

Withdrawn

**AMERICAN BAR ASSOCIATION
NEW YORK COUNTY LAWYERS' ASSOCIATION**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association adopts the black letter
- 2 *Protocols for Judges in the Settlement and Trial of Cases Involving*
- 3 *Unrepresented Litigants in Housing Court*, including the Preface, dated
- 4 February 2008.

**BLACK LETTER PROTOCOLS
FOR
JUDGES IN THE SETTLEMENT AND TRIAL OF CASES INVOLVING
UNREPRESENTED LITIGANTS IN HOUSING COURT**

(FEBRUARY 2008)

PREFACE

Court systems around the United States are faced with an increasing number of self-represented litigants in civil cases. Often these litigants cannot afford to pay for legal representation, even though their cases may have serious economic and other consequences for themselves and their families. In Housing Court, unrepresented tenants may be evicted, a “devastating and traumatic experience, particularly for low-income tenants...who are displaced into a housing market that has virtually no housing that is affordable to them.”¹

Providing representation for people facing eviction, often called civil Gideon, would clearly benefit those who cannot afford an attorney to represent them in housing proceedings. Advocates seeking enactment of legislation providing a right to counsel, as well as funding for programs to support that right, argue that “[f]undamental fairness, the constitutional rights to due process and equal protection of the law, and sound policy all require recognition of a right to counsel....”²

Until state and municipal legislatures enact a civil right to counsel and provide appropriations to finance it, court systems must develop mechanisms for promoting the fair, equitable and consistent treatment of unrepresented litigants. To provide a resource for the New York City Housing Courts, where 90 percent of the tenants appear without an attorney and the same percent of landlords are represented by counsel, the New York County Lawyers’ Association’s (NYCLA) Task Force on the Housing Court studied the problem, reviewed court procedures and directives from the administrative judge, surveyed Housing Court judges to obtain their views about *pro se* litigants’ experiences and produced a report, *Protocols for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court*. These *Protocols* provide for an active role for judges, both in approving settlements and conducting trials, so that unrepresented litigants will understand their rights, the court procedures and the results of the proceedings.

In addition to the black letter Protocols submitted for adoption by the ABA, the Report provided detailed Best Practices for judges to guide them in their use of the *Protocols* and included a background memo on judicial ethics by Professors Russell Engler and Stephen Gillers. The full

¹ Andrew Scherer, *Why People Who Face Losing their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 Cardozo Pub. L. Policy & Ethics J, 591 (January 2006) at 702.

² *Id.*

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report, along with other Task Force reports on the Housing Court, is available at http://www.nycla.org/siteFiles/News/News59_2.pdf.

Judicial Ethics: Role of the Judge in Cases Involving Unrepresented Litigants

Because use of the *Protocols* would require an enhanced role for judges in dealing with *pro se* litigants, NYCLA asked two ethics experts, Russell Engler, Professor of Law and Director of Clinical Programs, New England School of Law in Boston, and Stephen Gillers, Vice Dean and Professor of Law, New York University School of Law in New York City, to examine the Canons of Judicial Ethics and case law applying the Canons, as well as law review articles and reports of national and state judicial organizations commenting on the proper role of judges in cases involving unrepresented litigants. In their report, Professors Engler and Gillers recognized the need for guidelines that assist judges in playing a more active role while avoiding the appearance of partiality or partisanship for one side.³ Their conclusion was that there was “ample authority for the proposition that judges may play an active role in handling cases involving unrepresented litigants to avoid forfeiture of rights and allow unrepresented litigants meaningful access to the courts.”⁴

Use of the Protocols

The *Protocol for Housing Court Judges for the Allocation of Stipulations in Proceedings Involving Pro Se Litigants* requires the judge in housing cases to review all stipulations to which a *pro se* litigant is a party to try to ensure that the *pro se* litigant understands and agrees with the terms of the stipulation, and understands alternatives to settlement, including the right to a trial. The *Protocol* provides for mandatory allocation of all stipulations of settlement involving *pro se* litigants, and leaves the manner in which the allocation is conducted and the substance of the allocation to the sound discretion of the judge.

The *Protocols for Housing Court Judges for Motions and Trials/Hearings Involving Pro Se Litigants* require the Housing Court judge to explain the process for these proceedings and take measures to ensure that the *pro se* litigant has the opportunity to be heard. These *Protocols* are not a script that would limit the discretion of the judge.

The Best Practices set forth in the NYCLA Task Force Report are more detailed guidelines for judges when allocutions, motions, trials or hearings involve *pro se* litigants and were not intended to mandate detailed scripts or to limit judicial discretion to adapt to particular cases and litigants. Instead these Best Practices provide guidance for when and how a judge can explain the process, as well as how to invite narrative, address language barriers and mental incapacity,

³ Russell Engler and Stephen Gillers, *Background Memo on Judicial Ethics: The Role of Judges in Settlement and Trial In Cases Involving Unrepresented Litigants*, New York County Lawyers’ Association Report on Protocols for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court (December 2006), Appendix A, at 11.

