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Lawrence Wood
Director of the Housing Practice Group
This outline was created for the Poverty and Housing Law seminar at the University of Chicago Law School. It was drafted by Lawrence Wood, Lecturer in Law.

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A. Overview.

1. LAF is the Midwest’s largest provider of free legal services to the poor in civil cases.

2. All staff members work in a central location in downtown Chicago. No generalists. Every attorney specializes in one of five areas of law.

3. Individuals seeking advice or representation must call 312/341-1070, or the toll free number: 800/824-2050. No walk-ins unless the person seeking representation does not have a telephone.

4. The Legal Services Corporation (LSC) provides funding and imposes restrictions.

B. LSC Rules and Restrictions.

1. Use of non-LSC funds—45 C.F.R. § 1610.

   a) Such funds may be used to represent an individual or group that is not financially eligible for services, provided the representation will not violate other LSC restrictions.


   a) Individuals.

      (1) Income.

         (a) Income ceiling set at 125% of the federal poverty guidelines.

         (b) Authorized exceptions to income ceiling set forth at 45 C.F.R. § 1611.5.

         (c) Household income may not exceed 200% of federal poverty guidelines.

            (i) LAF has a suburban seniors grant that allows us to use non-LSC funds to represent suburban clients who are 60 or older and are financially ineligible for LSC services.

      (2) Assets.

         (a) LAF limit: $8,000.

         (b) Assets are defined as cash or other resources that are readily convertible to cash.
(c) LAF does not consider the client’s principle residence or vehicles used for transportation.

(d) The asset ceiling may be waived with approval from LAF’s executive director.

(3) If the client is a victim of domestic violence, discount the alleged perpetrator’s assets and income when determining financial eligibility for services. 45 C.F.R. § 1611.3(e).

b) Groups—45 C.F.R. § 1611.6.

(1) Must lack, and have no practical means of obtaining, funds to retain private counsel.

(2) Must be primarily composed of individuals eligible for LSC services, or have as its principal activity the delivery of services to people who are financially eligible for LSC services.

3. Restriction against lobbying—45 C.F.R. § 1612.

4. Restriction against class actions—45 C.F.R. § 1617.

5. Restrictions against legal assistance to aliens—45 C.F.R. § 1626.

a) LAF may use LSC funds to represent citizens and “eligible aliens” who meet the requirements set forth in 45 C.F.R. § 1626.5.

b) LAF may use non-LSC funds to represent an alien who has been battered or subject to extreme cruelty in the United States, or whose child has been battered or subject to extreme cruelty. 45 C.F.R. § 1626.4.

6. Restriction on representation in certain public housing eviction proceedings—45 C.F.R. § 1633.

a) LAF may not represent a public housing leaseholder who is facing eviction for illegal drug-related activity if:

(1) The leaseholder was convicted of the crime; or

(2) The criminal charges are pending; and

(3) The public housing authority alleges that the crime threatens the health and safety of other tenants or PHA employees.

b) When a public housing resident asks LAF to defend her against an eviction action that involves an allegation of drug-related criminal activity, LAF must complete a form stating either that the case was rejected or that it was accepted because it fell within one of the exceptions set forth in the governing regulation.
(1) One copy of the form must be downloaded into the client’s Legal Server profile.

(2) Another copy must be sent to the HPG Director.

   a) Must have a signed statement of facts on file, or a verified copy of the complaint.
   b) Must identify case as affirmative litigation in “Legal Server,” LAF’s electronic case management system.

8. Restriction against representing prisoners—45 C.F.R. § 1637.
   a) May not represent in civil litigation any person who is incarcerated in a federal, state, or local prison.
   b) Exception if the client becomes incarcerated after the civil litigation begins, the incarceration is anticipated to be brief, and the civil litigation will continue beyond the period of incarceration.

   a) Prohibits in-person unsolicited advice.
   b) Does not prohibit community legal education activities such as outreach, PSAs, staffing a help desk at a courthouse, disseminating education materials, and making presentations to groups.

10. Restriction against assisted suicide, euthanasia, and mercy killing—45 C.F.R. § 1636.
   a) This one really hurts, as mercy killing used to account for a substantial amount of our work.

C. Practice Groups.
   1. Housing Practice Group.
   2. Children and Family Practice Group.
   4. Immigrants’ and Workers’ Rights Practice Group.
   5. Public Benefits Practice Group.

D. Task Forces.
   1. Civil Rights.
2. Domestic Violence.
3. HIV.
4. People with Disabilities.
5. Seniors.
7. Veterans.

E. Housing Practice Group.

1. Priorities.

   a) **Subsidized housing.**

      (1) Evictions.

      (2) Termination of tenant-based rental assistance under the Housing Choice Voucher Program.

      (3) Admissions.

      (4) Rent calculations.

      (5) Warranty of habitability issues.

      (6) Relocation or transfer issues.

      (7) Lockouts.

      (8) Enforcing rights under lease agreement and applicable laws.

   b) **Unassisted housing.**

      (1) Tenants in foreclosure.

      (2) Warranty of habitability issues.

      (3) Enforcing rights under landlord-tenant ordinances.

      (4) Evictions under the following circumstances:

         (a) *When landlord is violating the prohibition against unlawful discrimination or retaliatory evictions; or*

         (b) *When the tenant is a person with a disability, a veteran, a senior, or a resident of suburban Cook County.*

      (5) Lockouts.
c) **Fair housing.**

(1) Enforce rights under the FHA.

(2) Request reasonable accommodations, and challenge refusals to grant such accommodations.

d) **Impact work.**

(1) Effect positive change on a large scale through the representation of tenants’ rights groups, through appeals, through negotiations with public housing authorities, and through collaborative projects with other tenants’ advocates.

(a) *Cabrini-Green Local Advisory Council v. CHA*, 2014 WL 683710 (N.D. Ill. 2014) (asserting that CHA’s refusal to maintain the Cabrini Rowhouses as 100% public housing violates the agency’s duty to affirmatively further fair housing).

(b) *Draper & Kramer, Inc. v. Nicole King*, 2014 IL App (1st) 132073 (published opinion setting forth new and liberal standard for vacating agreed orders).

(c) Meetings with the Chicago Housing Authority, and with the Housing Authority of the County of Cook.

(d) Forcible court project. Together with the Chicago Bar Foundation and tenants’ advocates, working with the presiding judge of the Municipal Department to improve the administration of justice in the forcible courtrooms.

(2) Increase, or prevent the loss of, affordable housing.

e) **Mobile Homes.**

(1) Evictions.

(2) Enforce rights under the Mobile Home Landlord and Tenants’ Rights Act.

(3) Improve park conditions.

(4) Challenge abuses committed by park owners.

2. **Special Projects.**

a) **Eviction Defense Help Desk (Markham).**

b) **Woodlawn Clinic.**

F. **Client Screening Unit.**
1. Intake specialists confirm client’s eligibility for services, perform conflict checks, create “Legal Server” profile on our electronic case management system, and either provide advice or schedule an appointment with an attorney.

G. Legal Server.

LAF’s electronic case-management system. Each client is assigned a Legal Server number and has a profile on the system. The profile identifies the client, legal problem, and attorney assigned to case. It also contains history notes. The profile must be closed when the case ends.

H. Interviewing Clients.

1. Must be conducted in interview rooms. Clients may not be in staff attorneys’ offices.

2. Interpreters.
   a) If you have a client with limited English proficiency (LEP), call Pacific Interpreters at 800/272-7442 and follow the prompts. We will provide you with LAF’s billing code.
   b) Interpreters are covered by the attorney-client privilege.

3. Laying groundwork for good interview.
   a) Begin by explaining the attorney-client privilege in layman’s terms.
   b) Explain importance of getting whole story. Cannot effectively represent client without all the facts.
   c) Assure client you will not judge him or her.

   a) Do not just transcribe everything client says. Listen critically.
   b) If something doesn’t make sense, probe until you get the truth.
   c) Be respectful.

5. Required documents.
   a) Retainer agreement.
   b) Citizenship form, or proof that client is an “eligible alien.”
   c) Attorneys’ fees form.
   d) Consent to representation by 711 students.
e) **Form for HIV-positive clients.**

f) **Form required pursuant to 45 C.F.R. § 1633 (when client is public housing resident facing eviction for drug-related criminal activity).**

g) **Releases.**

h) **Escrow agreement.**

I. **Case Acceptance Meetings.**

1. Wednesdays at 12:15 in Room 952.

2. Presenting cases.

   a) **Start by identifying the type of case and the procedural status.**

   b) **Present summary of case in concise, organized manner.**

      (1) Put written summary in Legal Server notes.

      (2) Goal is to provide HPG attorneys with enough information to make decision we will not later regret.

3. **CAM decisions are made by entire group.**

   a) **Accept for brief services or extended representation; or**

   b) **Advise and refer; or**

   c) **Open and investigate (O&I).**

4. Each case is assigned to an attorney during CAM.

J. **Countywide Tenants’ Advocates Meetings.**

1. Attendees include representatives from:

   a) **The Sargent Shriver National Center on Poverty Law;**

   b) **Bluhm Legal Clinic at Northwestern University Law School;**

   c) **Poverty Law Clinic, DePaul University College of Law;**

   d) **Cabrini Green Legal Aid;**

   e) **Lawyers’ Committee for Better Housing;**

   f) **Uptown People’s Law Center;**

   g) **Metropolitan Tenants’ Organization;**
h)  Illinois Legal Aid Online; and
i)  Coordinated Advice & Referral Program for Legal Services.

K.  Financial Assistance for Clients.

1.  Barbara & Steven Miller Foundation.
   a)  Provides one-time grants of up to $1,000 if the grant will completely resolve the client’s legal problem.
   b)  Application process.
   c)  Follow-up.

2.  All Chicago’s Emergency Fund program.
   a)  LAF is an Emergency Fund partner.
   b)  Monthly allotment of $1,000.
   c)  Emergency Fund Program Manager: Lynette Barnes lbarnes@allchicago.org or 312-379-0301 ext. 17).
   d)  Director of Programs: Dave Thomas (dthomas@allchicago.org, 312-379-0301 ext. 12).

L.  Social Workers.

1.  LAF has a social worker on staff: Suzy Stockton, 312/347-8396, sstockton@lafchicago.org. She can assist clients who need social services as well as legal assistance

2.  Suzy assigns one social work intern to the Housing Practice Group.

3.  Some clients, especially those with mental health issues, may have trouble cooperating with their legal representative without the assistance of a social worker.
III. HOUSING LAWS.

A. Federal Laws.

1. Statutes and laws governing the subsidized housing programs. (These will be discussed in more detail below in the sections that address each specific program.)


B. State Laws.

1. Forcible Entry and Detainer Act, 735 ILCS 5/9-101 et seq.

2. Rental Property Utility Services Act, 765 ILCS 735.


4. Safe Homes Act, 765 ILCS 750.


C. Local Laws.

1. Chicago.


(1) From September 15th of each year to June 1st of the succeeding year, the minimum temperature in a residential dwelling unit must be 68 degrees from 8:30 a.m. to 10:30 p.m., and 66 degrees from 10:30 p.m. to 8:30 a.m. Chicago Municipal Code, Title 13, Chapter 196, § 410.

c) Protecting Tenants in Foreclosed Rental Properties, Chicago Municipal Code, Title 5, Chapter 14 (aka “Keep Chicago Renting Ordinance”).

d) The Chicago Fair Housing Ordinance. Chicago Municipal Code, Title 5, Chapter 8, § 030.

e) “Bed Bug Ordinance.” Chicago Municipal Code, Title 7, Chapter 28, Article VII.

2. Evanston.


3. Mount Prospect.

a) Article XVIII, Residential Landlord and Tenant Regulations of the Village Code.
IV. CHICAGO RLTO.

A. History.

1. “In 1986, the City of Chicago adopted the RLTO, a landmark ordinance governing the respective rights and obligations of landlords and tenants.” Shadid v. Sims, 2015 IL App (1st) 141973, ¶ 5.

B. Purpose and Scope.

1. Section 5-12-010.

2. RLTO shall be liberally construed to promote its purposes and policies.
   
   a) “One clear purpose of the ordinance is to protect tenants. This purpose is rooted in the public policy that recognizes that tenants are in a disadvantaged position with respect to landlords.” Lawrence v. Regent Realty Group, Inc., 307 Ill. App. 3d 155, 160 (1st Dist. 1999).
   
   b) “The Ordinance was passed with a recognition of the historical disparity of bargaining positions between landlord[s] and tenants and to protect tenants from overreaching by residential landlords.” Pitts v. Holt, 304 Ill. App. 3d 871, 873 (1st Dist. 1999).

3. RLTO governs every dwelling unit in Chicago except for those identified in § 5-12-020 below.

4. RLTO specifically governs subsidized units to the extent it is not in direct conflict with the statutes and regulations governing those programs.
   
   a) A direct conflict occurs only when it is impossible to comply with both the RLTO and federal requirements, or where the RLTO stands as an obstacle to fully achieving the federal objective. See Resource Technology Corp. v. Illinois Commerce Commission, 354 Ill. App. 3d 895, 901 (1st Dist. 2005) (explaining principle behind conflict preemption).
   
   b) RLTO is not in direct conflict with federal regulations merely because it imposes additional requirements. See Bourbeau v. Woodner, 549 F. Supp. 2d 78, 88 (D.C. 2008) (state housing law did not conflict with federal housing law merely because it imposed additional requirements).
   

