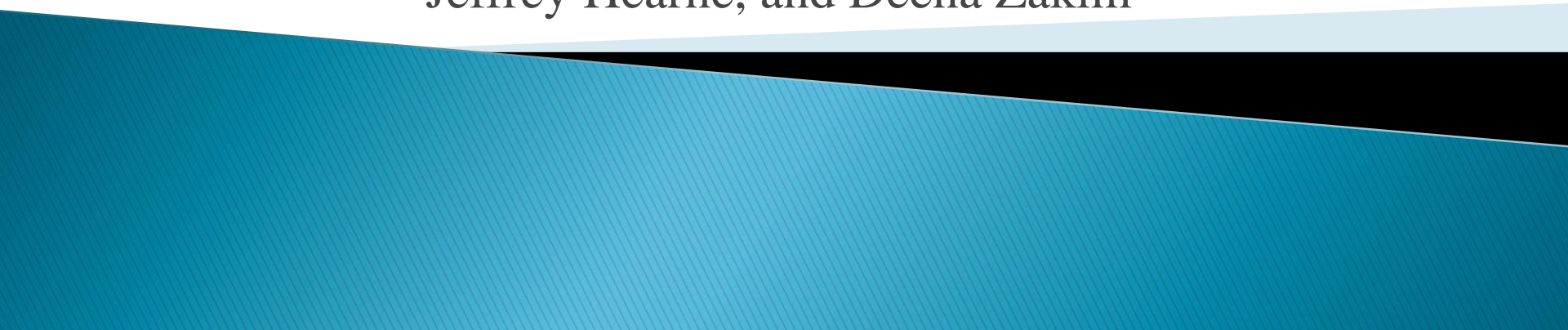


Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth

Housing Justice Network (HJN) Conference
October 29-31, 2022

Larry McDonough, Lawrence Wood,
Jeffrey Hearne, and Deena Zakim



Presenters

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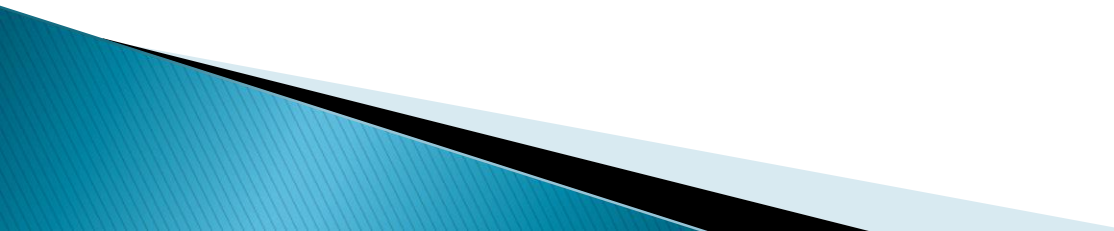
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Agenda

- I. Analyzing Cases
 - II. Advocacy in Courts, Legislatures, Counties, Cities, and PHAs
 - III. Open forum on participant work on the issue and ideas for federal and local action
- 

National Resources

Wait a Minute: Slowing Down Criminal Activity Eviction Cases to Find the Truth, 41 CLEARINGHOUSE REVIEW 55 (May/June 2007) (“Wait”)

<http://povertylaw.homestead.com/WaitAMinute.html>

Chapter 11, *Eviction and Subsidy Terminations*, in HUD HOUSING PROGRAMS: TENANTS' RIGHTS (National Housing Law Project, 5th ed. 2018) (“Green Book”)

<https://www.nhlp.org/products/green-book/>

Fred Fuchs, *Defending Families and Individuals threatened with Eviction from Federally Subsidized Housing, HOME-Funded Properties, § 515 Rural Rental Housing, § 8 Moderate Rehabilitation, Shelter Plus Care Housing, Supportive Housing for the Elderly and Persons with Disabilities, of Care Housing, HOPWA, Tax Credit Housing, Section 8 Housing Choice Voucher Program, Public Housing, Project-Based Voucher Program, Section 811 Project Rental Assistance, and Public Housing Converted under RAD Program* (Texas RioGrande Legal Aid, Updated Sep. 5, 2022) (“Fuchs”).

<http://povertylaw.homestead.com/WaitAMinute.html>

This Slide Show

<http://povertylaw.homestead.com/WaitAMinute.html>



State Materials (Example)

Housing Law in Minnesota

<http://povertylaw.homestead.com/HousingLawinMinnesot.html>

Residential Eviction Defense and Tenant Claims in Minnesota

<http://povertylaw.homestead.com/ResidentialEvictionDefenseandTenantClaimsinMinnesota.html>

If you do not have your own, start working on them!



Get Involved: Legal Services Attorneys and Others Can Help

“[LSC] Recipients are prohibited from defending any person in a proceeding to evict that person from a public housing project if:

- (a) The person has been charged with or has been convicted of the illegal sale, distribution, or manufacture of a controlled substance, or possession of a controlled substance with the intent to sell or distribute; and
- (b) The eviction proceeding is brought by a public housing agency on the basis that the illegal drug activity for which the person has been charged or for which the person has been convicted threatens the health or safety of other tenants residing in the public housing project or employees of the public housing agency.”

[45 C.F.R. § 1633.3](#)



Get Involved: Legal Services Attorneys and Others Can Help

Definitions.

“(a)Controlled substance has the meaning given that term in section 102 of the Controlled Substances Act (21 U.S.C. 802);

(b)Public housing project and public housing agency have the meanings given those terms in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a);

(c)Charged with means that a person is subject to a pending criminal proceeding instituted by a governmental entity with authority to initiate such proceeding against that person for engaging in illegal drug activity.”

[45 C.F.R. § 1633.2](#)



Get Involved, Continued

Break it down.

(1) LSC-funded attorneys may not

(2) defend

(3) in public housing

(4) evictions

(5) persons

...



Get Involved, Continued

(6) convicted of or

(7) charged with (subject to a pending criminal proceeding)

(8) illegal sale, distribution, or manufacture of a controlled substance, or possession of a controlled substance with the intent to sell or distribute;

(9) when the evictions are based on threats to health or safety

(10) of public housing residents or

(11) employees.



Get Involved, Continued

This of what is not covered by this limitation.

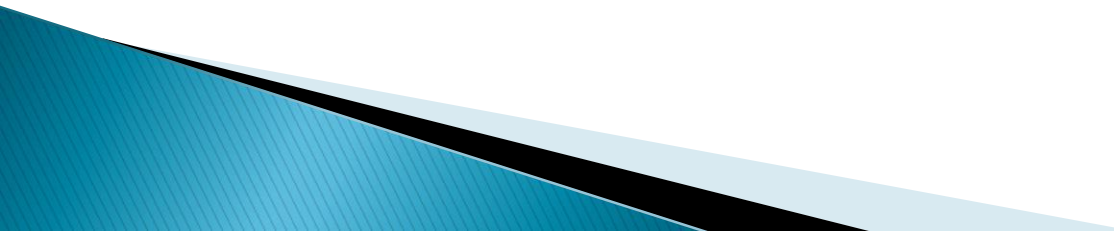
See Wait, supra, at 56.

- (1) Non-LSC-funded attorneys
- (2) If LSC-funded attorneys:
 - (a) Not public housing
 - (b) Not defending an eviction proceeding
 - (c) Not a person charged or convicted
 - (i) Can represent other household member
 - (ii) Can represent person if not charged or convicted

...