⁴ *Id.* at 12.

maintain courtroom decorum and explain alternatives, motion practice, elements of the case, rules of evidence and the terms and requirements of a settlement or other determination in a case.

The *Protocols for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court* can be adapted and implemented by civil courts in any jurisdiction, regardless of whether there is one court handling all civil matters, including landlord-tenant disputes, or a separate Housing Court as there is in New York City within the Civil Court. Until the unrepresented are represented by attorneys, the *Protocols* can be used by judges to improve access to justice for people who cannot afford an attorney and enhance the administration of justice for court systems confronting the proliferation of litigation involving the self-represented.

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PROTOCOL FOR HOUSING COURT JUDGES FOR THE ALLOCUTION OF STIPULATIONS IN PROCEEDINGS INVOLVING *PRO SE* LITIGANTS

I. No stipulation of settlement to which a *pro se* litigant is a party shall be approved unless:

A. the Judge conducts an allocution of the *pro se* litigant on the record; and

B. the Judge is reasonably satisfied that:

- 1. the *pro se* litigant understands the alternatives to signing the particular agreement proposed by the opposing party, and the alternatives to signing an agreement (i.e., the *pro se* litigant understands that (s)he is not required to agree to the term(s) proposed by the opposing party and that (s)he has a right to trial if she does not wish to sign an agreement);⁵**
- 2. the *pro se* litigant understands and agrees to all of the terms of the stipulation;**
- 3. the *pro se* litigant understands the effects of non-compliance with the stipulation by either side; and**
- 4. the *pro se* litigant understands that entry into the stipulation is a waiver of the right to trial.**

II. Prior to approval of a stipulation to which a *pro se* litigant is a party, the Judge should also ascertain whether the *pro se* litigant's claims or defenses are adequately addressed.

⁵ Unless the *pro se* litigant has knowledge of available alternatives, the Judge cannot be sure that the *pro se* litigant's waiver of alternative rights and remedies is, in fact, a knowing and intelligent waiver.

III. While all stipulations to which a *pro se* litigant is a party must be allocated by the Judge, the manner in which the allocation is conducted and its substance are matters within the sound discretion of the Judge.

PROTOCOLS FOR HOUSING COURT JUDGES FOR MOTIONS AND TRIALS/HEARINGS INVOLVING *PRO SE* LITIGANTS

Housing Court Judges shall use the following protocols when hearing motions and/or conducting trials/hearings involving at least one *pro se* party.

I. Resolution and Trial Parts

- A. Use plain English and minimize the use of complex legal terms in written materials when conducting court proceedings and when explaining court procedures and the other matters described below.
- B. Be attentive to language barriers experienced by *pro se* litigants. Judges should take the necessary steps to provide qualified interpreters to *pro se* litigants who are not fully fluent in English or who are hearing impaired.
- C. Where possible, give all instructions and explanations to *pro se* litigants in writing as well as orally.
- D. Verify that the party is not an attorney and that the party understands that (s)he has a right to be represented by an attorney if (s)he can retain one.
- E. Determine whether the *pro se* litigant is opting to proceed without an attorney because (s)he chooses to proceed *pro se* or because (s)he has not been able to retain counsel from Legal Services, Legal Aid or other *pro bono* entities. Explain the risks and difficulty of self-representation to a *pro se* litigant who is able to retain counsel, but chooses to proceed *pro se*.

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II. Resolution Parts

A. Motions

1. Whenever possible, provide the *pro se* litigant with a copy of the Judge's written motion rules and procedures sufficiently in advance of argument on a motion so the *pro se* litigant has an opportunity to review them prior to oral argument on the motion.
2. Ask the *pro se* litigant about her/his understanding of the issue(s) before the Court, particularly if the *pro se* litigant is the movant, rather than relying solely on the represented party's articulation of the issue(s) and facts.
3. Explain the process that will be followed in hearing the motion and confirm that each side understands the process.
4. Unless undue prejudice will result that cannot otherwise be mitigated, or unless otherwise prohibited by law, permit the *pro se* litigant to interpose oral, rather than written, opposition to the other side's motion.
5. Explain the elements that the person making the motion must meet in order to get the relief (s)he seeks and the elements that the person opposing the motion may have to meet to avoid an order in the movant's favor, and confirm that each side understands the elements and burdens. If possible, the list of elements should be provided in advance in writing in a checklist format given by the Judge or the Court Attorney, or by directing the *pro se* litigant to the Resource

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Center for such assistance.