C. Exclusions.
1. Section 5-12-020.

2. Units in owner-occupied buildings with six or fewer units.
   
   a) “[A]ny building or structure included in the definition of a landlord’s ‘dwelling unit’ must also be considered to be ‘owner-occupied’ within the meaning of the section 5–12–020(a) exclusion.” Berven v. Marquette Nat. Bank, 394 Ill. App. 3d 22, 26 (1st Dist. 2009) (exclusion applied because coach house with two rental units that was appurtenant to the owner’s building was part of the owner’s dwelling unit).

   b) Owner need not exercise control over dwelling unit for exclusion to apply. Detrana v. Such, 368 Ill. App. 3d 861, (1st Dist. 2006) (exclusion applied even though co-owner who occupied one of three units in building did not control the building).


   d) For purposes of determining whether a building contains six or fewer dwelling units, it does not matter whether the units are actually occupied. Meyer v. Cohen, 260 Ill. App. 3d 351, 357-58 (1st Dist. 1993) (exclusion did not apply to building containing seven dwelling units even though only three were occupied).

3. Consult RLTO for other, less common exclusions.

4. The RLTO’s prohibition against lockouts applies to many units that are otherwise not governed by the RLTO. RLTO, §§ 5-12-120(a) and (b).

D. Owner’s Right to Access.

1. Sections 5-12-050 and 060.

2. 48 hours’ advance notice required, unless emergency.

3. Owner may enter only between 8:00 a.m. and 8:00 p.m., unless tenant agrees to other time.

E. Security Deposits.

1. Section 5-12-080.


3. Within 30 days after each 12-month period, owner must pay interest on deposit or deduct interest from the rent due.
4. Within 45 days after tenant vacates the unit, owner must return deposit.
   
   a) Whether and when a tenant has actually relinquished possession of the premises is a question of fact. Meyer, 260 Ill. App. 3d at 361 (case remanded to determine whether tenant relinquished possession when she left premises, when she terminated lease, or when she returned keys to owner).
   
   b) Owner may withhold from the security deposit any unpaid rent that was not properly withheld.
   
   c) If the owner intends to withhold from the security deposit the cost of making necessary repairs, then within 30 days after the tenant vacates the premises the owner must send the tenant an itemized statement of the damages plus the actual or estimated cost of repair.

5. Owner who violates the RLTO provisions governing the treatment of security deposits is liable for damages equal to twice the deposit plus attorneys’ fees.
   
   a) Violation need not be willful. Lawrence, 197 Ill. 2d at 9-10 (tenant entitled to damages without establishing that owner willfully violated security deposit provision), overruling Szpila v. Burke, 279 Ill. App. 3d 964 (1st Dist. 1996).
   
   b) Tenant is entitled to no more than a single award of damages, even for multiple violations of security deposit provisions. Krawczyk v. Livaditis, 366 Ill. App. 3d 375, 377-78 (1st Dist. 2006).
   
   c) In Glenn v. Lucas, 2015 IL App (1st) 140530-U, the appellate court affirmed the trial court’s decision to award the plaintiff $4,200 in damages and $11,725 in fees for establishing a violation of the RLTO provisions regarding the treatment of security deposits. This unpublished opinion may not be cited, but its analysis is instructive.

F. Landlord’s Failure to Maintain the Premises.

1. Section 5-12-110.

2. Repair and deduct for minor defects—§ 5-12-110(c).
   
   a) Cost of repair must not exceed the greater of $500 or half a month’s rent.
   
   b) Tenant must provide owner with no less than 14 days’ advance written notice of intention to repair and deduct.

3. Withhold rent—§ 5-12-110(d).
a) Tenant must provide owner with no less than 14 days’ advance written notice of intention to withhold from the rent an amount that reasonably reflects the reduced value of the premises.

4. Recover damages by claim or defense—§ 5-12-110(e).

G. Landlord’s Failure to Provide Essential Services.

1. Section 5-12-110(f).

2. Essential services include heat, running water, hot water, electricity, gas and plumbing.

3. If owner is responsible for providing such services and violates this duty, the tenant may:
   
a) Pay for the services and deduct their cost from the rent; or

   b) Sue the owner for damages; or

   c) Move into a hotel and deduct the cost of the hotel from the monthly rent. This cost may not exceed the monthly rent for each month that the landlord fails to provide the essential service.

4. In addition, the tenant may terminate the rental agreement upon 72 hours’ advance written notice provided that the lack of service is not due to the utility company’s inability to provide service.

H. Curing Lease Violations

1. Section 5-12-130(b).

2. When tenant is facing eviction for some violation other than nonpayment of rent, termination notice must inform tenant of right to cure violation (provided it can be cured) in no less than ten days.

I. Abandonment.

1. Section 5-12-130(e).

2. Actual notice to landlord of tenant’s intent to leave; or

3. All tenants absent for 21 or more days, rent unpaid for this period, and tenants removed personal property from the premises; or

4. All tenants absent for 32 days and rent unpaid for the period.

J. Waiver by Acceptance of Rent.

1. Section 5-12-130(g).
2. Acceptance of rent demanded in notice, after notice expires, constitutes waiver;

3. This RLTO provision conflicts with the Forcible Act, which provides that, “[c]ollection by the landlord of past rent due after the filing of a suit for possession or ejectment pursuant to failure of the tenant to pay the rent demanded in the notice shall not invalidate the suit.” 735 ILCS 5/9-209.

4. The RLTO supersedes a conflicting provision of the Forcible Act. See below.

K. Notice of Nonrenewal.

1. Section 5-12-130(j).

2. Landlord must provide tenant with no less than 30 days’ advance written notice of intent to not renew lease.

3. When the RLTO does not apply and the lease agreement provides that the contract terminates on a date certain, no termination notice is required.

L. Prohibited Lease Provisions.

1. Section 5-12-140.

2. Lease may not provide that the tenant agrees to:

   a) Waive rights or remedies under RLTO.
   b) Confess judgment on any claim arising from the lease.
   c) Limit the landlord’s liability.
   d) Waive right to written termination notice or to any manner of service provided by law.
   e) Waive right to jury trial.

M. Late Fees.

1. Sections 5-12-140(h) and (i).

2. Monthly fee may not exceed $10 for the first $500 in rent, plus additional amount equal to 5% of amount by which the monthly rent exceeds $500.

3. Damages for violating the prohibition against excessive fees are equal to twice the monthly rent.

4. In a subsidized housing case where the tenant pays a reduced rent, use the tenant's contribution to calculate the late fee, but use the total rent to calculate damages.
a) **Curtis v. Surrette**, 726 N.E.2d 967, 972 (Mass. App. Ct. 2000) (“Allowing the tenants to recover on their counterclaim on the basis of the full contract rent, while allowing the landlord to recover on his claim for back rent based only upon the tenants’ share of the rent, does not result in a windfall to the tenants or in an award of punitive damages.”).

b) **Cruz v. Wideman**, 633 N.E.2d 384, 388 (Mass. 1994) (a landlord “is not shielded from liability to which the landlord would otherwise be exposed merely because a part of its income is derived from Federal subsidy funds.”).

c) **Simon v. Solomon**, 431 N.E.2d 556, 569 n.13 (Mass. 1982) (If damages were based on the tenant’s contribution, “[l]ow income tenants receiving rent subsidies, who are often the victims of the most flagrant violations, would recover the least damages, and so would have little incentive to sue and to force repairs.”).

N. Prohibition Against Retaliation.

1. Section 5-12-150.

2. Adverse action (e.g., terminating tenancy, refusing to renew lease) taken within one year after tenant engages in protected activity is presumptively retaliatory.

3. Protected activity is defined very broadly.

4. Landlord may rebut presumption by demonstrating legitimate reason for taking adverse action.

5. Damages for violating the prohibition are twice the monthly rent or twice actual damages, whichever is greater.

O. Prohibition Against Lockouts.

1. Section 5-12-160.

2. A lockout is any attempt to dispossess a tenant without authority of law.

3. RLTO prohibits threatened as well as actual lockouts.

4. Police must investigate lockout complaints.

   a) “Whenever a complaint of violation of this provision is received by the Chicago Police Department, the department shall investigate and determine whether a violation has occurred.” RLTO, § 5-12-160(d).

   b) **CPD Special Order 93-12**.

5. Damages for violating the prohibition against lockouts.
a) **Civil** – twice the monthly rent or twice actual damages, whichever is greater.

b) **Criminal** – $200 to $500 per day.

6. Remember that the prohibition against lockouts applies to many dwelling units that are otherwise excluded from the RLTO. See RLTO §§ 5-12-020(a) and (b).

P. RLTO Summary.

1. Section 5-12-170.

2. Summary must be attached to written lease or, if there is no written lease, the summary must be given to the tenant.

3. If the landlord violates this provision, the tenant may terminate the lease and obtain $100.
   
a) The tenant must provide a written termination notice.

b) This notice must specify the date of termination.

c) The termination date must be within the next 30 days.

d) The tenant’s motive for invoking the right of termination is irrelevant. *Plambeck*, 281 Ill. App. 3d at 266-67.

Q. Attorneys’ Fees.

1. Section 5-12-190.

2. With one important exception (see below), fees may be awarded to the prevailing plaintiff in any action arising out of the RLTO.

   a) Fees are NOT available to the prevailing plaintiff in a forcible action.

   b) Fees may be awarded to a forcible defendant who prevails on a counterclaim under the RLTO. *Shadid v. Sims*, 2015 IL App (1st) 141973 (reversing trial court’s decision to deny fees to forcible defendant who prevailed on counterclaim alleging that plaintiff violated § 5-12-110 of the RLTO by failing to maintain the premises).

3. “The attorney’s fees provisions are meant to give a financial incentive to attorneys to litigate on behalf of those clients who have meritorious cases but who, due to the limited nature of the controversy, would not normally consider litigation as being in their client’s financial best interest.” *Pitts v. Holt*, 304 Ill. App. 3d at 873.

4. Prevailing plaintiff is entitled to a hearing to determine the reasonable amount of fees. *Plambeck*, 281 Ill. App. 3d at 273.
5. The court may not reduce fees to a prevailing plaintiff just because the plaintiff was represented by a not-for-profit legal services provider. *Pitts*, 304 Ill. App. 3d at 873-74 (rejecting “the notion that legal services attorneys should be compensated at lower-than-market rates”).

R. Interpreting the RLTO.


2. “When a court interprets an ordinance, it must ‘ascertain and give effect to the drafter's intent’ . . . ‘All other rules of statutory construction are subordinate to this cardinal principle.’ The ordinance's language, given its plain and ordinary meaning, is the best indication of legislative intent. If a term is ambiguous, however, we can give some deference to the City’s interpretation of its own ordinance.” *Shadid v. Sims*, 2015 IL App (1st) 141973, ¶ 7 (adopting the City’s interpretation of the RLTO’s attorneys’ fee provision).

S. RLTO’s Constitutionality.

1. “The constitutionality of the ordinance has been upheld against a host of constitutional challenges.” *Shadid v. Sims*, 2015 IL App (1st) 141973, ¶ 5.

2. In fact, the RLTO survived a constitutional challenge filed the day after it went into effect on September 8, 1986. *Chicago Bd. Of Realtors v. City of Chicago*, 819 F.2d 732 (7th Cir. 1987).

T. RLTO Supersedes Conflicting State Law.

1. The City of Chicago is a home-rule unit. See 1970 Ill. Const., art 7, § 6(a).


3. In *Palm v. 2800 Lake Shore Drive Condo. Ass’n*, 988 N.E.2d 75, 84-85 (2013), the Illinois Supreme Court confirmed that an ordinance may supersede or limit a conflicting statute, rejected the idea that a home rule unit may only enact an ordinance more restrictive than statutory provisions,” and held that “[c]omprehensive legislation that conflicts with an ordinance is insufficient to limit or restrict home rule authority.”

4. Under this framework, it is clear that an RLTO provision supersedes a conflicting provision in the Forcible Act.

U. Statute Of Limitations.
1. The deadline depends on whether the RLTO provision at issue is penal or remedial.

   a) A penal provision imposes automatic liability for a violation of its terms, sets forth a predetermined amount of damages, imposes damages without regard to the actual damages suffered by the plaintiff, and is governed by the two-year statute of limitation set forth in 735 ILCS 5/13-202. Landis, 235 Ill. 2d at 13.

   b) A remedial provision imposes liability only when actual damages result from a violation of its terms and is governed by the five-year statute of limitation set forth in 735 ILCS 5/13-205. Id.

2. RLTO provisions governing the treatment of security deposits are penal and governed by the two-year statute of limitations. Id. at 13-14; Namur v. The Habitat Co., 294 Ill. App. 3d 1007, 1011 (1st Dist. 1998).

3. RLTO provisions prohibiting retaliation and authorizing claims against landlords who violate the warranty of habitability are remedial and therefore governed by the five-year statute of limitations. Sternic v. Hunter, 344 Ill. App. 3d 915, 918-19 (1st Dist. 2003).
V. LOCKOUTS.

A. Definition.

1. A lockout is any attempt to dispossess, without authority of law, someone who has come into possession of the subject premises peacefully and pursuant to some agreement.

2. Examples of lockouts:
   a) Changing, removing, or plugging a lock.
   b) Disconnecting utility service.
   c) Removing a tenant’s belongings.
   d) Removing a tenant’s door or window.

B. Prohibition Against Lockouts.

1. “[N]o person has the right to take possession, by force, of premises occupied or possessed by another, even though such person may be justly entitled to such possession. The forcible entry and detainer statute provides the complete remedy at law for settling such disputes.” People v. Evans, 163 Ill. App. 3d 561, 564 (1st Dist. 1987).

2. Any landlord who wants to forcibly evict a tenant must follow the proper legal procedure set forth in the Forcible Act by:
   a) Terminating the tenancy with advance written notice (unless such notice is not required because the lease identifies the date on which the tenancy ends and the tenancy is not governed by a local ordinance that requires such notice);
   b) Filing a forcible action;
   c) Obtaining a judgment for possession; and
   d) Paying the Sheriff of Cook County to enforce this judgment by changing the locks. 55 ILCS 5/3-6019.


C. Common Defenses to Lockout Claims.

1. “The tenant abandoned the premises.”
a) This is a factual issue which necessitates a hearing if the tenant denies abandoning the premises.

b) “Abandonment” has a very specific definition in some landlord-tenant ordinances.