Get Involved, Continued

- (6) Not drugs (i.e. other criminal activity)
 - (7) If possession, no intent to sell or distribute
 - (8) No criminal proceeding
 - (9) Not based on threats to health or safety
 - (10) No public housing residents or employees threatened
- 

The Rucker Decision: A Bad Decision But Not as Bad as You Think

Department of Housing and Urban Development v. Rucker,
535 U.S. 125 (2002)

Rucker held that the public housing eviction statute “requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity.”


See [*Wait, supra*, at 57](#), quoting *Rucker*, 535 U.S. at 130; Fuchs, *supra*, at 129-36.

Rucker Continued

Does it require eviction of tenants in households where criminal activity occurred? No.

Does it foreclose defenses based on the specific requirements of the regulations? No.

Does it preclude other defenses under federal and state law? No (i.e. disability reasonable accommodation, VAWA, improper notice, waiver, etc.). *See slides, infra.*



Public Housing

The main criminal-activity provisions of the statute and regulations may be broken down into 10 elements involving criminal activity not involving drugs, drug-related criminal activity, and the actor. 42 U.S.C.A. § 1437d(1)(6); 24 C.F.R. § 966.4(f)(12).

See Wait, *supra*, at 58-62; Green Book, *supra*, at 11.2.4.4 and Appendix 11B; Fuchs, *supra*, at Ch. XIII; Minnesota Answer Form A8.

Criminal Activity Not Involving Drugs

(1) *criminal* activity

(2) that *threatens* the health, safety, or right to peaceful enjoyment of the premises by other tenants

See Wait, *supra*, at 58-60; Green Book, *supra*, at 11.2.4.4.4 and Appendix 11B at 637-43; Fuchs, *supra*, at XIII.B.

Drug-Related Criminal Activity

- (3) any drug-related
- (4) *criminal* activity
- (5) *on or off* such premises

See Wait, *supra*, at 61-62; Green Book, *supra*, at 11.2.4.4.4 and Appendix 11B at 637-43; Fuchs, *supra*, at XIII.E.

The Actor

For both criminal activity not involving drugs and drug-related criminal activity, it must be:

- (6) engaged in by
- (7) a public housing tenant,
- (8) any member of the tenant's household, or
- (9) any guest or
- (10) other person under the tenant's control

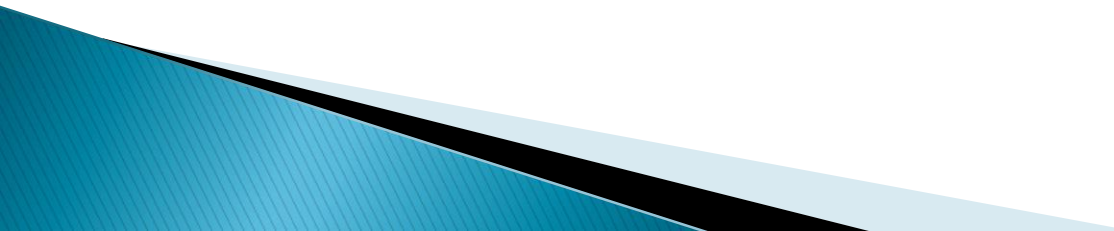
See [Wait, *supra*, at 60-62](#); Green Book, *supra*, at 11.2.4.4.6 and Appendix 11B at 637-43; Fuchs, *supra*, at XIII.I.



The Actor

However, when a person in the category of “other person under the tenant’s control” commits the drug-related criminal activity, the statute and regulations apply only when the activity occurs on the premises.

See [Wait, supra, at 60-62](#); Green Book, *supra*, at 11.2.4.4.6 and Appendix 11B at 637-43; Fuchs, *supra*, at XIII.I.



The Actor

Persons whose alleged criminal activity does *not* subject a public housing tenant to lease termination and eviction include:

- (1) a visitor who was invited by a person who is not a member of the household or by a member of the household who does not have express or implied authority to so consent on behalf of the tenant;
- (2) a visitor who was not invited to the property;

...

See [Wait, *supra*, at 60-62](#); Green Book, *supra*, at 11.2.4.4.6 and Appendix 11B at 637-43; Fuchs, *supra*, at XIII.I.

The Actor

- (3) a stranger;
- (4) a person temporarily and infrequently on the premises solely for legitimate commercial purposes, absent evidence to the contrary; and
- (5) a person in the category of “other person under the tenant’s control” commits drug-related criminal activity off the premises.

See Wait, *supra*, at 60-62; Green Book, *supra*, at 11.2.4.4.6 and Appendix 11B at 637-43; Fuchs, *supra*, at XIII.I.

Other Criminal Activity

Conviction of any household members for manufacturing or producing methamphetamine on the premises: mandatory eviction

[42 U.S.C.A. § 1437n\(f\)](#)

[24 C.F.R. § 966.4\(l\)\(5\)\(i\)\(A\)](#)

Violent criminal activity or felony conviction: mandatory eviction

[42 U.S.C.A. § 1437d\(l\)\(4\)\(A\)\(ii\)](#)

[24 C.F.R. § 966.4\(l\)\(3\)\(i\) \(B\)\(2\)–\(3\)](#)

[24 C.F.R. § 5.100](#)

Tenant fleeing to avoid prosecution, or custody or confinement after felony conviction, or violating a condition of probation or parole imposed under Federal or State law: permissive eviction

[42 U.S.C.A. § 1437d\(l\)\(9\)](#)

[24 C.F.R. § 966.4\(l\)\(5\)\(ii\)\(B\)](#)

See [Wait, *supra*, at 62](#); Green Book, *supra*, at 11.2.4.4.1. and Appendix 11B at 637-43.

Drug Paraphernalia

Although drug-related criminal activity is grounds for eviction, possession of drug paraphernalia does not constitute “drug-related criminal activity” under the governing federal regulations.

24 C.F.R. § 5.100 (definitions of *drug* and *drug-related criminal activity*).

See Fuchs, *supra*, at XIII.G.



Medical Marijuana

HUD issued a memo directed to federally subsidized owners reminding them that despite increasing decriminalization of marijuana at the state level, the “manufacture, distribution, or possession of marijuana is a federal criminal offense.” The memo also states, however, that owners have discretion whether to evict tenants for illegal drug use. The memo also states that owners cannot enact lease terms that permit occupancy by any individual who uses marijuana.

HUD Memo Regarding Use of Marijuana in Multifamily Assisted Properties (Dec. 29, 2014).

<https://www.hud.gov/sites/documents/USEOFMARIJINMFASSISTPROPTY.PDF>

Whether state laws decriminalizing marijuana protect public and subsidized housing tenants is an issue of preemption. See Wait, *supra*, at 76-77; Green Book, *supra*, at 11.2.4.4.4; Fuchs, *supra*, at XIII.H.

Notice PIH 2015-19

Notice PIH 2015-19: Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions

Arrest records may not be the basis for denying admission, terminating assistance or evicting tenants.

HUD does not require adoption of “One Strike” policies.

PHAs can use police reports and other relevant documentation.

PHAs and owners have the obligation to ensure that any admissions and occupancy requirements they impose comply with applicable civil rights requirements contained in the Fair Housing Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, and Titles II and III of the Americans with Disabilities Act of 1990, and the other equal opportunity provisions listed in 24 CFR 5.105.

Bypassing the Grievance Process

A PHA may exclude from the PHA administrative grievance procedure under this subpart any grievance concerning a termination of tenancy or eviction that involves:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises of other residents or employees of the PHA;

(B) Any violent or drug-related criminal activity on or off such premises; or

(C) Any criminal activity that resulted in felony conviction of a household member.

24 C.F.R. § 966.51 (a)(2)(I).



Section 8 Tenant-Based Voucher Program: Eviction

Similar but not identical to public housing:

There is cause for eviction where a tenant, member of the tenant's household, guest, or other person under the tenant's control engages in

(1) “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants,”

(2) “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

...