6. Explain that the Judge may ask each side some questions during argument, but that such questioning should not be interpreted to indicate that the Judge agrees with either party.
7. Questioning by the Judge during argument should be directed at obtaining information from each side necessary for the Judge to decide the motion and should be done in a way that does not create an appearance of partiality or of advocacy for one side.
8. Whenever possible, the motion should be decided and an order prepared immediately upon the conclusion of the motion so that the order can be served on the parties while they are still in Court and its terms explained to the *pro se* litigant, including what, if anything, the order requires her/him to do and when, the consequences of not doing those things, and what the *pro se* litigant may be able to do if (s)he cannot comply with Court's order. However, in matters that require that a decision be reserved, *pro se* litigants should be directed in the written decision to go to speak with the *pro se* attorneys in the Resource Center if they require assistance in understanding the terms and requirements of the written decision.

B. Prior to Referring Cases for Trials/Hearings

1. Inquire whether the *pro se* litigant understands the issues that will be involved at the trial/hearing and what (s)he will have to demonstrate in order for the landlord to get a judgment or for the tenant to avoid a judgment.
2. Provide the *pro se* litigant with trial preparation materials prepared and/or distributed by the Court or posted on its website or refer the *pro se* litigant to the Resource Center for such materials.
3. Inquire whether the *pro se* litigant has the evidence (s)he will need

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- for the trial/hearing and, if not, explain to her/him how to obtain such evidence. If production of evidence requires a judicial subpoena, refer the *pro se* litigant to the court attorney for assistance in having the subpoena issued and for an explanation regarding the process for service of the subpoena and how documents will be produced pursuant to the subpoena.
4. Unless undue prejudice to the other side will result that cannot otherwise be mitigated, adjourn the trial/hearing to a date sufficient for the *pro se* to obtain necessary evidence and witnesses and to review trial preparation materials.
 5. If possible, provide the *pro se* litigant with a copy of the written trial/hearing rules and procedures of the Judge to whom the case will be referred for trial/hearing.

III. Trial Parts, Trials and Hearings.

- A. Inquire regarding the matters set forth at II, B, 3-4, and take appropriate action unless undue prejudice to the other side will result that cannot otherwise be mitigated.
- B. Explain the process that will be followed in the trial/hearing and verify that each side understands the process. If possible, the list of elements should be provided in advance in writing in a checklist format given by the Judge or the Court Attorney, or by directing the *pro se* litigant to the Resource Center for such assistance.
- C. Explain the elements of the case and verify that each side understands the elements.
- D. Explain that the party bringing the case has the burden to present evidence in support of the relief (s)he seeks and verify that the parties understand the burdens.

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- E. Explain that the Judge may ask each side some questions during the trial/hearing, but that such questioning should not be interpreted as indicating that the Judge agrees with either party.**
- F. If evidentiary objections are not waived:**
- 1. Explain the kinds of evidence that may be presented and the procedure for admitting exhibits and inquire whether the parties understand the kinds of evidence that can be admitted.**
 - 2. Explain the limits on the kind of evidence that can be considered and confirm that the parties understand the limits.**
 - 3. Require that the objector provide the *pro se* litigant with sufficient information regarding the grounds of her/his objections so that the *pro se* litigant can cure the defect if possible.**
 - 4. Explain the foundational facts that must be established by the *pro se* litigant in order to make her/his evidence admissible.**
 - 5. Ask questions of the *pro se* litigant or her/his witness to determine whether the evidentiary defect can be cured.**
 - 6. Explain the reason for any evidentiary ruling.**
 - 7. Assist the *pro se* litigant in objecting to otherwise inadmissible evidence regarding the essential elements of the case to avoid undue prejudice to the *pro se* litigant.**
- G. Allow the *pro se* litigant to testify in a narrative style and limit as much as possible evidentiary objections during the narrative unless undue prejudice to the rights of the other party would result.**
- H. Questioning by the Judge during the trial/hearing should be directed at obtaining information from each side necessary for the Judge to decide**

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the issue(s) raised at the trial/hearing and should be done in a way that does not create an appearance of partiality or of advocacy for one side.

- I. Whenever possible, the trial/hearing should be decided and a judgment/decision prepared immediately upon the conclusion of the trial/hearing so that the judgment/decision can be served on the parties while they are still in Court and its terms explained to the *pro se* litigant, including what, if anything, the judgment/decision requires her/him to do and when, the consequences of not doing those things, and what the *pro se* litigant may be able to do if (s)he cannot comply with the Court's judgment. However, in matters that require that a decision be reserved, *pro se* litigants should be directed in the written decision to go to speak with the *pro se* attorneys in the Resource Center if they require assistance in understanding the terms and requirements of the written decision.**