2. “I had to make necessary, emergency repairs.”

a) This may be a valid defense provided the landlord did not interfere with possession any longer than necessary to make the repairs.

3. “I have a judgment for possession against the tenant.”

a) Only the Sheriff can enforce the judgment. 55 ILCS 5/3-6019.

b) Until evicted by the Sheriff, a tenant is protected by the prohibition against lockouts. Holtzrichter v. City of Chicago, 497 Fed. Appx. 645 (7th Cir. 2012) (rejecting hotel desk clerk’s contention that he could not be arrested for violating the RLTO’s prohibition against lockouts because he had a judgment for possession against the tenant).

4. “The tenant breached the lease,” or “the tenant remained in the premises after the lease expired.”

a) The landlord may have a strong claim for possession, but he has to establish this claim in court.

D. Local Prohibitions Against Lockouts.

1. Chicago RLTO, § 5-12-160.

2. Evanston RLTO, § 5-3-12.


E. Resolving Lockouts Without Litigation.

1. If the tenant has not yet been dispossessed, advise her to keep with her some proof, such as a lease agreement or utility bill, that she resides in the premises.

2. If the tenant has already been dispossessed, tell her to call the police.

a) If the tenant resides in Chicago, advise her about CPD Special Order 93-12.

b) Sometimes the police respond but don’t intervene, so tell the tenant to get the police officers’ names and badge numbers so we can address the situation with the precinct’s watch commander.
3. Get the landlord’s contact information, call the landlord, get the landlord’s side of the story, explain the proper eviction procedures to the landlord, advise him that we may have to sue him if he does not restore the tenant to possession of her unit, and send the landlord a letter summarizing your conversation and noting any admissions the landlord made.

F. Seeking Judicial Relief.

1. File a verified complaint for injunctive relief pursuant to 735 ILCS 5/11-102 and, if applicable, the governing section of the local landlord-tenant ordinance.

2. Along with the complaint file an emergency motion for a temporary restraining order pursuant to 735 ILCS 5/11/101.

3. Where to file:
   
   a) Chancery Division.
   
   b) Municipal Department – Forcible Entry and Detainer Section.

4. Bond.

5. Ex-parte orders.
VI. EVICTION PRACTICE—TERMINATING THE TENANCY.

A. Advance Written Notice Typically Required.

1. Exceptions to the general rule.
   
a) No advance written notice is required to terminate the tenancy when:

   (1) The lease identifies the date on which the agreement ends and the landlord intends to rely on that termination date; or
   
   (2) The lease waives the notice requirement; and
   
   (3) The tenancy is not governed by a local landlord-tenant ordinance that requires advance written notice of the landlord’s intention not to terminate or to not renew the agreement.

b) A landlord may, however, waive his right to terminate the lease without following the statutory provisions regarding advance written notice. Avdich v. Kleinert, 69 Ill. 2d 1, 9 (1977) (Although under provisions of lease, landlord might have had right to terminate tenancy without notice on grounds that tenant was in default in payment of rent, where landlord instead chose to give statutory five-day notice, landlord could not file forcible action until after this notice expired.).

B. Notices for Nonpayment of Rent.

1. What amounts may be demanded in the notice?

   a) Federal housing programs.

   (1) In the federal housing programs, rent does not include extra charges for the purpose of terminating the lease.

   (2) Accordingly, a tenant who fails to pay an extra charge may not be evicted for nonpayment of rent. See 24 C.F.R. § 966.4(b) (rent and extra charges are treated separately); see also PUBLIC HOUSING OCCUPANCY GUIDEBOOK, § 17.6 (“In an effort to improve their chances of collecting delinquent charges in addition to rent many PHAs have written their leases in such a way that the charges, if not paid timely, are called delinquent rent. This is not permitted under the regulation.”).

   b) Unassisted housing.

   (1) The Illinois Appellate Court recently held that rent may include extra charges, and that such additional charges may be demanded in a termination notice. American Mgmt. Consultant v. Carter, 392 Ill. App. 3d 39, 46-47 (3d Dist. 2009).
(a) **Carter** rests on a case that may no longer be good law. In addressing the issue of extra charges, **Carter** relied almost exclusively on an old public housing case—**Chicago Housing Authority v. Bild**, 346 Ill. App. 272, 274 (1st Dist. 1952)—which held that a charge for the excess use of electricity constituted rent.

(b) The regulations governing the public housing program have changed over the past half-century. When introducing the model Public Housing lease in 1975, HUD’s introductory comments to the regulations provided that, “the regulation as adopted separates definitively rent from other charges.” 40 Fed. Reg. 33,402 (Aug. 7, 1975). While these regulations have been superseded, the distinction between rent and other charges remains. See 24 C.F.R. § 966.4(b).

2. **Demanding the rent due.**

   a) **Generally.**

   (1) Most tenants are entitled to no less than five days’ advance written notice that the lease will be terminated unless the rent is paid before the notice expires. See 735 ILCS 5/9-209.

   (2) The tenant “must pay the entire amount due to escape the effect of the 5-day notice.” **Elizondo v. Medina**, 100 Ill. App. 3d 718, 721 (1st Dist. 1981); 735 ILCS 5/209 (“Only FULL PAYMENT of the rent demanded in this notice will waive the landlord’s right to terminate the lease under this notice, unless the landlord agrees in writing to continue the lease in exchange for receiving partial payment.”).

   (3) A notice that demands more rent than is due is not invalid unless the tenant can claim prejudice. **Elizondo**, 100 Ill. App. 3d at 721 (tenant could not claim prejudice when tenant did not tender the amount actually due before the notice expired).

   (4) The landlord may, after the notice expires, collect the rent demanded in the notice and still evict the tenant. 735 ILCS 5/9-209. As explained above, however, this statutory provision conflicts with and is superseded by § 5-12-130(g) of the Chicago RLTO.

   b) **Public Housing.**

   (1) Residents are entitled to no less than 14 days’ advance written notice. 24 C.F.R. § 996.4(f)(3)(i)(A).

   (2) The notice must inform tenant of her right to request a grievance hearing before the notice expires.
If the tenant submits a timely request for such a hearing, the lease remains in effect until the grievance process ends. The tenant should always request the hearing because (as explained below in a separate section) postponing the termination of the lease keeps bankruptcy on the table as an option for preserving the tenancy.

c) **Subsidized Properties using the HUD Model Lease.**

(1) The HUD Model Lease is used in the following programs;

\[\begin{array}{l}
(a) & \text{Section 8 New Construction; } \\
(b) & \text{Section 8 Substantial Reconstruction; } \\
(c) & \text{State Housing Agencies Program; } \\
(d) & \text{Section 8 Loan Management Set-Aside Program; } \\
(e) & \text{Section 8 Program for the Disposition of HUD-Owned Properties. }
\end{array}\]

(2) Paragraph 23(e) of the lease provides that every termination notice must inform the tenant that she “has 10 days within which to discuss the proposed termination of tenancy with the Landlord.”

(3) Based on this lease provision, one can argue that a tenant must be given ten days to pay the rent due. Otherwise, the ten day discussion requirement is meaningless. See *Intown Mgmt. Corp. v. Knowling*, 1991 WL 204891, *5 (Conn. Up. Ct. 1991).

d) **Evanston RLTO.**

(1) Tenants whose lease agreements are governed by this ordinance are entitled to no less than 10 days’ advance written notice. Evanston RLTO, § 5-3-6-1(B).

e) **HOME Investment Partnership Program.**

(1) Tenants whose lease agreements are subsidized under this program are entitled to 30 days’ advance written notice. 24 C.F.R. § 92.253(c).

f) **Section 811 Supportive Housing for Persons with Disabilities.**

(1) Tenants whose lease agreements are subsidized under this program are entitled to 30 days’ advance written notice. 42 U.S.C. § 8013(i)(2)(B)(2).

g) **Programs governed by 24 C.F.R. § 247.4(e).**

(1) The covered programs:

\[\begin{array}{l}
(a) & \text{Section 8 Loan Management Set-Aside Program; } \\
\end{array}\]
(b) Section 8 Program for the Disposition of HUD-Owned Properties;

(c) Section 221(d)(3) Below Market Interest Rate;

(d) Section 236; and

(e) Section 202.

(2) The regulation provides that, “[i]n any case in which a tenancy is terminated because of the tenant’s failure to pay rent, a notice stating the dollar amount of the balance due on the rent account and the date of such computation shall satisfy the requirement of specificity . . . .” (emphasis added).

C. Notices for Violations other than Nonpayment of Rent.

1. Generally.

   a) Most tenants are entitled to no less than 10 days’ advance written notice. 735 ILCS 5/9-210.

2. HOME Investment Partnership Program.

   a) Tenants whose lease agreements are subsidized under this program are entitled to 30 days’ advance written notice. 24 C.F.R. § 92.253(c).

3. Section 811 Supportive Housing for Persons with Disabilities.

   a) Tenants whose lease agreements are subsidized under this program are entitled to 30 days’ advance written notice. 42 U.S.C. § 8013(i)(2)(B)(2).

4. Evanston RLTO.

   a) Tenants whose lease agreements are governed by this ordinance are also entitled to 30 days’ advance written notice. Evanston RLTO, § 5-3-6-1(A).

   b) The notice must inform the tenant of his or her right to cure the alleged violation, provided it can be cured, in no less than ten days. Id.

5. Chicago RLTO.

   a) The notice must inform the tenant of his or her right to cure the alleged violation, provided it can be cured, in no less than ten days. RLTO, § 5-12-130(b).

D. Notices to Terminate Without Good Cause.

1. 7 days’ advance written notice for a week-to-week tenancy. 735 ILCS § 5/9-207.
2. 30-days' advance written notice to terminate a month-to-month tenancy. 735 ILCS 5/9-207.

   a) The notice must provide the full 30 days.

   (1) Hoefler v. Erickson, 331 Ill. App. 577, 583 (1st Dist. 1947) (A notice served on June 3, 1946, could not terminate the tenancy at midnight on June 30, 1946, as it would not give the tenant the 30 days required by statute.)

   (2) William Knapp & Co. v. Jones, 335 Ill. App. 226 (1st Dist. 1948) (notice dated November 1, 1947 and stating that month-to-month tenancy would terminate on November 30, 1947, was only 29 days' notice, so that plaintiff had no right to maintain forcible action against tenant).

E. Notices to Terminate in Foreclosed Properties.

1. Generally, tenants are entitled to no less than 90 days' advance written notice unless they are facing eviction for good cause. Furthermore, tenants with bona fide lease agreements may remain in the premises until their lease agreements expire.

2. These requirements are discussed in detail below in the section entitled, “Tenants in Foreclosure.”

F. Calculating the Date on which the Notice Expires.

1. Notice period starts to run on the day after the notice is served and expires at midnight on the last day of the notice period. 5 ILCS 70/1.11.

2. When the notice is served by certified mail, return receipt requested, the notice period does not start to run until the tenant actually receives the notice. Avidich, 69 Ill. 2d at 9 (“service of a notice by certified mail is not to be considered complete until it is received by the addressee”).

3. If the last day falls on a weekend or holiday, the notice period is extended to the following day. Id.

G. Service.

1. State law – 735 ILCS 5/9-211.

   a) When the tenant is in actual possession of the premises.

   (1) Notice may be served by:

      (a) Personal service;

      (b) Substitute service; and

      (c) Certified mail, return receipt requested.
The Illinois Appellate Court has held that these three methods of service are not meant to be exhaustive, so a tenant’s actual receipt of the notice cures the landlord’s failure to serve the notice in accordance with one of these methods. Prairie Mgmt. Corp. v. Bell, 289 Ill. App. 3d 746, 752 (1st Dist. 1997) (relying on the presence and permissive nature of the word “may” in the statute, the court concluded that § 9-211 does not restrict the methods of service to the three identified therein).

b) When the tenant is not in actual possession of the premises.

(1) The notice may be served by posting.

(2) In American Mgmt. Consultant v. Carter, 392 Ill. App. 3d 39, 55-56 (1st Dist. 2009), the court held that a landlord may not serve a tenant who remains in actual possession of the premises by posting. Furthermore, the tenant’s receipt of the notice does not cure the defect in the manner of service.

(a) Instead of overruling Bell, however, the Carter court made a not very convincing effort to distinguish its earlier decision.

(b) “We are aware that the court has held that ‘the methods of service suggested in the . . . statute are not meant to be exhaustive. Illinois cases have upheld a landlord’s written notice even when the method of service deviated slightly from those noted in the statute.’ Prairie Mgmt. Corp. v. Bell. Plaintiff’s reliance on Bell is misplaced. The Bell case is distinguishable because the Bell court did not consider the section of the statute involved here, which only allows service by posting when the defendant is no longer in possession.” Carter, 392 Ill. App. 3d at 56-57.

(c) That is not a very convincing way to distinguish Bell, as the very same statutory provision (735 ILCS 5/9-211) was at issue in both cases. The Carter court should have just overruled Bell instead of creating unnecessary confusion.

(3) One court has gone so far as to find that a landlord’s attempt to serve, by posting, a tenant who is in actual possession of the premises deprives the trial court of subject-matter jurisdiction. Figueroa v. Deacon, 404 Ill. App. 3d 48, 53 (1st Dist. 2010) (distinguishing Bell on the grounds that Bell did not consider the posting section of the statute at issue in Figueroa).