Section 8 Tenant-Based Voucher Program: Eviction

...

(3) “any violent or drug-related criminal activity on or near such premises.”

[42 U.S.C.A. § 1437f\(d\)\(1\)\(B\)\(iii\)](#)

[42 U.S.C.A. § 1437f\(o\)\(7\)\(D\)](#)

[24 C.F.R. § 982.310\(c\)\(1\), \(2\)\(I\)](#)

Tenancy Addendum Section 8 Tenant-Based Assistance Housing Choice Voucher Program, Form HUD-52641-A (8/2009).

Fleeing Prosecution:

[42 U.S.C.A. § 1437f\(d\)\(1\)\(B\)\(v\)](#)

[24 C.F.R. § 982.310\(c\)\(2\)\(ii\)](#)

See [Wait, supra, at 63](#); Green Book, *supra*, at 11.2.4.4.1 and Appendix 11B at 637-43; Fuchs, *supra*, at XIII.D; [Minnesota Answer Form A3](#).

Section 8 Tenant-Based Voucher Program: Subsidy Termination

Termination of assistance is permitted if the PHA determines any of the following:

- (1) any household member (including the tenant) is engaged in any illegal use of a drug,
- (2) any family member violated the family's obligation not to engage in any drug-related criminal activity,

...



Section 8 Tenant-Based Voucher Program: Subsidy Termination

...

- (3) any household member violated the family's obligation not to engage in any violent criminal activity, or
- (4) the family committed any serious or repeated violation of the lease in violation of its family obligations.

24 C.F.R. §§ 982.551-.553.

Conviction for manufacturing or producing meth.

24 C.F.R. § 982.553(b)(1)(ii)

See Wait, supra, at 63-64; Green Book, *supra*, at 11.2.4.4.1 and Appendix 11B at 637-43; Fuchs, *supra*, at XIII.D.

Section 8 Moderate Rehabilitation Program

Similar to Section 8 Vouchers

24 C.F.R. § 882.511

24 C.F.R. § 882.518

See Wait, *supra*, at 64-65; Green Book, *supra*, at 11.2.4.4.1 and Appendix 11B at 637-43; Minnesota Answer Form A5.

HUD-Subsidized Multifamily Housing Projects

Similar to Section 8 Vouchers, but methamphetamine convictions are not separately regulated in these programs.

[42 U.S.C.A. § 1437f\(d\)\(1\)\(B\)\(iii\)](#)

[42 U.S.C.A. § 1437f\(d\)\(1\)\(B\)\(v\)](#)

[42 U.S.C.A. § 13662\(a\)\(1\)](#)

[24 C.F.R. §§ 5.858, 5.859](#)

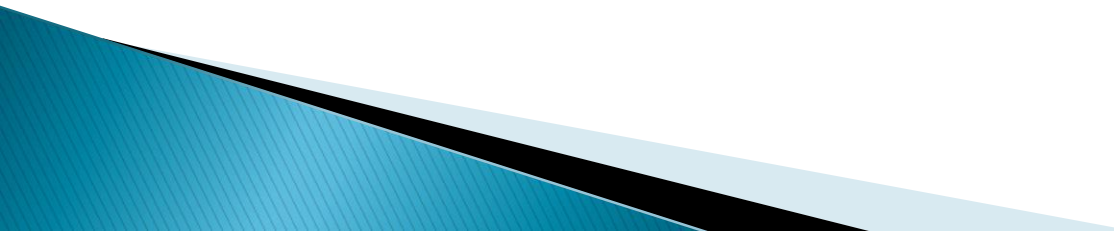
[24 C.F.R. § 247.3\(a\)\(3\)](#)

HUD-Subsidized Multifamily Housing Projects

U.S. Department of Housing and Urban Development,
HUD Handbook 4350.3: Occupancy Requirements of
Subsidized Multifamily Housing Programs, Ch. 8

http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgb/4350.3

See [Wait, *supra*, at 65](#); Green Book, *supra*, at 11.2.4.4.1
and Appendix 11B at 637-43; Fuchs, *supra*, at XIII.C;
[Minnesota Answer Form A4](#).



Care and Supportive Housing Programs

The criminal activity provisions of [24 CFR § 5.850 et seq.](#) don't apply to Shelter Plus Care, HOPWA, HOME, or McKinney supportive housing programs (now HEARTH and Continuum of Care) if no Section 8 funding is involved. [24 CFR §§ 5.850, 5.100 \(lists of covered programs\)](#).

Evictions based on alleged criminal activity must comply with program standards. *See* Green Book at 11.2.4.4.1; [Minnesota Answer Forms A4x and A5x](#).



Rental Assistance Demonstration (RAD) Program

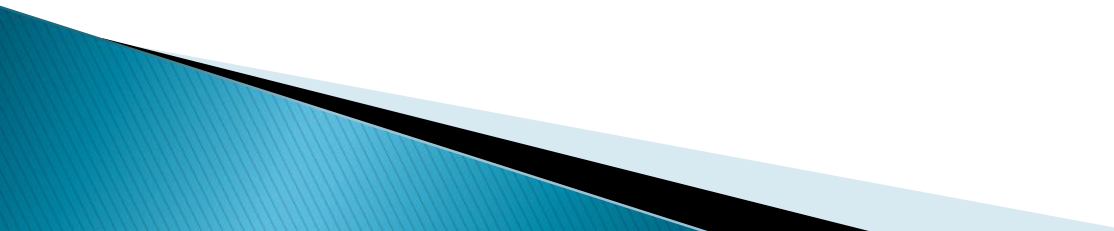
The Rental Assistance Demonstration (RAD) gives owners of public housing and four HUD “legacy” programs (Rental Supplement (Rent Supp), Rental Assistance Payment (RAP), Section 8 Moderate Rehabilitation (Mod Rehab), and Section 202 properties with Project Rental Assistance Contracts (PRACs)) the option to enter into long-term project-based Section 8 contracts that facilitate the financing of necessary repairs.

<https://www.nhlp.org/resources/rental-assistance-demonstration-rad/>



Rental Assistance Demonstration (RAD) Program

The owner may evict and terminate assistance with written notice for drug-related or violent criminal activity or any felony conviction. [Notice H-2017-03, REV-3, PIH-2012-32 \(HA\) at 58, 75, 136, 207, and 226 \(January 12, 2017\).](#) There is no discussion of eviction or assistance termination for non-violent criminal activity, or criminal activity near to or off the property. http://portal.hud.gov/hudportal/documents/huddoc?id=RAD_Notice_Rev3_Final.docx



Rural Housing Service Subsidized Housing Programs

The regulations for Rural Housing Service programs contain the most protection for tenants facing criminal-activity claims. Tenant defenses include:

- (1) The tenant, household member, guest, or person under the tenant's control did not admit to and was not convicted for involvement with illegal drugs.
- (2) The tenant, household member, guest, or someone under the tenant's control did not conduct illegal drug activity on the premises.

...

Rural Housing Service–Subsidized Housing Programs

...

(3) The tenant took reasonable steps to prevent or control illegal drug activity committed by a non-adult household member; such steps might include that the person is either actively seeking or receiving assistance through a counseling or recovery program, is complying with court orders related to a drug violation, or completed a counseling or recovery program within the time frames specified by the owner.

...



Rural Housing Service–Subsidized Housing Programs

...

(4) The adult person conducting the illegal drug activity vacated the unit within the time frames established by the landlord and did not return to the premises without the landlord's prior consent.