(a) Figueroa is almost certainly wrong on the jurisdictional issue. Aside from the fact that it did not convincingly distinguish Bell, it is inconsistent with Belleville Toyota, Inc v. Toyota Motor Sales, 199 Ill. 2d 325 (2002). In Belleville, the Illinois Supreme Court held that, with the single exception of administrative review, a circuit court’s jurisdiction is conferred by the constitution, and the failure to comply with statutory requirements does not deprive a court of jurisdiction. 199 Ill. 2d at 334.
2. Federal law.

a) **Public housing** – “[N]otice to a tenant shall be in writing and delivered to the tenant or to an adult member of the tenant’s household residing in the dwelling or sent by prepaid first-class mail properly addressed to the tenant.” 24 C.F.R. § 966.4(k)(1)(i) (emphasis added).

b) **Section 8 Moderate Rehabilitation Program** – “The notice of termination must . . . [b]e served on the Family by sending a prepaid first class properly addressed letter (return receipt requested) to the tenant at the dwelling unit or by delivering a copy of the notice to the dwelling unit.” 24 C.F.R. § 882.511(d)(2)(iii) (emphasis added).

c) **Programs governed by 24 C.F.R. Part 247.**

(1) Service of the notice “shall be accomplished by: (1) Sending a letter by first class mail, properly stamped and addressed, to the tenant at his or her address at the project, with a proper return address, and (2) serving a copy of the notice on any adult person answering the door at the leased dwelling unit, or if no adult responds, by placing the notice under or through the door, if possible, or else by affixing the notice to the door.” 24 C.F.R. § 247.4(b).

(2) “Service shall not be deemed effective until both notices provided for herein have been accomplished. The date on which the notice shall be deemed to be received by the tenant shall be the date on which the first class letter provided for in this paragraph is mailed, or the date on which the notice provided for in this paragraph is properly given, whichever is later.” Id.

(3) **Covered programs:**

(a) **Section 8 Loan Management Set-Aside Program;**

(b) **Section 8 Program for the Disposition of HUD- Owned Properties;**

(c) **Section 221(d)(3) Below Market Interest Rate;**

(d) **Section 236; and**

(e) **Section 202.**
d) **NOTE:** The methods of service set forth in the regulations governing these federally-subsidized programs are mandatory, so Bell does not apply and a tenant’s receipt of the notice will not cure a defect in the manner of service. See *Draper & Kramer, Inc. v. King*, 2014 IL App (1st) 132073 (methods of service set forth in regulations governing the Section 8 LMSA Program are mandatory, and “[t]he regulations make clear that service must be effectuated by first-class mail and personally served on an adult in the unit or slipped under the door if no adult answered the door.”) (emphasis in original).
VII. EVICTION PRACTICE—FILING SUIT.

A. The Complaint.

1. A single action seeks possession of the premises.

2. A joint action seeks possession plus rent. See 735 ILCS 5/9-106 (“a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent found due.”).

3. Plaintiff need allege only that it is entitled to possession of the subject premises and that the defendant unlawfully withholds possession. 735 ILCS 5/9-106.

4. Are exhibits necessary?

   a) “If a claim . . . is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her.” 735 ILCS 5/2-606.

   b) This statutory provision would seem to require that the plaintiff in a forcible action attach to its complaint a copy of any written lease agreement and termination notice. Nevertheless, most plaintiffs do not attach anything to the complaint, and most judges refuse to dismiss on that basis.

   (1) The denial of a motion to dismiss is an interlocutory order, and challenging such an order can be difficult. The procedure is set forth in S. Ct. Rule 308, which requires the trial court to state in writing not just “that the order involves a question of law as to which there is substantial ground for difference of opinion,” but “that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”

   (2) Establishing that second element is especially difficult in a forcible action, which is a summary proceeding.

   (3) Furthermore, even if the trial court certifies the question by issuing the requisite written finding, the defendant must within the next 14 days file an application for leave to appeal with the clerk of the Appellate Court. The Appellate Court has discretion to deny this application.

B. Summons.

1. Personal or substitute service—735 ILCS 5/2-203.

a) If personal or substitute service cannot be obtained, the plaintiff may complete an affidavit stating that the defendant does not reside in Illinois, or has left the State, or on due inquiry cannot be found, and then serve the defendant by posting or publication in accordance with Section 2-206 of the Illinois Code of Civil Procedure.

b) The court may not enter a money judgment against a defendant who has been served by posing or publication unless the defendant submits herself to the jurisdiction of the court.


a) The process server must deliver a summons and complaint naming “unknown occupants” to the tenant or any unknown occupant who is at least 13 year old.

b) If unknown occupants are not named in the summons and complaint, or in the judgment for possession, and the Sheriff determines when enforcing the judgment that unknown occupants are present, the Sheriff must:

   (1) Leave with someone who is at least 13 years old, or post on the premises, a copy of the order for possession along with a notice stating that the occupants have seven days to file a petition setting forth their legal claim for possession;

   (2) If no legal claim is filed, the Sheriff can enforce the judgment.

c) No money judgment may be entered against an unknown occupant.

C. Challenging Personal Jurisdiction.

1. The defendant may file a motion to quash service of process “[p]rior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear . . . .” 735 ILCS 5/2-301.

2. Combined Motions—735 ILCS 5/2-619.1.

   a) A motion to quash service of summons may be combined with any of the following motions, but they must be filed in separate parts:

      (1) Motion with respect to pleadings under § 2-615;

      (2) Motion for involuntary dismissal under § 2-619; and

      (3) Motion for summary judgment under § 2-1005.
3. The defendant may file a general appearance and even a jury demand without waiving the jurisdictional challenge because neither constitutes a pleading or motion. *See KSCA Corp. v. Recycle Free, Inc., 364 Ill. App. 3d 593, 597 (2d Dist. 2006)* (“A pleading ‘consists of a party’s formal allegations of his claims or defenses,’ and a motion is ‘an application to the court for a ruling or an order in a pending case.’”).
VIII. EVICTION PRACTICE—THE RETURN DATE.

A. No Answer Required Unless Ordered by Court.

1. “If the defendant appears, he or she need not file an answer unless ordered by the court, and when no answer is ordered, the allegations of the complaint will be deemed denied, and any defense may be proved as if it were specifically pleaded.” S. Ct. Rule 181(b)(2) (emphasis added).

2. If the court orders the defendant to answer or otherwise plead by a date certain, then before this deadline passes the defendant must file:

   a) A motion with respect to the pleadings under § 2-615; and/or
   b) A motion for involuntary dismissal under § 2-619; and/or
   c) Any germane affirmative defense and counterclaims (see below).

3. If the defendant is ordered to answer or otherwise plead and does not file affirmative defenses in a timely manner, the defendant may be barred from asserting such defenses at trial and may be restricted to challenging the plaintiff's ability to establish a prima facie case.

   a) “[A]ny ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.” 735 ILCS 5/2-613(d) (emphasis added).

   b) Accordingly, “[t]he facts constituting any affirmative defense which would likely take the opposite party by surprise must be plainly set forth in the answer. The failure to state such facts waives the asserted defense and it cannot be considered even if the evidence suggests the existence of such a defense.” Vanlandingham v. Ivanow, 246 Ill. App. 3d 348, 357 (4th Dist. 1993) (finding that “breach of the implied warranty of habitability is an affirmative defense which must be pleaded and plainly set forth in the answer.”).

   c) However, “[a]n affirmative defense may be raised in a motion for summary judgment even though not raised in an answer.” Hill v. Chicago Housing Auth., 233 Ill. App. 3d 923, 932 (1st Dist. 1992); see also Hanley v. City of Chicago, 343 Ill. App. 3d 49, 54 (1st Dist. 2003) (“a determination that an affirmative defense has been waived is especially inappropriate where, as here, the party asserting that the defense has been waived had ample time to respond to the defense and, as a result, was not unfairly prejudiced by the failure to raise it in the answer.”).
d) Furthermore, if the evidence establishes that the plaintiff would not be surprised by the affirmative defense, the defendant should be allowed to assert it, even on the eve of trial. See Pantaleo v. Our Lady of Resurrection Medical Center, 297 Ill. App. 3d 266, 282 (1st Dist. 1998) (in medical malpractice action, trial court did not err by allowing defendants on the eve of trial to amend pleadings to include affirmative defense of contributory negligence because the record indicated that plaintiff, who had questioned defendants’ expert witnesses about contributory negligence during their depositions, “clearly was not surprised”); see also Holladay v. Boyd, 285 Ill. App. 3d 1006, 1012 (1st Dist. 1996) (“Section 2-613 is designed to prevent unfair surprise at trial.”).

B. Venue.

1. State statute.

a) Venue lies “in the circuit court for the county where such premises are situated . . . .” 735 ILCS 5/9-106.

b) There are six municipal districts in Cook County – see below – so the landlord should file in the district in which the property is located. General Order 1.2, 2.3(d)(2) (“Actions of attachment, distress for rent, forcible entry and detainer, and for the recovery of property may be filed in the district where the property is located.”).

(1) First Municipal District—Chicago.

(a) Five non-jury courtrooms open every weekday.

(b) Jury cases are transferred to Room 1501, where the judge presides over discovery and dispositive motions and transfers the case to another judge when it is ready for trial.

(2) Second Municipal District—Skokie.

(a) One forcible courtroom open every Friday morning.

(b) HPG sends one attorney to cover this call every week.

(3) Third Municipal District—Rolling Meadows.

(a) Three forcible courtrooms.

(b) Forcible call every Thursday at 9:00 a.m.

(4) Fourth Municipal District—Maywood.

(a) Two forcible courtrooms

(b) Forcible call every Monday at 9:30 a.m.
(5) Fifth Municipal District—Bridgeview.

(a) One forcible courtroom.

(b) Forcible call Wednesday through Friday at 9:30 a.m.

(6) Sixth Municipal District—Markham.

(a) Two forcible courtrooms open every weekday morning.

(b) LAF staffs the eviction defense help desk.

c) If the case is filed in the wrong venue, the defendant may file a motion, supported by affidavit, to have the action transferred. 735 ILCS 5/2-104.

d) An objection to venue is waived unless it is made on or before the first appearance date. 735 ILCS 5/2-104(b).

e) A lease provision that permits the landlord to sue in any circuit in Illinois is unenforceable. Martin-Trigona v. Roderick, 29 Ill. App 3d 553, 555 (1st Dist. 1975) (“the ‘waiver of venue’ provision contained in plaintiff’s lease is void as against public policy.”).


a) The FDCPA provides that debt collection actions may be brought “only in the judicial district or similar legal entity—(A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action.” 15 U.S.C. § 1692i(a)(2).

b) In Suesz v. Med-1 Solutions, LLC, 757 F.3d 636, 639 (7th Cir. 2014), the Seventh Circuit Court of Appeals stated that this provision is designed to prevent abusive forum-shopping (i.e., suing in a court that is not convenient to the debtor or is perceived to be friendly to debt collection actions).

c) Overruling its earlier decision in Newsom v. Friedman, 76 F.3d 813 (7th Cir. 1996), the Seventh Circuit interpreted the term “relevant judicial district or similar legal entity” to mean “the smallest geographical area relevant to venue in the court system in which the case is filed.” Id. at 643.

(1) In Cook County, therefore, debt collectors can comply with the FDCPA’s venue provision only by filing suit in the municipal district where the debtor either signed the contract or currently lives.

(2) A debt collector who files in the wrong venue is liable for $1,000 plus attorneys’ fees.
The court’s decision has retroactive effect, so if the one-year statute of limitations (which starts to run when the debt collection action is filed) has not yet passed, debtors may sue debt collectors who violated the FDCPA venue provision prior to Suesz because they were relying on the Seventh Circuit’s earlier decision in Newsom.

d) The relationship between the FDCPA and state law.

(1) As noted above, a defendant may waive her right under state law to object to venue.

(2) This means that a debt collector “may comply with state law, obtain a perfectly valid state court judgment, and simultaneously violate the FDCPA by suing in the wrong venue.” Suesz, 757 F.3d at 648.

(3) “Such violations would not undermine the validity of state court judgments in favor of a debt collector, but they would provide the basis for federal remedies against the debt collector.” Id.

e) The FDCPA and forcible actions.

(1) Rent is a debt to which the FDCPA applies.

(2) Attorneys who file forcible actions are debt collectors within the meaning of the FDCPA.

(3) Accordingly, an attorney violates the FDCPA’s venue provision if he files a joint forcible action (i.e., one that seeks not just possession of the premises but also unpaid rent) in the wrong municipal district.

C. Jury Demands.

1. Parties in a forcible action have the right to a trial by jury. Any lease provision purporting to waive this right is unenforceable. 735 ILCS 5/9-108.

2. Timing.

   a) Typically, jury demands must be filed on or before the date on which the answer is due. 735 ILCS 5/2-1105.

   b) Since no answer is required in a forcible action, the jury demand should be filed on or before the return date. First Bank of Oak Park v. Carswell, 111 Ill. App. 3d 71, 73 (1st Dist. 1982). If, however, the defendant requests a continuance to get an attorney, the court should honor a jury demand filed on or before the second court appearance. Pecoraro v. Kesner, 217 Ill. App. 3d 1039, 1045 (1st Dist. 1991).

3. Waiving Filing Fees.
a) File a Civil Legal Services Provider (CLSP) form. 735 ILCS 5/5-105.5(b) (“When a party is represented in a civil action by a civil legal services provider . . ., all fees and costs relating to filing, appearing, transcripts on appeal, and service of process shall be waived without the necessity of a motion for that purpose . . .”); or

b) File an application to defend as a poor person (aka a pauper’s petition). 735 ILCS 5/5-105; S. Ct. Rule 298.

D. Motions for Substitution of Judge.

1. As of right – 735 ILCS 5/2-1001(a)(2).
   a) Each party is entitled to one substitution of judge without cause.
   b) Motion must be brought before the trial or hearing begins, and before the judge “has ruled on any substantial issue in the case.”
   c) Although the statute does not require a written motion, the best and safest practice is to present one.

2. For cause – 735 ILCS 5/2-1001(a)(3)
   a) Petition must be verified.

E. Plaintiff’s Motion for “Use and Occupancy.”

1. Authority for ordering payment of use and occupancy.
   a) “It is established law that liability for rent continues so long as the tenant is in possession . . .” Jack Spring, 50 Ill. 2d at 359. Nevertheless, the landlord may not accept this rent after learning about a lease violation without waiving his right to evict the tenant for that violation. Midland Mgmt. v. Helgason, 158 Ill. 2d 98, 102 (1994).
   b) Section 9-201 of the Forcible Act resolves this problem by permitting the plaintiff “to recover use and occupancy charges pending resolution of the possession claim.” Circle Mgmt. v. Olivier, 378 Ill. App. 3d 601, 608 (1st Dist. 2007).