7 C.F.R. pt. 3560, subpt. D, in particular §§ 3560.156(b)(15), 3560.159(a)(1)(iii), 3560.159(d)

See Wait, *supra*, at 65-66; Minnesota Answer Forms A7 (RHS) and A7x (RHS with HUD Subsidies).

Low-Income Tax Credit Program

The program requires good cause for eviction but does not have separate requirements for criminal-activity cases.

26 U.S.C.A. § 42 (h)(6)(e)(ii)(I).

Low-income tax credits often are used in conjunction with other programs (such as federal public housing or HUD multifamily subsidized housing), and those programs' eviction and termination of subsidy rules overlap with tax credit rules.

See Wait, *supra*, at 66; Minnesota Answer Forms A6x (LITC), A4 (HUD Subsidized Projects), and A8 (Public Housing).



Violence Against Women Act

The Violence Against Women Reauthorization Act of 2022 went into effect October 1, 2022. It expands the provisions of the 2013 Act.

It applies to a long list of HUD, Agriculture, and Treasury subsidized housing programs, along with “any other Federal housing programs providing affordable housing to low- and moderate-income persons by means of restricted rents or rental assistance, or more generally providing affordable housing opportunities, as identified by the appropriate agency through regulations, notices, or any other means.”

Tenant eviction defenses include:

(1) Failure to include the VAWA Notice of Occupancy Rights under the Violence Against Women Act and a certification form ([Form HUD 5383](#)).

[24 C.F.R. §§ 5.2005](#) (notice and form), [5.2003](#) (covered programs). *See* [42 U.S.C. § 1437d \(u\)\(2\)\(B\)](#); Violence Against Women Reauthorization Act of 2013, [34 U.S. Code § 12491](#) (formerly [42 U.S.C. 4043e-11](#)).

Violence Against Women Act

(2) The landlord failed to state facts that authorize recovery by failing to state any allegations that are not related to or the result of an incident(s) of domestic violence, dating violence, sexual assault or stalking that the federal Violence Against Women Act (VAWA) prohibits as a basis for eviction.

42 U.S.C. § 1437d (1)

24 C.F.R. §§ 5.2001-5.2009, 966.4.



Violence Against Women Act

(3) The landlord alleged breach by criminal activity that

(1) was directly related to domestic violence, dating violence, sexual assault or stalking,

(2) was done by a member of the household, guest, other person under the tenant's control, and

(3) the tenant or a person affiliated with the tenant was the victim or threatened victim.

42 U.S.C. § 1437d (1)

24 C.F.R. §§ 5.2001-5.2009, 966.4.



Violence Against Women Act

(4) The landlord alleged breach of the lease by damage to the premises that is the result of domestic violence, dating violence, sexual assault and stalking so cannot be the basis to evict the tenant.

42 U.S.C. § 1437d (l)

24 C.F.R. §§ 5.2001-5.2009, 966.4.

Violence Against Women Act

(5) The landlord alleged breaches that are the result of domestic violence, dating violence, sexual assault or stalking of the tenant or tenant's household members so they are not (1) serious or repeated violations of the lease, (2) material violations of the lease, or (3) other good cause.


[42 U.S.C. § 1437d \(1\)](#)

[24 C.F.R. §§ 5.2001-5.2009, 966.4.](#)

Violence Against Women Act

Notice PIH-2017-08 (HA) discusses the prohibition of eviction and termination based on an adverse factor that is a direct result of the fact that the tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, along with a long list of examples. Id. § 7 at 6-10.

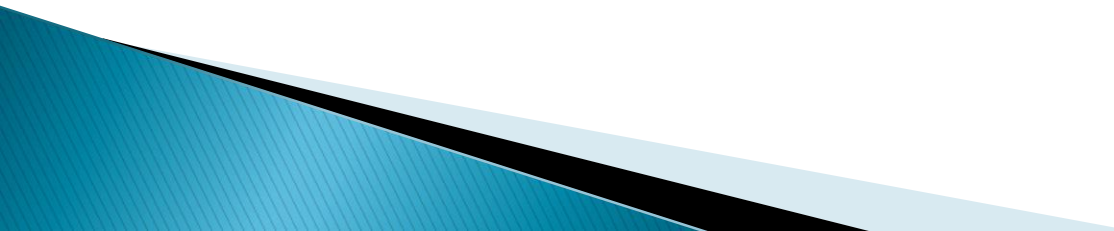
See Wait, supra, at 66-67; Green Book, *supra*, at 11.2.4.6.17 and Appendix 11B; Fuchs *supra*, at XIII.J; Minnesota Answer forms.



Violence Against Women Act

Remedies:

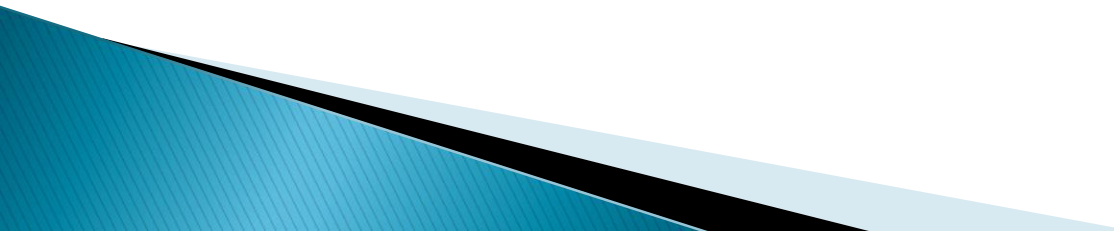
(1) Order the landlord to (1) accept the tenant's certification of domestic violence, dating violence, sexual assault or stalking, and (2) withdraw its termination notice and (3) dismiss this action with prejudice.



Violence Against Women Act

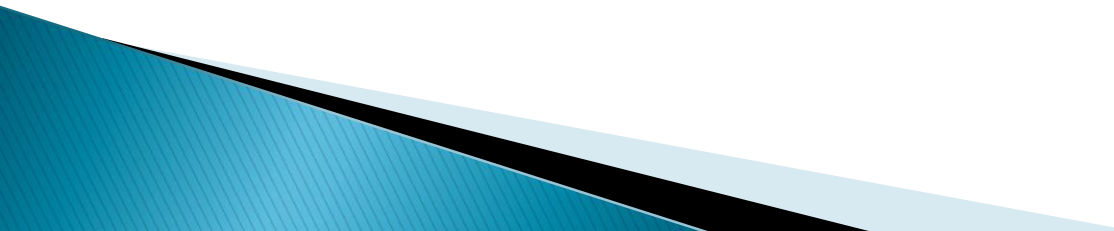
(2) Evict the abuser/ attacker/stalker, but do not evict the tenant or the rest of the tenant's household.

(3) Order the landlord to evict the abuser/ attacker/stalker, but do not evict the tenant or the rest of the tenant's household.



Violence Against Women Act

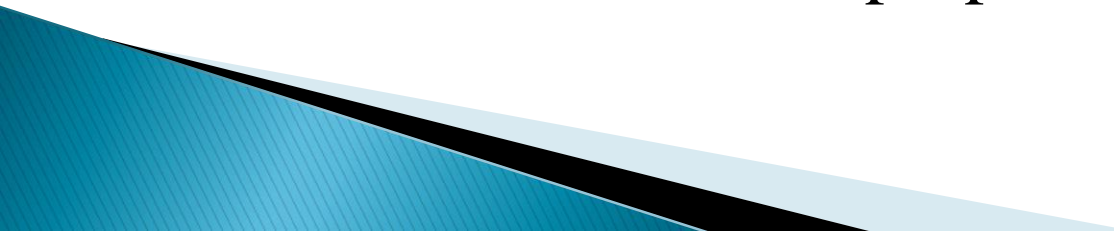
(4) Order the landlord to execute a new lease with the tenant that does not include the abuser/attacker/stalker, in the household. If the landlord has not established my eligibility for this housing program, order the landlord to allow the tenant to establish eligibility. If the tenant cannot establish eligibility for this housing program, then the landlord must provide the tenant with a reasonable time to find new housing.



Violence Against Women Act

(5) Order the landlord to recertify/recalculate the tenant's rent without the income of the abuser/attacker/stalker if no longer a member of the tenant's household.

(6) Seal any information in this court file that contains information about any incidents of domestic violence, domestic abuse violence, sexual assault or stalking, including the tenant's address, so it is not accessible to anyone but court employees, the tenant or the landlord for the purposes of the action.

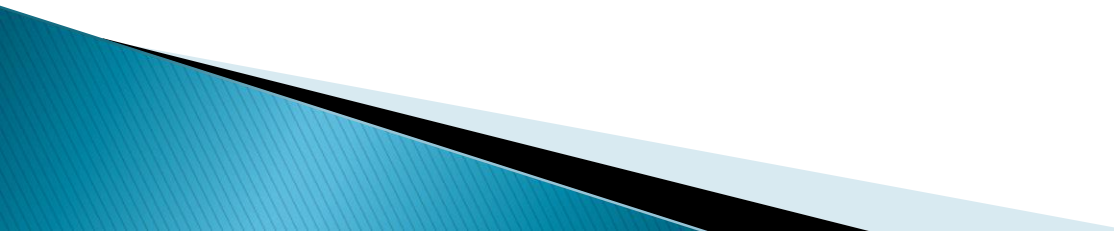


Violence Against Women Act

42 U.S.C. § 1437d (1)

24 C.F.R. §§ 5.2001-5.2009, 966.4.

See Wait, *supra*, at 66-67; Green Book, *supra*, at 11.2.4.6.17 and Appendix 11B; Fuchs, *supra*, at XIII.J; Minnesota Answer forms.



Violence Against Women Act - Examples

1. Upon returning from the hospital, where she was treated for injuries sustained during a savage beating from her boyfriend in her apartment, a public housing resident received from the Chicago Housing Authority written notice of the agency's decision to terminate her tenancy on the grounds that her boyfriend caused over \$3,000 worth of damage to the unit and disturbed the neighbors while beating her.
2. The resident of a Section 8 project-based development in Chicago faced eviction for stabbing her ex-boyfriend while defending herself after he crawled through her kitchen window while she was sleeping and attacked her.
3. A public housing resident was severely burned when her adult daughter's ex-boyfriend (whom the police had brought to the public housing unit so she would be safe) set fire to the unit by pouring gasoline through her window. Three months later, when she was released from the hospital, the Housing Authority of Cook County refused to rehouse her, in part because HACC blamed her for the fire.
4. After the resident of a Section 8 project-based development was beaten by her fiancé in her apartment, the property manager gave her a written notice stating that her subsidized tenancy would be terminated on the following grounds; Your guest was taken from your apartment by the Chicago Police Department in response to your phone request for someone to alert the police because you needed help. The police officer and management came to your unit, and when you answered the door it was obvious that you had been beaten. Your face was swollen, especially your nose, and scratches as well as bite marks appeared to be present. Allowing this individual in your unit is a violation of [the lease provision that prohibits your guests from engaging in criminal activity].

Still Required:

Proper Notice and Procedure

The attorney or advocate for the tenant should not overlook other federal legal and regulatory requirements, and lease provisions concerning evictions that apply to all cases, including notice and grievance procedures, whether or not the PHA or landlord alleges criminal activity.

See [Wait, *supra*, at 70-73](#); Green Book, *supra*, at 11.3 and Appendix 11A at 636; [Minnesota Answer forms](#).



Coronavirus Aid, Relief, and. Economic Security (CARES) Act § 4024

Part of the Act remains in effect.

A lessor (*of a covered property*) may not evict a tenant after the moratorium expires except on 30 days' notice that may not be given until after the moratorium period.

This provision is not limited to nonpayment of rent, and has no expiration date.

<https://library.nclc.org/sec-4024-temporary-moratorium-eviction-filings>

<https://library.nclc.org/major-consumer-protections-announced-response-covid-19#content-1>



CARES Act § 4024 - Covered Properties

The Act defines a “covered property” as a property that:

- participates in a “covered housing program” as defined by the Violence Against Women Act (VAWA) as amended through the 2013 reauthorization, or participates in the “rural housing voucher program under section 542 of the Housing Act of 1949” (HUD and Rural Housing Service public and subsidized housing programs)
- has a federally backed mortgage loan or a federally backed multifamily mortgage loan

According to recent estimates, the CARES Act applies to as many as 50% of tenancies in Minnesota.



CARES Act § 4024 - Covered Properties

- Properties that “participate in” a subsidy program covered by the Violence Against Women Act (VAWA”):
 - Section 8 Housing Choice Voucher (“HCV”) or VASH (HUD-Veterans Affairs) voucher
 - Section 8 Project-Based Voucher (PBV) units
 - Public housing units
 - HOME (HOME Investment Partnership) units
 - HOPWA (Housing Opportunities for Persons with AIDS) units
 - Permanent Supportive Housing (PSH) units
 - Tenants that use a PSH or Shelter Plus Care voucher
 - Federal Low Income Housing Tax Credit (LIHTC or “tax credit”) units
 - Property receives a project-based subsidy through HUD
 - Property receive a project-based subsidy through the U.S. Department of Agriculture
- Property participated in the Section 542 Rural Housing Voucher program
- Property has any tenant who uses a Rural Housing Voucher

CARES Act § 4024 - Covered Properties

How to find out if it is a covered property (Covered by VAWA or USDA rural housing voucher):

- If the tenant must do an annual income recertification the property is likely a covered property
- If the tenant deals with a Public Housing Authority for matters related to their housing it is likely a covered property
- If the tenant's rent adjusts based on their income the property is likely a covered property
- The tenant's lease may reference a federal subsidy program
- Some subsidies are searchable on the National Housing Preservation Database: <https://preservationdatabase.org/>

CARES Act § 4024 - Covered Properties

Property has a federally backed single family (1-4 units) or multifamily mortgage:

- Mortgage insured by the Federal Housing Administration (FHA)
- Mortgage guaranteed, provided by, or insured by HUD, the Department of Veterans Affairs (VA), or Department of Agriculture (USDA)
- Mortgage owned by Fannie Mae or Freddie Mac

Federally backed multifamily mortgage loan secured by a property with five or more dwelling units



CARES Act § 4024 - Covered Properties

Covered Properties

How to find out if it is a covered property (Federally-backed mortgage):

- Sometimes this information is recorded in public records, but sometimes it is not.
- A non-exhaustive database of multifamily properties with HUD, FHA, USDA, Fannie Mae and Freddie Mac mortgages can be found at the National Low Income Housing Coalition: https://nlihc.org/federal-moratoriums?ct=t%28update_041720%29
- Properties that have multifamily FHA or USDA mortgages are searchable on the National Housing Preservation Database: <https://preservationdatabase.org/>
- The landlord can call the FHA, VA, USDA, Fannie Mae or Freddie Mac escalation number listed on this website to inquire as to the status of their mortgage: <https://www.hmpadmin.com/portal/resources/advisors/escalation.jsp>

The landlord can look up if Fannie Mae or Freddie Mac own their mortgage on these sites:


<https://www.consumerfinance.gov/ask-cfpb/how-can-i-tell-who-owns-my-mortgage-en-214/>
<https://www.knowyouroptions.com/loanlookup>
<https://www3.freddiemac.com/loanlookup/>

Interrelationship Between Criminal and Civil Proceedings

Some courts hold that evidence obtained from an illegal police search of the apartment may not be used in the eviction case.