2. Grounds for challenging the motion.
   a) Incorrect amount demanded (e.g., the owner of an assisted unit in the Housing Choice Voucher Program is improperly seeking abated subsidy payments from the tenant).
   b) Warranty of habitability defense (i.e., the plaintiff’s failure to maintain the premises has reduced its value).
c) Granting the motion would improperly require the court to decide the ultimate issue in the case (e.g., subsidized housing resident who is facing eviction for nonpayment of market rent contends that plaintiff never had cause to raise her rent, and plaintiff is asking court to order resident to pay market rent while case is pending.)


a) Court may not sanction the defendant by awarding the plaintiff possession of the premises.

(1) *Rotheimer v. Arana*, 384 Ill. App. 3d 569, 584-85 (1st Dist. 2008) (even though defendants willfully violated court order for use and occupancy because they wanted to challenge the use of such orders to evict tenants without first considering the underlying merits of the forcible action, trial court exceeded its authority by awarding plaintiff possession of the premises as a sanction for the defendants’ violation).

(2) *Circle Mgmt.*, 378 Ill. App. 3d at 612-614 (where defendant’s failure to comply with agreed “use and occupancy” order stemmed from her insolvency and inability to pay rather than from willful defiance, trial court exceeded its inherent authority to sanction by awarding plaintiff possession of the premises).
IX. AFFIRMATIVE DEFENSES & COUNTERCLAIMS.

A. Must be Germane.

1. Section 9-106 of the Forcible Act provides that “no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise.” 735 ILCS 5/9-106.

B. What Matters are Germane?

1. In Spanish Court Two Condo. Assoc. v. Carlson, 979 N.E.2d 891, 896 (2d Dist. 2012), rev’d on other grounds, 2014 IL 115342 (2014), the court noted that Section 9-106 of the Forcible Act has been “the subject of conflicting interpretations.” It then attempted to resolve these conflicts.

2. The court first recognized that claims which are germane to the issue of possession generally fall into one of the following four categories:
   a) Claims asserting a paramount right of possession;
   b) Claims denying the breach of any agreement vesting possession in plaintiff;
   c) Claims questioning the validity or enforceability of the document upon which plaintiff’s right to possession is based; and
   d) Claims questioning a plaintiff’s motivation for the bringing of the forcible action. 979 N.E.2d at 901.

3. The court then addressed the common misperception that claims for damages are never germane. “A more accurate statement is: ‘Where a [defendant’s] claim seeks damages and not possession, it is not germane to the distinct purposes of the forcible entry and detainer proceeding.’ Damages sought by the defendant must be tied to the issue of possession.” Id. (citation omitted) (emphasis in original).

   a) “The first corollary to this principle is that, where possession is not contested, the defendant may not seek damages at all.” Id. at 902.

   b) “The second corollary is that, where possession is contested, the defendant may claim damages, but restrictedly.” Id. (emphasis in original).

(1) The default rule may be summarized as follows: “In any case where possession is sought on the basis of delinquent rent, it is legally permissible for the defendant not only to deny liability for rent, but also to seek recoupment of overpaid rent.” Id.
(2) There is a recognized exception to the default rule, and this exception may be summarized as follows: “[C]ourts will recognize a claim for damages in addition to recoupment of rent if there is an applicable legal provision authorizing it.” Id. at 905 (emphasis added).

(a) For example, a claim seeking damages for violating the Chicago RLTO’s prohibition against retaliatory evictions is germane. Id. at 904-05.

(b) Spanish Court also stated that the court in American National Bank v. Powell, 293 Ill. App. 3d 1033 (1st Dist. 1997), “clearly erred . . . in affirming the dismissal of the defendant’s counterclaim [under the Chicago RLTO] seeking a ‘refund of overpaid rent for [the plaintiff’s] breach of the implied warranty of habitability.’” Id.
X. SAMPLE DEFENSES & COUNTERCLAIMS.

A. Premature Filing.

1. General rule.

a) Plaintiff may file suit only after the termination notice expires. *Avdich*, 69 Ill. 2d at 9 (forcible action filed prior to expiration of 5-day termination notice was premature).

b) If the plaintiff is seeking to terminate a tenancy without good cause, the plaintiff may not file suit until after the lease expires. *Fifth Third Mortgage Co. v. Foster*, 994 N.E.2d 101, 105 (1st Dist. 2013) (when lease was set to expire on the last day of the year, forcible action filed on December 20 was premature).

(1) Note: *Foster* repeats the mistake made in *Figueroa* and holds that the landlord’s premature filing deprives the court of subject matter jurisdiction. A premature filing certainly warrants dismissal of the case, but it does not deprive the court of subject matter jurisdiction.

2. Public housing.

a) “When the PHA is required to afford the tenant the opportunity for a hearing under the PHA grievance procedure for a grievance concerning the lease termination, the tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.” 24 C.F.R. § 966.4(l)(3)(iv).

b) *Housing Auth. of Danville v. Love*, 375 Ill. App. 3d 508, 512 (4th Dist. 2007) (“the trial court erred in entertaining this action for forcible entry and detainer while the grievance procedure was still pending.”).

3. Subsidized Properties using the HUD Model Lease.

a) As noted above, paragraph 23(e) of the lease provides that every termination notice must inform the tenant that she “has 10 days within which to discuss the proposed termination of tenancy with the Landlord.”

b) Based on this lease provision, one can argue that the notice does not expire until after the 10-day discussion period ends.

c) The HUD Model Lease is used in the following programs;

(1) Section 8 New Construction;

(2) Section 8 Substantial Reconstruction;
(3) State Housing Agencies Program;
(4) Section 8 Loan Management Set-Aside Program;
(5) Section 8 Program for the Disposition of HUD-Owned Properties.

B. Premature Termination Date.

1. A termination notice need not identify the date on which the lease agreement will terminate. It may simply state that the lease will terminate a certain number of days after the notice is served.

2. Nevertheless, if the notice sets forth a specific date of termination, that date must fall after the applicable 5- or 7- or 10- or 14- or 30-day period has passed.

3. To calculate the proper date, follow the statute on statutes, which provides that, “The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Saturday or Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall also be excluded. If the day succeeding such Saturday, Sunday or holiday is also a holiday or a Saturday or Sunday then such succeeding day shall also be excluded.” 5 ILCS 70/1.11.

4. The Illinois Appellate Court addressed this defense in Holsten Mgmt. Corp. v. Diaz, 2014 IL App (1st) 131261-U (5-day notice stating that lease would terminate on Sunday, October 21, unless tenant paid the rent due by that date was invalid on its face because, under the statute on statutes, tenant had until Monday, October 22 to comply with the demand for rent). Although this is an unpublished order that was issued pursuant to S. Ct. Rule 23 and therefore has no precedential value and may not be cited, it demonstrates that the Illinois Appellate Court is receptive to the argument that a premature termination date renders a termination notice invalid.

   a) In Diaz, the court rejected the plaintiff’s contention that “the one-day difference is irrelevant because [the tenant] did not claim that she did, in fact, tender the overdue rent on Monday, October 22. Even taking that as true, it does not change the result.”

   b) “[T]he defect invalidated the notice. The purposes of the notice requirement include providing tenants with grace periods to make slightly late rent payment and avoid loss of their leasehold, and to provide fair warning to tenants, in cases where there might be a dispute or misunderstanding over the rent amount or its transmission, that the landlord has not received the rent due. Where the notice, as here, sets forth a deadline that is earlier than the actual, legal deadline, the tenant may rely on that information and decline to make a payment after the specified date, in the mistaken belief that the ‘late’ payment would be futile. Forcible entry and detainer actions are special statutory proceedings in derogation of the common law.”
C. Impermissibly Vague Termination Notice.

1. In Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970), the United States Supreme Court held that a public aid recipient is entitled, as a matter of due process, to “timely and adequate notice detailing the reasons for a proposed termination.”


3. In the federal housing programs, therefore, any termination notice must set forth good cause for termination with enough specificity to enable the tenant to prepare a defense. Indeed, this specificity requirement is set forth explicitly in the regulations governing these programs:


   b) Housing Choice Voucher Program and Section 8 Project-Based Voucher Program – “The owner must give the tenant a written notice that specifies the grounds for termination of tenancy during the term of the lease.” 24 C.F.R. §§ 982.310(e)(1)(i) and 983.257(a).

   c) Section 8 New Construction Program, Substantial Rehabilitation Program, and State Housing Agencies Program – “The owner must give the family a written notice of any proposed termination of tenancy, stating the grounds.” 24 C.F.R. § 880.607(c)(1).

   d) Section 8 Moderate Rehabilitation Program – The notice “must . . . state the reasons for such termination with enough specificity to enable the Family to prepare a defense.” 24 C.F.R. § 882.511(d)(2).

   e) Section 8 Loan Management Set-Aside Program, Program for the Disposition of HUD Owned Projects, the 21(d)(3) BMIR Program, and the 236 Program – “The landlord’s determination to terminate the tenancy shall be in writing and shall . . . state the reasons for the landlord’s action with enough specificity so as to enable the tenant to prepare a defense.” 24 C.F.R. §247.4(a).

4. A notice that fails to comply with the specificity requirement is insufficient to terminate the tenancy. See Moon v. Spring Creek Apts., 11 S.W.3d 427, 433 (Tex. App. 2000) (collecting relevant cases, and noting that “[t]ermination notices for federally subsidized housing have been found to be insufficient where they contain only one sentence, are framed in vague and conclusory language, or fail to set forth a factual statement to justify termination.”).

D. Immaterial Violation.
1. Generally.

a) “[A] breach, to justify a premature termination or forfeiture of a lease agreement, must have been material or substantial.” *Wolfram Partnership Ltd. v. LaSalle National Bank*, 328 Ill. App. 3d 207, 222-23 (1st Dist. 2001); *First National Bank of Evergreen Park v. Chrysler Realty Corp.*, 168 Ill. App. 3d 784, 793 (1st Dist. 1998) (“For a party to terminate or rescind a contract . . . the nonperformance or breach by the other party must be substantial or material.”); *Mann v. Mann*, 283 Ill. App. 3d 915, 922 (3d Dist. 1996) (lessee did not materially breach lease term, so lessor’s successors in interest were not entitled to terminate lease.).

2. In the context of subsidized housing.

a) **Public Housing – 24 C.F.R. § 966.4(l)(2).**

   (1) The PHA may terminate the tenancy only for:

   (a) Serious or repeated violation of material terms of the lease; or

   (b) Financial ineligibility for the program; or

   (c) Other good cause (including criminal activity).

b) **HCV Program – 24 C.F.R. § 982.310(a).**

   (1) During the lease term, the owner may not terminate the tenancy except for:

   (a) Serious violation (including but not limited to failure to pay rent or other amounts due under the lease) or repeated violation of the terms and conditions of the lease; or

   (b) Violation of federal, State, or local law that imposes obligations on the tenant in connection with the occupancy or use of the premises; or

   (c) Other good cause.

   (2) The owner may terminate the lease agreement without good cause at the end of the initial or any successive term because the family may then move to another unit where the family may re\[receive the benefit of its tenant-based rental assistance.

   c) **Section 8 Project-Based Programs.**

   (1) For the New Construction, Substantial Rehabilitation, and State Housing Agencies Programs – 24 C.F.R. 880.607(b)(3).

   (a) The owner may not terminate any tenancy except upon the following grounds:
(i) Material noncompliance with the lease; or

(ii) Material failure to carry out obligations under any State landlord and tenant act; or

(iii) Criminal activity by a covered person in accordance with sections 5.858 and 5.859, or alcohol abuse by a covered person in accordance with section 5.860; or

(iv) Other good cause.

(2) For the Moderate Rehabilitation Program – 24 C.F.R. § 882.511.

(a) The Owner must not terminate or refuse to renew the lease except upon the following grounds:

(i) Serious or repeated violation of the terms and conditions of the lease; or

(ii) Violation of applicable Federal, State or local law; or

(iii) Other good cause.

(3) For the Project-Based Voucher Program – 24 C.F.R. § 983.257.

(a) 24 C.F.R. § 982.310 – which governs the procedure for terminating tenancies in the HCV Program – applies with the exception that §982.310(d)(1)(iii) and (iv) do not apply to the PBV program. (In the PBV program, “good cause” does not include a business or economic reason or desire to use the unit for an individual, family, or non-residential rental purpose.)

(b) 24 C.F.R. §§ 5.858 through 5.861 on eviction for drug and alcohol abuse apply to this part.

(4) For programs governed by 24 C.F.R. Part 247.

(a) The landlord may not terminate any tenancy in a subsidized project except upon the following grounds:

(i) Material noncompliance with the rental agreement; or

(ii) Material failure to carry out obligations under any state landlord and tenant act; or

(iii) Criminal activity by a covered person in accordance with sections 5.858 and 5.859, or alcohol abuse by a covered person in accordance with section 5.860; or

(iv) Other good cause.
“Material noncompliance is defined as one or more substantial lease violations or repeated minor violations which disrupt the livability of the building, adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises, interfere with the management of the building or have an adverse financial impact on the building.” Mid-Northern Mgmt., Inc. v. Heinzerloh, 234 Ill. App. 3d 240, 247 (2d Dist. 1992).

Absent one or more substantial violations, “[m]aterial noncompliance’ requires a pattern of repeated minor violations of the lease, not isolated incidents.” Id. at 250.

E. Rent Improperly Increased to Market Rate.

1. In the Section 8 Project-Based Programs, the owner may raise the rent to the market rate when:
   a) The unit has been rendered uninhabitable as a result of the tenant’s “carelessness, misuse, or neglect” (see HUD Model Lease, ¶ 11); or
   b) The tenant failed to comply with the annual recertification procedures in a timely manner (see HUD Handbook 4350.3, Chapter 7).