The regulations do not require that the tenant or household member have been arrested or criminally convicted for the PHA or owner to proceed with eviction or termination of assistance.

The burden of proof is preponderance of the evidence as to whether the person alleged to have committed the criminal activity engaged in the criminal activity.



Interrelationship Between Criminal and Civil Proceedings

Fifth Amendment rights against self-incrimination can be asserted in the eviction trial and in pretrial stages, such as at an informal conference or grievance hearing.

If the tenant is determined to be guilty in the criminal case after trial, the majority rule is that this determination collaterally estops the tenant from relitigating issues decided in the criminal case.

See Wait, *supra*, at 73-75; Green Book, *supra*, at 11.2.4.4.8.



Failure to Reasonably Accommodate Disabilities

42 U.S.C. § 3604(f)(3)

29 U.S.C. §§ 706, 794

24 C.F.R. Parts 8, 100

Douglas v. Kriegsfeld Corp., 884 A.2d 1109 (D.C. Ct. App. 2005)

To succeed on a failure to accommodate claim, a tenant with a disability must link their disability to the reason for the eviction and show that with an accommodation, they will be able to comply with their lease moving forward.

A reasonable accommodation request is not “reasonable” if it imposes a fundamental alteration in the nature of the program or an undue financial or administrative burden on the party to whom it is submitted.

See generally Deena A. Zakim, *Reasonable Accommodations Demystified, The Tenant Perspective* (Greater Boston Legal Services May 23, 2022); Green Book, *supra*, at 11.2.4.6.9.

Failure to Reasonably Accommodate Disabilities

The FHAA does not require “a dwelling unit to be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damages to the property of others.” 42 U.S.C. § 3604(f)(9). Nevertheless, the fact that a tenant with a disability committed a violent act does not automatically warrant a finding that the tenant poses a “direct threat.” *Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307, 336. “In determining whether an individual poses a direct threat to the health or safety of others, the agency must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain:


1. the nature, duration, and severity of the risk;
2. the probability that the potential injury will actually occur; and
3. whether reasonable modifications of policies, practices, or procedures will mitigate the risk. 24 C.F.R. § 9.131(c); see also the Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act (May 17, 2004) (Joint Statement), at 4.

A landlord cannot take advantage of the statutory “direct threat” exception until the landlord has determined, “after a factual inquiry, that no reasonable accommodation could ameliorate the situation sufficiently to protect the health, safety, and property of others.” *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109, 1125.

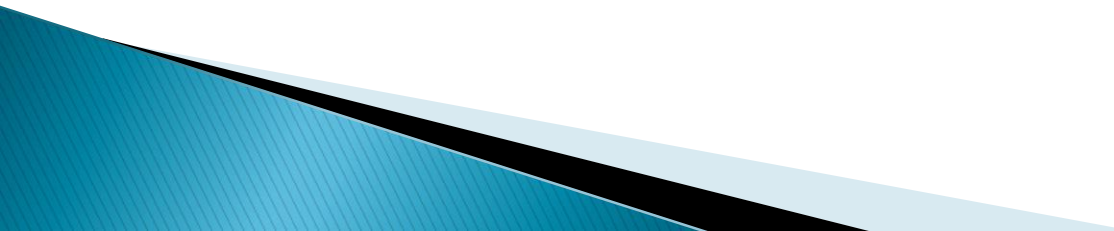
Failure to Reasonably Accommodate Disabilities - Examples

1. Tenant faced eviction for repeatedly informing property manager that voices in her head were telling her to sleep with property manager.
2. Public housing resident faced eviction for past use of crack cocaine that numbed constant emotional distress caused by infant child's murder.
3. Tenant with bi-polar disorder faced eviction for lying naked in doorway and inviting passersby to have sex with her.
4. Bone-cancer survivor faced eviction from public housing for past use of marijuana that eased physical pain caused by lifetime of reconstructive surgeries.
5. Massachusetts Appeals Court concluded that housing authority's fair housing obligations trump Rucker. The Court concluded that the Tenant was entitled to an accommodation to continue her participation in the Section 8 program when her mobility-limiting disabilities prevented her from finding drugs and other paraphernalia that her son/caretaker had secreted in a bedroom that she did not use, then banned her son from her home, and obtained a new caretaker. [Moretalara v. Boston Housing Authority, 99 Mass.App.Ct. 1 \(2020\).](#)

Failure to Reasonably Accommodate Disabilities - Examples

5. Tenant who is legally blind (with progressively worsening vision) and who has custody of teenage granddaughters faced eviction based on alleged drug-related criminal activity in unit discovered when police searched the premises looking for granddaughter's boyfriend and found him in her room with drugs and drug paraphernalia on bureau in plain sight.
 6. Tenant faced eviction for PCA allegedly overdosing in second bedroom and leaving drugs and paraphernalia out in the room discovered after Tenant found him unconscious and called police. Tenant used large motorized wheelchair that could not even physically fit into PCA's bedroom so could not have observed it nor could he have stopped the drug activity.
 7. Tenant faced eviction for engaging in drug-related criminal activity after calling police when she found her neighbor unconscious due to overdose.
 8. Section 8 participant faced termination for alleged possession of small amount heroin on premises. Participant checked himself into a rehab facility to avoid relapse, arranged for services, and joined support group.
- 

Other Defenses under Federal Law Not Specific to Criminal Activity

- (1) Failure to communicate with designated contact person
 - (2) Discrimination
 - (3) Servicemember rights
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Other Defenses under State Law Not Specific to Criminal Activity

Defenses vary from state to state. But common defenses include:

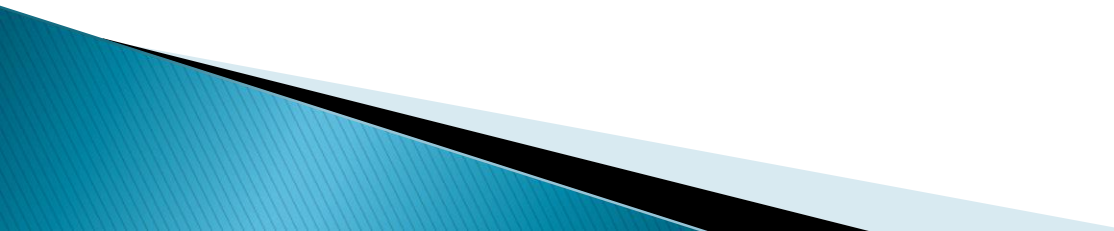
- (1) Improper notice
- (2) Waiver of notice
- (3) Waiver of breach
- (4) Equitable defenses
- (5) Cure
- (6) Improper service of process
- (7) Signing new lease

See Wait, *supra*, at 75; Green Book, *supra*, at 11.2.4.4.7; Minnesota Answer forms.



State Statutes and Local Ordinances Providing More Protection to Tenants

Examples include:

- (1) establishing a tenant's right to notice of lease violations and right to cure them,
 - (2) limiting grounds for eviction to just cause,
 - (3) applying the innocent-tenant defense that the Rucker Court found not to be implied in the federal public housing lease statute, and
- 

State Statutes and Local Ordinances Providing More Protection to Tenants

(4) establishing defenses to public housing evictions and subsidized-housing evictions.

Are they preempted by federal law? The courts are divided.