2. In these cases, it is often possible to challenge the owner’s decision to raise the rent to the market rate.
   a) The evidence may show that the damage to the unit was not the result of the tenant’s “carelessness, misuse, or neglect.”
   b) If the owner contends that the tenant did not recertify in a timely manner, the evidence may show that the owner did not provide the tenant with all the requisite reminder notices.

F. Failure to Pay Utility Bills or to Maintain Service.


2. Even when the service has been disconnected, the tenant may be able to argue that her failure to maintain service does not warrant eviction. See Sayles v. Greater Gasden Hous. Auth., 658 So. 2d 489 (PHA had no cause for terminating tenant's lease because of disconnected utility service, where utilities were restored shortly after they were disconnected, no property damage occurred, no other residents were placed in danger because of disconnection, tenant's gas bill for month before disconnection was unusually high because of winter storm, and her income from public assistance did not allow for increased utility bills in extreme weather months).
G. Improper Rejection of Rent.

1. A landlord may not reject the rent due if it is tendered within the period set forth in the termination notice. *Madison v. Rosser*, 3 Ill. App. 3d 851, 852 (1st Dist. 1972) (A landlord may not pursue a forcible action based on a termination notice demanding unpaid rent if the tenant tendered the amount due before the notice expired, and the landlord's reason for rejecting the timely tender is immaterial.).

2. A landlord may not reject a rent payment on the grounds that the money is coming from a third-party. *16 Apartment Assoc. v. Lewis*, 889 N.Y.S.2d 884 (N.Y. App. Div. 2009) (landlord had no right to reject third-party checks offered on tenant's behalf by social service agencies).

H. Late Rent Payment Excused.

1. When the resident of a Section 8 project-based development receives public assistance, her rent payment may not be considered late for the purpose of terminating her lease if she tenders it within three days after receiving her assistance. *American National Bank & Trust v. Dominick*, 154 Ill. App. 3d 275, 279-80 (1st Dist. 1987) (relying on a HUD Circular dated 4/24/86, in which the agency took note of the staggered payment system for public assistance benefits in Illinois).

2. By repeatedly accepting late payments, a landlord may waive its right to demand strict compliance with the payment date set forth in the lease unless and until it provides the tenant with advance notice that late payments will no longer be tolerated. *Dominick*, 154 Ill. App. 3d at 282.

I. Waiver.

1. Overview.

   a) "Waiver is the express or implied voluntary and intentional relinquishment of a known and existing right." *Wolfram*, 328 Ill. App. 3d at 223 (emphasis added).

   b) "Implied waiver . . . has been stated to arise where (1) an unexpressed intention to waive can be clearly inferred from the circumstances or (2) the conduct of the waiving party has misled the other party into a reasonable belief that a waiver has occurred." *Id.* at 224.

2. In the context of forcible actions.

   a) "It has long been established that any act of a landlord which affirms the existence of a lease and recognizes a tenant as his lessee after the landlord has knowledge of a breach of lease results in the landlord's waiving his right to forfeiture of the lease." *Midland Mgmt. Co. v. Helgason*, 158 Ill. 2d 98, 102 (1994); see also *McGill v. Wire Sales Co.*, 175 Ill. App. 3d 56, 59 (1st Dist. 1988).
3. **Acts that constitute waiver.**

   a) **Acceptance of rent.**

      (1) “Evidence of acts inconsistent with a declaration of a termination of the lease may prove waiver of the breach, which operates to reinstate the lease. Acceptance of rent accruing subsequent to a breach is one such inconsistent act.” *Helgason*, 158 Ill. 2d at 102

      (2) “Lessor’s acceptance of rent accruing after the breach, with knowledge of the breach, is a well-established indication of the waiver of the right to forfeit the lease on that ground.” *Barrick & Assoc. v. Witz*, 147 Ill. App. 3d 615, 619 (2d Dist. 1986).

      (3) “[T]he acceptance of rent following a breach has long been considered to be highly indicative of an intention to waive.” *Wolfram*, 328 Ill. App. 3d at 224 n.9.

   b) **Retaining money orders for an unreasonably long period.**

      (1) *Helgason*, 241 Ill. App. 3d at 904-05 (2d Dist. 1993), rev’d on other grounds, 158 Ill. 2d 98 (1994) (retention for one-week does not constitute acceptance); *Day-Luellwitz Lumber Co. v. Serrell*, 177 Ill. App. 30, 38-39 (1st Dist. 1913) (retention for three months constitutes acceptance.)

      (2) *Day-Luellwitz* was decided prior to 1935 and is therefore not binding authority because it predates an amendment to the Courts Act that conferred precedential authority to Illinois Appellate Court decisions. See *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 95 (1996) (declining to rely on 1888 appellate court decision holding that “it is not per se defamatory to call a woman a slut,” in part because “[a]ppellate court decisions issued prior to 1935 ha[ve] no binding authority.”).

      (3) Nevertheless, *Day-Luellwitz* has not been overruled, so it still constitutes persuasive authority. See *Reichert v. Court of Claims of State of Illinois*, 203 Ill. 2d 257, 262 n.1 (2003) (“appellate court decisions issued prior to 1935 are persuasive authority only.”).

   c) **Execution of a new lease agreement.**

      (1) “Obviously, it is inconsistent for a landlord to claim that a tenant has breached the lease, but then enter into a new lease with the same tenant.” *Superior Housing Authority v. Foote*, 158 Wis. 2d 732 (Wis. Ct. App. 1990).
(2) Execution of a new lease with knowledge of lessee's default under the original lease constituted waiver by lessor of right of re-entry reserved in original lease. *Felton v. Strong*, 37 Ill. App. 58, 61 (1st Dist. 1890) (“The new lease was made with full knowledge of the prior default . . . No more conclusive waiver of the right of re-entry could be imagined.”). As noted above, cases decided before 1935 are not binding, but they are still persuasive.

4. Acts that do not constitute waiver.

a) *Acceptance of subsidy payments.*

(1) *Helgason*, 158 Ill. 2d at 103 (“[A]ssistance payments do not constitute rent.”).

b) *Recertifying a subsidized housing resident.*

(1) “[T]he recertification process is a necessary step in qualifying for HUD assistance payments and therefore does not constitute a waiver of a breach of a lease.” *Burnham v. Davis*, 302 Ill. App. 3d 263, 270-71 (2d Dist. 1998).

c) *General rule.*

(1) Any act the landlord is required to perform (e.g., making necessary repairs or issuing a utility allowance) does not constitute waiver.

5. Issuing successive termination notices may or may not constitute waiver.

a) *Successive termination notices do not constitute waiver if the second notice merely updates the first and would not lead a reasonable person to believe that the landlord was waiving its right to rely on the first notice.* *Chicago Housing Authority v. Taylor*, 207 Ill. App. 3d 821, 827 (1st Dist. 1990) (question of fact existed as to whether housing authority intended second notice to operate as waiver of its rights under first notice, so remand was necessary for evidentiary hearing.).

b) *Second demand might give tenant opportunity to comply with demand and thereby preserve tenancy.* *Taylor*, 207 Ill. App. 3d at 826 (distinguishing *Duran v. Housing Auth. of Denver*, 761 P.2d 180 (Colo. 1988), in which the public housing resident tendered all the rent demanded in the second notice before it expired).

c) *Distinguish Taylor from any case in which the second notice does not merely update the first (e.g., notice demanding rent issued after notice alleging excessive noise).*

6. Preserving the right to evict while accepting rent.
a) A landlord may take steps that will allow it to accept rent without waiving its right to evict for a series of minor lease violations when each violation, by itself, would not warrant eviction.

b) In Barrick & Assoc. v. Witz, 147 Ill. App. at 620, the plaintiffs argued that, “if acceptance of rent is interpreted as a waiver of minor breaches, a lessor has no recourse against a tenant whose actions, when considered separately, might not constitute a breach of the lease but which would be a breach when viewed as a consistent course of conduct.”

c) The court disagreed. “[A] lessor in that position may simply notify the tenant that his actions are not consistent with the lease terms and that further deviations will not be tolerated and will be followed by termination of the lease. Such notice will preserve the lessor's objection to his tenant's conduct, and acceptance of rent under those circumstances cannot reasonably be interpreted by the tenant as acquiescence. What the lessor may not do, however, is consistently accept rent from a problem tenant without objection, warning, or comment, and then attempt to forfeit the lease based on his prior behavior.” Id.

J. Warranty of Habitability.


a) Jack Spring v. Little, 50 Ill. 2d 351, 358-59 (1972) (when a tenant is facing eviction for nonpayment of rent, the tenant may assert as an affirmative defense and counterclaim that the landlord's failure to maintain the premises reduced its value by an amount that exceeds the rent due.).

(1) Court rejected contention that only issue in forcible action is the right to possession and that no equitable defenses can be recognized. Id. at 359 (“[A] tenant may bring an action against his landlord for breach of a covenant or may recoup for damages in an action brought to recover rent.”).

(2) “It would be paradoxical, indeed, to hold that if these were actions to recover sums owed for rent the defendants would be permitted to prove that damages suffered as the result of the plaintiffs' breach of warranty equaled or exceeded the rent claimed to be due, and therefore, that no rent was owed, and at the same time hold that because the plaintiffs seek possession of the premises, to which admittedly, they are not entitled unless rent is due and unpaid after demand, the defendants are precluded from proving that because of the breach of warranty no rent is in fact owed.” Id.
In the contracts, both oral and written, governing the tenancies of the defendants in the multiple unit dwellings occupied by them, is an implied warranty of habitability which is fulfilled by substantial compliance with the pertinent provisions of the Chicago building code.” *Id.* at 366.

b) *Peoria Housing Auth. v. Sanders*, 54 Ill. 2d 478, 483 (1973) (“when an action for possession is based upon nonpayment of rent, the question whether the defendant owes rent to the plaintiff is germane, whether or not the plaintiff seeks judgment for the rent that he says is due.”).

(1) Public housing resident was permitted not only to dispute that she owed rent, but to file a counterclaim seeking to recoup rent that she had allegedly overpaid, and the trial court erred by striking this counterclaim. *Id.*

c) *South Austin Realty Ass’n v. Sombright*, 47 Ill. App. 3d 89, 92-93 (1st Dist. 1977) (extended holding in *Jack Spring* to dwelling units in two-flat structures, finding that such structures were multiple-unit dwellings).

(1) Trial court erred by dismissing the counterclaim seeking equitable relief in the form of an order requiring the landlord to make necessary repairs and bring the premises into substantial compliance with building codes. *Sombright*, 47 Ill. App. 3d at 94.


(1) The court rejected the idea that a tenant cannot fight for possession of a dwelling unit and simultaneously contend that it has not been maintained in substantial compliance with building codes. *Pole Realty*, 84 Ill. 2d at 183 (“while on superficial examination there may seem to be some conceptual inconsistency between a tenant's remaining in possession and at the same time claiming a breach of a warranty of habitability, it is evident that the simple fact that a house can be inhabited does not necessarily mean that the warranty of habitability has been satisfied.”).

2. Local law.

a) *If the landlord has failed to properly maintain the premises, the tenant may recover damages “by claim or defense.”* RLTO, § 5-12-110(e).

K. Cure.

1. Some landlord-tenant ordinances provide that, when the tenant is facing eviction for a violation other than nonpayment of rent, the termination notice must inform the tenant of the right to cure the violation (provided it can be cured) before the cure period expires.
2. Can a tenant cure criminal activity?

   a) **Landlords argue that criminal activities fall outside the realm of curable violations.**

   b) **The ability to cure may depend on who committed the crime.**  
      *Though a tenant may not be able to cure her own criminal activity, she may be able to cure another person’s crime by barring the offender from the premises.*

3. In the subsidized housing context, is a local ordinance’s cure provision preempted by federal “one-strike” statutes (which are discussed in more detail below in the sections addressing the public housing and Section 8 programs)?

   a) **Maybe.**

      (1) **Scarborough v. Winn Residential**, 890 A.2d 249, 255 (D.C. 2006) (the resident of a Section 8 project-based development who was facing eviction for possession of an unlawful weapon could not take advantage of a local law that otherwise afforded her an opportunity to correct this violation because enforcing that requirement would frustrate the objectives of the federal program).

   b) **Maybe not.**

      (1) **Housing Auth. of Covington v. Turner**, 295 S.W.3d 123, 127 (Ky. Ct. App. 2009) (public housing resident who was facing eviction for her nephew’s drug-related criminal activity in her unit could take advantage of state statute that afforded her opportunity to cure this violation because state statute was not preempted by federal one-strike law).

L. **Retaliatory Eviction.**

1. State law.

   a) **Retaliatory Eviction Act, 765 ILCS 720.**

      (1) “It is declared to be against the public policy of the State for a landlord to terminate or refuse to renew a lease or tenancy of property used as a residence on the ground that the tenant has complained to any governmental authority of a bona fide violation of any applicable building code, health ordinance, or similar regulation.” 765 ILCS 720/1.

      (2) In **Wood v. Wood**, 284 Ill. App. 3d 718 (4th Dist. 1996), the Illinois Appellate Court expanded the definition of protected activity set forth in the statute to include obtaining an order of protection.
(a) “To date, the retaliatory eviction defense has generally been recognized in the context of a landlord's retaliation for a tenant's complaints to governmental authorities regarding building codes, based on the Retaliatory Eviction Act. However, Illinois has never decided the defense is limited to that recognized in the Eviction Act.” Wood, 284 Ill. App. 3d at 725.

(b) “It violates public policy to evict a woman from her home merely because she got an order of protection against her husband who was physically abusing her.” Id. at 725-26.

(c) Wood relied on Seidelman v. Kouvasus, 57 Ill. App. 3d 350, 354 (2d Dist. 1978), in which the court noted the “possibility that circumstances may arise, in future cases, where a landlord's action in seeking to evict a tenant would be so invidiously motivated and would so contravene the public policy of our State that we would not permit our courts to implement the eviction in a forcible entry and detainer proceeding.”