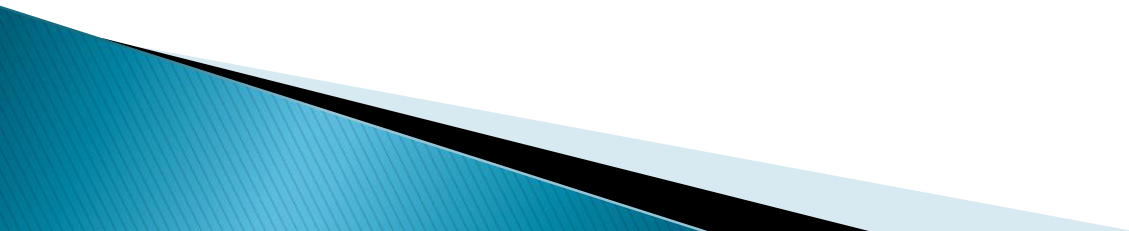
If federal law is more protective of the tenant than state and local law, the federal law preempts the state and local laws.

See Wait, *supra*, at 76-77; Green Book, *supra*, at 11.2.4.4.7.



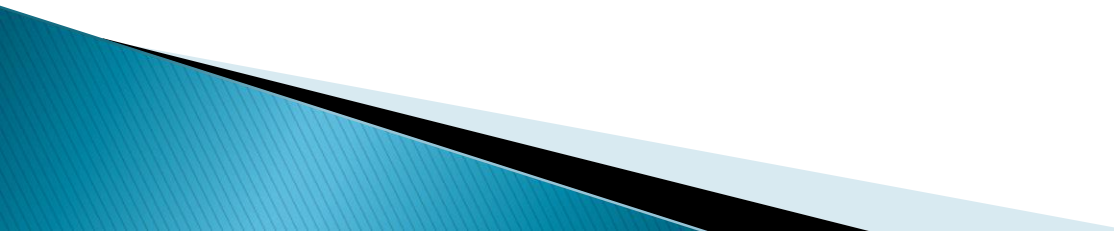
Always Read the Lease

In all of the cases, arguments on precise language of the lease might be more persuasive with conservative judges.



Litigation Strategies:

Pleading and Discovery

1. Form Answers: [Minnesota forms](#)
 2. Interrogatories
 - a. If your client's tenancy is subsidized, ask the plaintiff to identify the specific program under which the tenancy is subsidized.
 - b. If your client is facing eviction for criminal activity, draft a separate interrogatory for each allegation in the termination notice. Begin by writing, "With respect to the allegation set forth in your termination notice that [on whatever date, whatever happened], please..." Then ask questions that will elicit all the information you need about the alleged violation (e.g., when did you learn about this incident, how did you learn about this incident, identify each and every person who witnessed this incident). Ask the plaintiff to identify each and every witness it may call at trial, and to identify the subject of each witness' testimony.
 3. Depositions
 4. Witness lists
 5. Exhibits
- 

Litigation Strategies:

Motions in Limine

“A motion in limine is a motion in advance of trial in which a party seeks a ruling on the admissibility of evidence. The purpose of the motion is to promote a trial free of prejudicial material and to avoid highlighting the evidence to the jury through objection.”

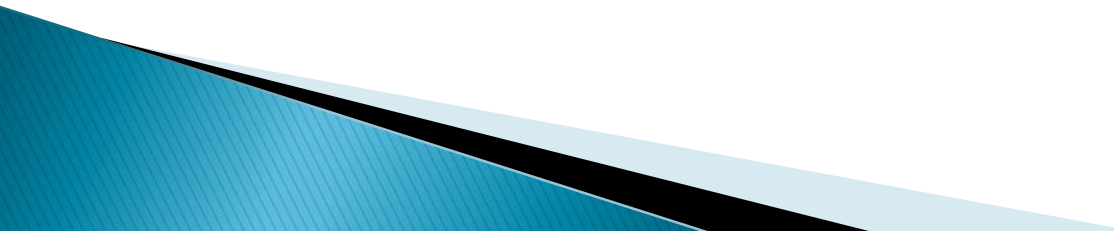
“Oral in limine motions and orders provide fertile ground for confusion and misunderstanding during the trial. For this reason, in addition to a written motion a written proposed order should be prepared by the moving party prior to the trial court's ruling on the motion. The proposed order must clearly and specifically outline the evidence to be excluded. The trial court's subsequent disposition of the motion and its limitations on the presentation of evidence would then be part of the record of the cause.”

Lundell v. Citrano, 129 Ill. App. 3d 390, 395-96 (1st Dist. 1984).

Litigation Strategies:

Motions in Limine

The motion should:

1. Set forth the basic, relevant issues of the case;
 2. Explain why opposing counsel's conduct to date, as well as other discovered facts, suggests that opposing counsel will likely present the contested matter at the trial;
 3. Identify the specific evidence that should be excluded, and explain exactly why any reference to evidence will inflame the jury's passion, prejudice, hostility, or sympathy, or cause confusion, or consume an inordinate amount of time;
 4. Explain why the contested evidence is either inadmissible under the rules of evidence, or of such minor legal relevance that its prejudicial effect outweighs its probative value;
 5. Explain that deferring a ruling on your motion will threaten your client's right to a fair trial because the contested matter will prejudice the jury even if the court sustains your evidentiary objection at trial and instructs the jury to disregard the contested matter;
 6. Establish that an in limine order is an appropriate method of preserving your client's right to a fair trial.
- 

Litigation Strategies:

Motions in Limine

Sample motions:

1. Bar evidence regarding violations not mentioned in the termination notice.
 - a. The regulations governing the Section 8 New Construction, Substantial Rehabilitation, and State Housing Agencies Programs provide that, “[i]n any judicial action instituted to evict the family, the owner may not rely on any grounds which are different from the reasons set forth in the notice.” [24 C.F.R. § 880.607\(c\)\(3\).](#)
 - b. The regulations governing the Section 8 Loan Management Set-Aside Program, the Program for the Disposition of HUD-Owned Properties, and the 221(d)(3) BMIR and 236 Programs provide that, “[i]n any judicial action instituted to evict the tenant, the landlord must rely on grounds which were set forth in the termination notice served on the tenant under this subpart. The landlord shall not, however, be precluded from relying on grounds about which he or she had no knowledge at the time the termination notice was sent.” [24 C.F.R. § 247.6\(b\).](#)
 - c. Basic principles of due process also preclude the landlord from relaying at trial on allegations not set forth in the termination notice.

Litigation Strategies:

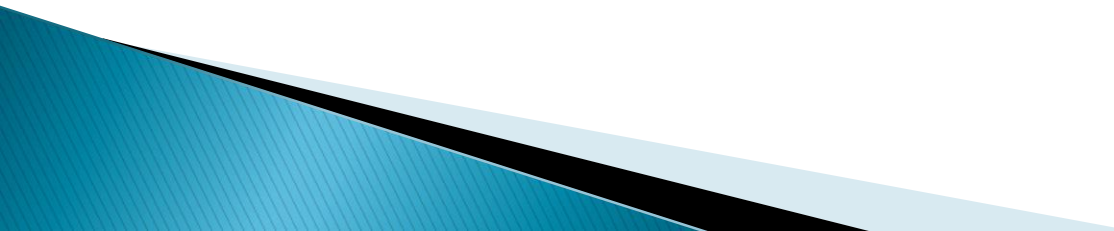
Motions in Limine

2. Bar evidence regarding history of defendant's arrests. Proof of arrests is generally inadmissible to impeach a witness or attack his character. *People v. Bull*, 185 Ill. 2d 179, 206 (1998).
3. Bar evidence regarding prior convictions. In Illinois, "evidence of a witness' prior conviction is admissible to attack the witness' credibility when: (1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statements, regardless of punishment, (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later, and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice." *People v. Patrick*, 233 Ill. 2d 62, 69 (2009).
4. Bar police reports
5. Bar evidence regarding gang affiliation. The prejudicial effect of testimony regarding gang-affiliation far outweighs its probative value. See *United States v. Richmond*, 222 F.3d 414, 417 (7th Cir. 2000) ("Evidence of gang involvement must be considered carefully to avoid undue prejudice.").
6. Bar documents referenced but not produced in response to discovery requests