2. Local law.
   a) Chicago RLTO, § 5-12-150.
   b) Evanston RLTO, § 5-3-9-1.
   c) Mount Prospect, § 23.1809.

M. Reasonable Accommodation.

1. A tenant with a disability who is facing eviction for a violation that is directly related to that disability may request a reasonable accommodation that will allow her to preserve her tenancy and comply with her obligations in the future. (This defense is discussed in more detail in a separate section below.)

N. VAWA 2013/Safe Homes Act.

1. These laws protect domestic violence victims and are discussed in more detail in a separate section below.

O. Laches.

1. “Laches is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party.” Tully v. State, 143 Ill. 2d 425, 432 (1991).

2. Two elements are necessary to a finding of laches:
   a) lack of diligence by the party asserting the claim; and
   b) prejudice to the opposing party resulting from the delay. Id.


5. In the context of nonpayment cases.
   
a) No Illinois Court has addressed the use of a laches defense in a nonpayment case. It is therefore appropriate to consider relevant decisions from outside Illinois. See *Draper & Kramer v. King*, 2014 IL App (1st) 132073 (“Although the decisions of foreign courts are not binding, ‘the use of foreign decisions as persuasive authority is appropriate where Illinois authority on point is lacking or absent.’”) (citation omitted).

   (1) *Marriott v. Shaw*, 574 N.Y.S.2d 477 (N.Y. Civ. Ct. 1991) (granting motion for summary judgment based on *laches* defense because landlord had slept on his rights, and delay had prejudiced tenant who was poor and did not have resources to satisfy large rental debt).

   (2) *Lemle 58th LLP v. Wolf*, 872 N.Y.S.2d 691 (N.Y. Civ. Ct. 2008) (*laches* barred landlord from evicting subsidized housing resident for nonpayment of almost $7,000 in rent that had accrued over eight years).

   (3) *Building Mgmt. Co., Inc. v. Bonifacio*, 906 N.Y.S.2d 770 (N.Y. Civ. Ct. 2009) (*laches* barred owner of rent-stabilized apartment from evicting tenant for nonpayment of more than $20,000 in rent that had accrued over a period of 21 months).

P. Denying Plaintiff Relief to which it is Legally Entitled.

1. The power to grant equitable relief.

   a) “A court may grant relief against the termination of a lease by forfeiture when equitable circumstances warrant such relief.” *In re Gully’s, Inc.*, 8 B.R. 556, 557 (N.D. Ill. 1981); see also 24 Ill. Law and Prac., Landlord and Tenant, § III.

   b) “The source of the right in the landlord to declare a forfeiture is not important. It is of the nature of equitable relief that it may be granted to obviate the effect of an act which the other party has a right to perform, but by which he in equity and good conscience should not be allowed to benefit. . . . The basis of the relief is that the [party] is seeking to exercise a right which he has, but which he should not be permitted to exercise.” *Illinois Merchants’ Trust Co. v. Harvey*, 335 Ill. 284, 294 (1929), overruled in part and on other grounds, *Kanter & Eisenberg v. Madison Assoc.*, 116 Ill. 2d 506, 512 (1987).
IIinois Merchants’ Trust Co. was decided prior to 1935 and is therefore not binding authority because it predates an amendment to the Courts Act that conferred precedential authority to Illinois Appellate Court decisions. (See above.) Nevertheless, the relevant part of the decision has not been overruled, so it still constitutes persuasive authority.

2. The reason to grant equitable relief.

   a) “[One] reason not to enforce a forfeiture provision is to prevent injustice that may result from ejecting the tenant.” Daugherty v. Burns, 331 Ill. App. 3d 562, 568 (4th Dist. 2002) (citing Illinois Merchants’ Trust Co. with approval and noting that the prevention of a forfeiture “‘is within the protecting care of equity whenever wrong or injury will result from its enforcement.’”)

3. Must a defendant have “clean hands” to raise an equitable defense?

   a) The plaintiff may argue that the defendant is not entitled to equitable relief because she does not have clean hands.

   b) As an initial matter, the doctrine of clean hands applies only to a plaintiff who is seeking equitable relief, or to a defendant who has filed a counterclaim. It does not apply to a defendant who is seeking nothing but defensive relief. Diehl v. Olson, 141 Ill. App. 3d 110, 113-14 (“the defendants had no burden to meet with respect to the doctrine of clean hands since it is inapplicable when defendants are seeking defensive relief from a court of equity and are not counterclaiming.”).

   c) Furthermore, the doctrine of clean hands applies only “if a party seeking equitable relief is guilty of misconduct, fraud, or bad faith toward the party against whom relief is sought and if that misconduct is connected with the transaction at issue in the litigation.” Zahl v. Krupa, 365 Ill. App. 3d 653, 658 (1st Dist. 2006) (emphasis added).

(1) Assume, therefore, that an elderly tenant with disabilities argues that evicting her from public housing for nonpayment of $3.86 would shock the conscience. (That’s from an actual case.)

(2) The PHA may not argue that she is precluded from raising an equitable defense because she continually exits the back door and refuses to grant the PHA access to her unit for housekeeping inspections. Why? Because the alleged misconduct is not related to nonpayment of rent, which is the transaction at issue in the litigation.

4. Will a forcible court exercise its equitable powers?
In *H. J. Russell & Co. v. Tammy Joiner*, 2015 IL App (1st) 133310-U, the Chicago Housing Authority challenged a forcible court's decision to exercise its equitable powers and deny CHA the relief to which the court had found CHA was legally entitled. The appellate court dismissed this appeal for want of jurisdiction, but the case is instructive.

Ms. Joiner was a public housing resident. *Joiner*, at ¶ 3. On July 16, 2009, she was arrested for possession of cannabis after she voluntarily allowed Chicago police officers to search her apartment. *Id.* Ms. Joiner used cannabis as to alleviate the severe chronic pain she suffered because of numerous health issues—childhood bone cancer, a gunshot wound, a dislocated hip, and osteoarthritis. *Id.* The State did not pursue charges after Joiner's arrest. *Id.*

On November 5, 2009, CHA filed a forcible action against her, alleging that she had violated the lease by possessing marijuana. *Id.* at ¶ 4.

After nearly four years of litigation, which might be a record for a forcible action, the trial court granted CHA’s motion for summary judgment. *Id.* at ¶ 5.

The trial court, however, “concluded eviction was not an appropriate remedy given the circumstances and, therefore, left the rights of the parties to possession undetermined. The court, instead, placed Joiner on six-months’ probation, allowing her to remain in the apartment as long as there was no recurrence of illegal drug use during that time.” *Id.*

Five months before the probationary period ended, CHA filed an appeal and challenged the trial court’s exercise of its equitable powers. *Id.*

Ms. Joiner moved to dismiss the appeal as premature, but the appellate court’s preliminary panel denied this motion. *Id.*

On May 13, 2015, the appellate court revisited the jurisdictional question and dismissed the appeal. *Id.* at ¶¶ 6-7.

The challenged order, said the appellate court, “depended on a possible future event—whether Joiner complied with the terms of her lease during the six-month probationary period—for its outcome and, therefore, did not terminate the parties' dispute.” *Id.* at ¶ 7. Accordingly, the order was not a final and appealable order and CHA filed its notice of appeal prematurely. *Id.*

By the time the appellate court issued this decision, the deadline for filing a timely appeal had passed, so Ms. Joiner got to stay in her apartment.
XI. EVICTION PRACTICE—DISCOVERY.

A. Right to Discovery.

1. Forcible actions seek not just money but possession of a dwelling unit. Accordingly, they are not small claims cases and are not subject to the prohibition set forth in S. Ct. Rule 287 against conducting discovery in such matters. See Draper & Kramer, Inc. v. King, 2014 IL App (1st) 132073, ¶ 44 n.5 (forcible actions are not small claims cases as defined in S. Ct. Rule 281).


   a) Full disclosure required. S. Ct. Rule 201(b)(1).

   b) Privilege and work product. S. Ct. Rule 201(b)(2).

   c) “The trial of a case shall not be delayed to permit discovery unless due diligence is shown.” S. Ct. Rule 2019(f).

   d) Make a reasonable attempt to resolve discovery disputes before filing a motion to compel. S. Ct. Rule 201(k) (“Every motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord . . . .”).

   e) Do not file discovery requests or responses with the Clerk of the Circuit Court unless the discovery request is being issued to a nonparty. S. Ct. Rules 201(m) and (o).

B. Interrogatories.


2. Must be served on the other party, but need not be filed.

3. Request answers in 28 days.

4. Issue no more than 30 interrogatories, including subparts, “except by agreement of the parties or leave of court granted upon a showing of good cause.” S. Ct. Rule 213(c).

5. Specific questions.

   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 nonpayment of rent, ask the plaintiff to explain exactly what the amount demanded in the termination notice represents, and to identify the time period during which the debt was incurred.

c) If your client is facing eviction for some violation other than nonpayment of rent, draft a separate interrogatory for each allegation in the termination notice.

(1) Begin by writing, “With respect to the allegation set forth in your termination notice that [on whatever date, whatever happened], please . . .”

(2) 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).

d) Ask the plaintiff to identify each and every witness it may call at trial, and to identify the subject of each witness’ testimony.

6. Responding to interrogatories.

a) The responding party must answer or object within 28 days.

b) Answer must be sworn. The responding party may satisfy this requirement by attaching to its answer a verification page that complies with 735 ILCS 5/1-109.

(1) “Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.”

7. The requesting party may, by motion, ask the court to rule on its objection to any answer or refusal to answer. The motion must be brought promptly.

8. Like discovery depositions—see below—interrogatory answers may be used:

a) For the purpose of impeaching the testimony of the responding party as a witness in the same manner and to the same extent as any inconsistent statement made by a witness;

b) As an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person;

c) If otherwise admissible as an exception to the hearsay rule; or
d) For any purpose for which an affidavit may be used.

C. Request for Production of Documents.

2. Must be served on the other party, but need not be filed.
3. Request response in 28 days.
4. Specific document requests:
   a) Current lease agreement, together with all addenda.
   b) Termination notice upon which the action is based.
   c) Rent ledgers.
   d) Written witness statements.
   e) Police reports (if your client is facing eviction for an alleged crime).
   f) All documents upon which the plaintiff relied in answering the interrogatories.
   g) All documents the plaintiff intends to introduce at trial.

5. Responding to document requests.
   a) Produce the requested documents (either as they are kept in the usual course of business, or organized and labeled to correspond with the categories in the discovery request) or object to the request in writing.
   b) Furnish an affidavit stating whether the production is complete in accordance with the request.

D. Requests to Admit.

2. Requests to admit are a discovery tool, but their main purpose is not to discover. It is, instead, to withdraw certain facts from contention.
3. Making the request.
   a) A party may serve a written request for the admission of:
      (1) The truth of any specified relevant fact; or
      (2) The genuineness of any relevant document.
b) Requests for legal conclusions are improper in form, and the failure to respond to such a request does not result in a judicial admission. *Robertson v. Sky Chefs, Inc.*, 344 Ill. App. 3d 196, 200 (1st Dist. 2003).

c) Requests to admit may not be included with other discovery. They must be served “separate from other documents.”

d) The party issuing the requests must put the following warning in a prominent place on the first page in 12-point or larger boldface type: “WARNING: If you fail to serve the response required by Rule 216 within 28 days after you are served with this document, all the facts set forth in the requests will be deemed true and all the documents described in the requests will be deemed genuine.”

4. Responding to the request.

a) Two acceptable responses:

   (1) A sworn statement admitting or denying the request or setting forth in detail the reasons the party cannot truthfully admit or deny the request; or

   (2) A written objection to the request.


c) Valid written objections.

   (1) Relevance;

   (2) Privilege;

   (3) Failure to define material terms;

   (4) Unclear time frame;

   (5) Requests a legal conclusion.

5. Serving the response.

a) The responding party must serve the requesting party within 28 days after receiving the request.

b) Determining when the 28-day period begins.

   (1) Service by mail is effective four days after mailing. S. Ct. Rule 12(c).
(2) Service by facsimile and e-mail is effective “on the first court day following transmission.” S. Ct. Rules 12(c).

c) **Filing the response with the court will not satisfy the service requirement.**

(1) “Rule 216(c) only requires that responses to requests for admissions be served on the opposing party within the specified time period. When a response is filed with the court is irrelevant. Indeed, filing is not even necessary under the rule. The only purpose it serves is to help document when a responding party has acted within the rule’s time limits.” *Bright v. Dicke*, 166, Ill. 2d 204, 207 (1995).

6. **Harsh consequences for non-compliance.**

a) “The requirements of Rule 216, particularly providing a timely sworn response, must be strictly complied with, and the failure to comply will result in a judicial admission that is considered incontrovertible, withdrawing that fact from contention.” *Z Financial v. ALSJ, Inc.*, 977 N.E.2d 189, 195 (1st Dist. 2012);

b) *Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 828-29 (1st Dist. 2010) (in case alleging multiple violations of the Chicago RLTO, defendants’ attorney filed response to request to admit under his own signature and without his clients’ verification, so facts set forth in the request were deemed admitted).

7. **Requesting additional time to respond.**

a) For good cause, a party can move for and receive an extension of time within which to respond pursuant to S. Ct. Rule 183. *Z Financial*, 977 N.E.2d at 195.

b) The Illinois Supreme Court has rejected the view that mistake, inadvertence, and attorney neglect can never serve as the basis for a finding of good cause, and expressly overturned five appellate court decisions that narrowed the definition of good cause and limited trial court discretion. *Vision Point*, 226 Ill. 2d at 349-52 (2012)

c) The motion for an extension may be brought even after the deadline for responding has passed. S. Ct. Rule 183. The best practice, however, is to bring the motion before the deadline has passed. Judges are more receptive to such motions if they are brought at the earliest possible date.