Litigation Strategies:

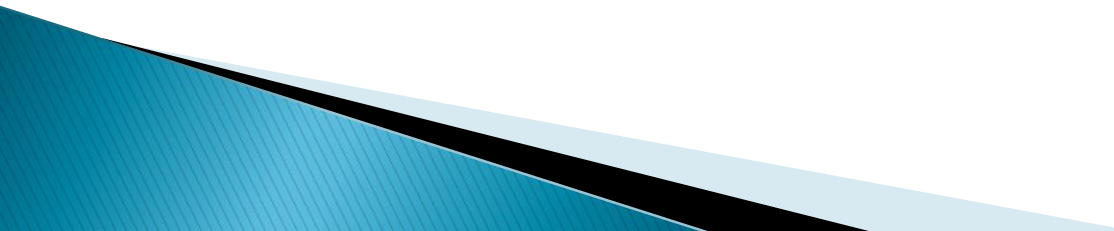
Motions in Limine

Responding to your opponent's motion in limine: The plaintiff may argue that an acquittal is inadmissible because the verdict establishes only that the defendant's guilt was not proved beyond a reasonable doubt, whereas in a civil action the standard of proof (preponderance of the evidence) is significantly lower. The consideration set forth above, however, "should go to the weight rather than the admissibility of evidence, since the failure of the state to prove guilt may have some tendency to prove that the accused was not, in fact, guilty." W.E. Shipley, Annotation, Conviction on Appeal as Evidence of the Facts on Which It Was Based in *Civil Action*, 18 A.L.R. 1287 (2005). The acquittal is relevant because the defendant's arrest was the first step in a criminal prosecution. If the defendant is precluded from informing the jury that he was acquitted, the jury will presume that he was convicted. The trial court can ensure that the acquittal is not accorded too much weight by informing the jury that the acquittal does not establish the defendant's innocence.



Litigation Strategies: Voir Dire

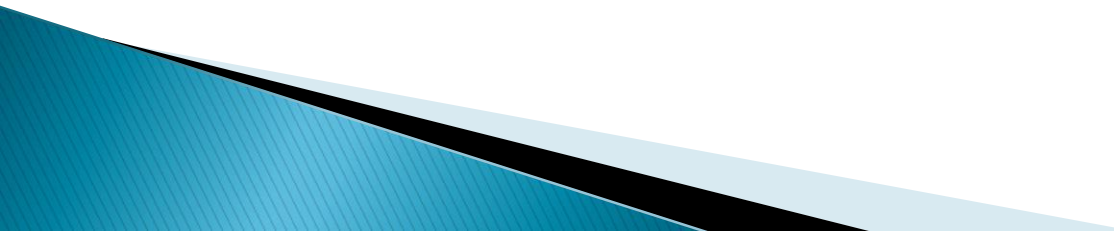
Questions to ask potential jurors when your client is facing eviction for criminal activity:

1. Do you know any police officers?
 2. Have you had any experiences with the police? If so, please describe the experience(s).
 3. Do you think a police officer is more likely to tell the truth than an ordinary citizen?
 4. Have you ever been the victim of a crime? (If the prospective juror is a crime victim, question him or her carefully, respectfully, and with sensitivity about the crime.)
 5. A line of questioning about jurors' views on public benefits and the role of government in helping people with basic needs like housing. It can lead to some revealing answers and potential bias.
- 

Advocacy

A. Individual case representation

B. Legislation

1. Enact city and county ordinances
 2. Enact state statutes
 3. Revise federal statute and regulations
- 

Advocacy

C. PHAs

1. Nominate board members

2. Modify policies

a. Miami-Dade's ACOP:

- (1) list of circumstances the PHA must consider before sending the notice :
This may include the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action
- (2) prohibits termination for misdemeanors considered civil violations, such as litter, illegal use of dairy cases, egg baskets, poultry boxes, or bakery containers, trespass on property other than structure or conveyance retail theft by removal of a shopping cart, loitering or prowling, possession of cannabis in an amount of 20 grams or less, and possession of drug paraphernalia.

Advocacy

b. Legal Aid Chicago

1. Representing the Central Advisory Council, negotiated with CHA and convinced the agency to adopt the innocent-tenant defense. CHA incorporated this defense into a lease provision stating that, “CHA will not be required to prove that the resident knew, or should have known, that the authorized member of the household, guest, or another person under the resident’s control was engaged in the prohibited activity. However, the resident may raise as a defense that the resident did not know, nor should have known, of said criminal activity.”
2. In 2002, the United States Supreme Court affirmed the constitutionality of Section 1437d(1)(6). *HUD v. Rucker*, 535 U.S. 125 (2002). Nevertheless, CHA confirmed its commitment to the innocent-tenant defense. See Kate N. Grossman, “Housing Agency May Fine-Tune Aid Program,” *Chicago Sun-Times*, April 17, 2002, at 24 (“Peterson affirmed his support for [the innocent-tenant defense] Tuesday, despite the Supreme Court ruling.”).
3. On May 17, 2011, CHA reversed course and proposed eliminating the “innocent tenant” provision from all its leases. CHA also announced its plan to subject all adult public housing residents to mandatory drug-testing. Such policies already existed at the mixed-income developments. The ACLU took the lead on challenging the drug-testing proposal, while Legal Aid Chicago took the lead on the “innocent tenant” issue.
4. Because of *Rucker*, there was no way to challenge CHA’s proposal regarding the “innocent tenant” defense in court. The decision to retain or remove the “innocent tenant” defense was completely within CHA’s discretion. Legal Aid Chicago, therefore, focused on a public advocacy campaign. On June 2, 2011, more than 400 public housing residents attended a public hearing on CHA’s proposal, where many of them, together with tenants’ rights advocates, spoke out against removing the innocent-tenant defense. Less than three weeks later, CHA announced that it was “shelving” its proposal to remove the innocent-tenant defense because of “the tremendous amount of feedback during the public comment period.” See Maudlyne Ihejirika, “CHA Kills Controversial Plan to Drug Test Residents,” *Chicago Sun-Times*, June 21, 2011.

Advocacy

D. Training

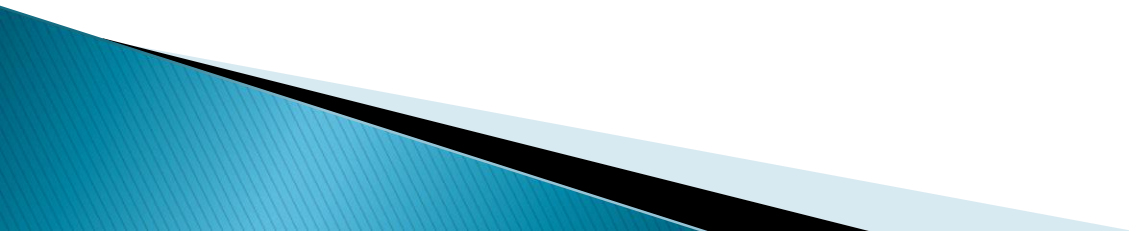
1. Staff
2. Advocates
3. Judges
4. Volunteer attorneys
5. Law students
6. Websites and forms

E. Media Coverage

1. Pros
 2. Cons
- 

Let's Talk

Open forum on participant work on the issue
and ideas for federal and local action



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