E. **Depositions.**

1. Carefully consider every witness identified in response to your interrogatories and decide whether you need to depose that witness.

2. Notice of deposition to a party – S. Ct. Rule 204(a)(3).


   a) For the purpose of impeaching the testimony of the responding party as a witness in the same manner and to the same extent as any inconsistent statement made by a witness;

   b) As an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person;

   c) If otherwise admissible as an exception to the hearsay rule; or

   d) For any purpose for which an affidavit may be used.

F. Discovery Sanctions.


2. Failure to Comply with Order or Rules.

   a) If a party unreasonably fails to comply with the rules governing discovery, or with a court order regarding discovery, the court, on motion, may order:

      1) That further proceedings be stayed until the order or rule is complied with;

      2) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

      3) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

      4) That a witness be barred from testifying concerning that issue;

      5) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice; or

      6) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.
b) The court may also, upon motion or upon its own initiative, impose upon the offending party or the party’s attorney, or both, an appropriate sanction, which may include an order to reimburse the other party for reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is willful, a monetary penalty.

3. Abuse of Discovery Procedures.
   a) The court may order that information obtained through abuse of discovery procedures be suppressed.

4. Voluntary Dismissals.
   a) A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit.
   b) The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action.

G. After Completion of Discovery.

1. Determine whether you have grounds to file a motion for summary judgment. (Although such motions may be filed at any time, you may not have all the evidence you need to support the motion until discovery is complete.)

2. Governing statute and rule.
   a) 735 ILCS 5/2-1005.
   b) S. Ct. Rule 191.

3. Timing.
   a) Present the motion at least 45 days before the trial date. Local Rule 2.1(f) of the Circuit Court of Cook County. (Complying with this local rule is often difficult because, on the initial status date, many forcible judges set a trial date that does not provide the parties with sufficient time to complete discovery and subsequently file a motion for summary judgment.)

   a) “The parties to a forcible entry and detainer action, like other civil litigants, may avail themselves of a motion for summary judgment where the procedural device is appropriate.” Wells Fargo Bank v. Watson, 972 N.E.2d 1234, 1237 (3d Dist. 2012).

c) “If the party moving for summary judgment supplies facts which, if not contradicted, would entitle such a party to a judgment as a matter of law, the opposing party cannot rely upon his complaint or answer alone to raise genuine issues of material fact.” Carruthers, 57 Ill. 2d at 380; see also North American Old Roman Catholic Church v. Bernadette, 253 Ill. App. 3d 278, 289 (1st Dist. 1992) (“Even if the complaint and the answer [in a forcible action] purport to raise an issue of fact, summary judgment is nevertheless appropriate if such issues are not further supported by evidentiary facts through affidavits or other proper materials.”).
XII. EVICTION PRACTICE—SETTLEMENT.

A. Continuing for Compliance Status.

1. Useful when the defendant is a voucher-holder who can take his or her rental assistance to another unit and is willing to move in exchange for the plaintiff’s willingness to dismiss the case with prejudice.

2. Case is continued for compliance status.

   a) The continuance order provides that if the defendant has vacated the premises by the compliance status date, the case will be dismissed with prejudice.

   b) The order also typically provides that if the defendant has not vacated the premises by the compliance status date, the plaintiff will be awarded immediate possession (and sometimes rent and costs, as well).

B. Dismissing with Leave to Reinstate.

1. Dismissal order authorizes the plaintiff to reinstate the case during a probationary period if the defendant:

   a) Fails to comply with the terms of any repayment agreement set forth in the dismissal order; and/or

   b) Commits a new and material lease violation; and/or

   c) Permits a barred individual to enter the premises.

2. The order must either confirm that the defendant owes no rent or identify the amount owed and set forth a repayment schedule.

   a) Example: “The defendant shall satisfy this debt by giving the plaintiff, in addition to her regular monthly rent, $___ per month on or before the ___ of the month from [month and year] through [month and year], with a final additional payment of $___ in [month and year].”

3. The order must also provide that the plaintiff may not reinstate the case after the probationary period ends.

4. The precise terms that you are able to negotiate will depend on the strength of your defense(s). Generally, however, the order should provide that:

   a) The motion to reinstate must set forth the alleged violation(s) with enough specificity to enable the defendant to prepare a defense.

   b) The plaintiff may not reinstate for any incident the plaintiff knew or should have known about prior to the date of the dismissal order.
c) The plaintiff waives its right to reinstate for an alleged violation if, after learning about the violation, it accepts the defendant’s rent or enters into a new lease agreement with the defendant.

d) The defendant retains his or her right to conduct discovery limited to the allegation(s) set forth in the motion to reinstate.

e) At the trial in the reinstated action, the plaintiff may rely only on the allegation(s) set forth in its motion to reinstate.
XIII. EVICTION PRACTICE—TRIALS (GENERALLY).

A. Compelling Appearance.

B. Plaintiff Bears Burden of Establishing Right to Possession.
   1. Even though forcible actions are summary proceedings, “an eviction trial, like any other trial, should be an orderly procedure wherein the plaintiff presents evidence of possession and compliance with the necessary procedural steps for notice of termination, filing suit and summons.” Eckel v. MacNeal, 256 Ill. App. 3d 292, 298 (1st Dist. 1993).

C. Plaintiff’s Prima Facie Case:
   1. The plaintiff has a superior right to possession of the premises;
   2. The defendant is in possession of the premises;
   3. The defendant violated the lease or held-over after the lease expired;
   4. The plaintiff served the defendant with a valid termination notice (assuming such notice was required); and
   5. In a joint action, the defendant owed rent.

D. Motion for Directed Finding in a Bench Trial.
   1. (The procedure for bringing a motion for a directed verdict in a jury trial is discussed below in the section addressing jury trial practice.)
   2. If the plaintiff does not establish its prima facie case, the defendant may move for a finding in his or her favor. 735 ILCS 5/2-1110.
   3. Ruling on the motion.
      a) “[T]he trial judge must first determine, as a legal matter, whether the plaintiff has made out a prima facie case. If he has not, the court should, without more, grant the motion and enter judgment in the defendant’s favor.” Kokinis v. Kotrcih, 81 Ill. 2d 151, 155 (1980).
b) “If, however, the plaintiff has made out a prima facie case, the trial judge, in his role as the finder of fact, must then weigh the plaintiff’s evidence . . . . This weighing process may result in the negation of some of the evidence necessary to the plaintiff’s prima facie case, in which event the court should grant the defendant’s motion and enter judgment in his favor.”  

Id.

4. If the motion for a directed finding is denied, “the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived.” 735 ILCS 5/2-1110.

E. If Plaintiff Wins the Trial.

1. The court will award the plaintiff possession of the premises and, if appropriate, a judgment for the rent due plus costs.

2. Unless a local ordinance like the RLTO precludes the award of attorney fees in a forcible action, the court may also award fees.

3. The court will likely stay enforcement of the judgment for a period of 7-21 days, depending on the defendant’s circumstances. The plaintiff may not place the order for possession with the Sheriff until this stay expires.
XIV. EVICTION PRACTICE—JURY TRIALS.

A. Motions in Limine.

1. Purpose.
   
a) “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.” Konieczny v. Kamin Bros., 304 Ill. App. 3d 131, 136 (3d Dist. 1999).
   
b) “Even though the title—motion in limine—suggests that such motions may be used only to seek to bar or limit evidence, they may also be used by the proponent of the evidence to obtain a pretrial ruling in appropriate circumstances . . . .” People v. Owen, 299 Ill. App. 3d 818, 822 (4th Dist. 1998).

2. Drafting and presenting the motion.
   
a) “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).
   
b) 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
court 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.

3. Sample motions.

   a) *Bar evidence regarding violations not mentioned in the termination
      notice.*

      (1) 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).

      (2) 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).

      (3) Basic principles of due process also preclude the landlord from
      relaying at trial on allegations not set forth in the termination notice.

   b) *Bar evidence regarding history of defendant’s arrests.*

      (1) Proof of arrests is generally inadmissible to impeach a witness or

   c) *Bar evidence regarding prior convictions.*

      (1) “[E]vidence 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.”
In People v. Sanchez, 404 Ill. App. 3d 15, 18 (1st Dist. 2010), the court held that defense counsel’s failure to object to admission of defendant’s prior drug conviction that was more than ten years old was deficient performance, as prior conviction was inadmissible and only served to damage defendant’s credibility as a witness.

“[A] trial court’s failure to rule on a motion in limine on the admissibility of prior convictions when it has sufficient information to make a ruling constitutes an abuse of discretion.” Patrick, 233 Ill. 2d at 73.

d) Bar police reports.

(1) See “Criminal Law and Housing” below for separate section on inadmissibility of police reports.

e) Bar evidence regarding gang affiliation.

(1) 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.”).

f) Bar documents referenced but not produced in response to discovery requests.

4. Responding to the plaintiff’s motions.

a) In general.

(1) Remember that “an in limine order which precludes the opponent from presenting a valid defense is an abuse of discretion by the court.” Duffy v. Midlothian Country Club, 135 Ill. App. 3d 429, 436 (1st Dist. 1985).

b) When the plaintiff moves to bar evidence regarding the defendant’s source and amount of income.

(1) The plaintiff may claim that this information is irrelevant and prejudicial, and the plaintiff may be right. Nevertheless, this information may be relevant when the tenant is facing eviction for nonpayment of rent, and the source of income may be relevant when a tenant with a disability is asserting a reasonable accommodation defense.

c) When the plaintiff in a subsidized housing case moves to bar evidence regarding eviction’s effect on the defendant.

(1) Although you cannot argue to the jury that your client will likely become homeless if evicted from subsidized housing, you should be able to mention that:
(a) The lease automatically renews itself at the end of every term unless it is terminated for good cause;

(b) The rental assistance runs with the unit; and

(c) The defendant pays a reduced rent equal to a percentage of his or her household income.

(2) All these facts are set forth in the lease agreement, which the plaintiff must introduce into evidence as part of its prima facie case. During deliberations, the jury will put these facts together to draw the necessary conclusion.

d) When the plaintiff moves to bar evidence that the defendant was not convicted of crime for which the defendant was arrested.

(1) 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.

(2) 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).

(3) 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.

(4) 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.

5. Responding to violation of order in limine.

a) Don’t be dramatic.

b) Respond outside the presence of the jury so you don’t draw the jurors’ attention to the contested evidence.

a) “An alleged violation of an in limine order will warrant a new trial where the order is specific, the violation is clear, and the violation deprived [the other party] of a fair trial.” 

Fletcher, 394 Ill. App. 3d at 589 (landlord violated order in limine when it called defendant as adverse witness after failing to disclose defendant as a witness in its discovery responses, but this violation did not warrant new trial because defendant did not suffer undue harm or prejudice).

7. Challenging decision to deny motion in limine.

a) “The ruling remains subject to reconsideration by the court throughout the trial. It is within the discretion of the trial judge to grant or deny the motion. Whether granted or denied, a motion in limine does not preserve issues for review. If the court denies the motion, the movant must object to the evidence when it is offered at trial. An issue that is not objected to at trial is waived on appeal.” Konieczny, 304 Ill. App. 3d at 136.

b) “A court's evidentiary rulings are unreviewable on appeal if they have not been properly preserved. When the court makes its rulings before trial pursuant to the parties' motions in limine, the rulings are interlocutory and remain subject to reconsideration by the court throughout the trial. Consequently, denial of the complaining party's pretrial motion to exclude evidence is not sufficient to preserve the issue for appeal. The complaining party must also make a contemporaneous objection at trial when the evidence is introduced to allow the court the opportunity to revisit its earlier ruling. Failure to object at trial results in forfeiture of the issue on appeal.” Guskı v. Raja, 409 Ill. App. 3d 686, 695 (1st Dist. 2011).

8. Challenging decision to grant motion in limine.

a) “When a defendant claims that he has not been given the opportunity to prove his case because the trial court improperly barred evidence, he 'must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been.” People v. Pelo, 404 Ill. App. 3d 839, 875 (4th Dist. 2010) (citation omitted).

B. Offers of Proof.

1. Dual purpose.

a) “To disclose to the trial judge and opposing counsel the nature of the offered evidence, enabling them to take appropriate action . . . .” People v. Thompkins, 181 Ill. 2d 1, 10 (1998).

b) “To provide the reviewing court with a record to determine whether exclusion of the evidence was erroneous and harmful.” Id.

2. Right to make offer.
a) “Trial courts are required to permit counsel to make offers of proof, and a refusal to permit an offer generally is error.” *Id.* at 9.

b) “Illinois courts of review have not hesitated to remand cases for new trials where circuit judges have mishandled attempts by defendants to make offers of proof on excluded evidence.” *Id.* at 10 (collecting cases).

3. Necessity of offer.

a) “When a trial court excludes evidence, no appealable issue remains unless a formal offer of proof is made. The failure to do so results in a waiver of the issue on appeal.” *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495 (2002).

b) An offer of proof “is not required where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced.” *Id.*

4. Adequacy of offer.

a) “An adequate offer of proof is the key to preserving a trial court’s error in excluding evidence.” *Thompkins*, 181 Ill. 2d at 10.

b) “Where it is not clear what a witness would say, or what his basis would be for saying it, the offer of proof must be considerably detailed and specific. A reviewing court can thereby know what was excluded and determine whether the exclusion was proper.” *People v. Peeples*, 155 Ill. 2d 422, 457 (1993).

5. Formal and informal offers.

a) “The traditional way of making an offer of proof is the ‘formal’ offer, wherein counsel offers the proposed evidence or testimony by placing a witness on the stand, outside the jury’s presence, and asking him questions to elicit with particularity what the witness would testify to if permitted to do so.” *Pelo*, 404 Ill. App. 3d 875.

b) “In lieu of a formal offer of proof, counsel may request permission from the trial court to make representations regarding the proffered testimony.” *Id.*

(1) “A trial court may deem an informal offer of proof sufficient if counsel informs the court, with particularity, (1) what the expert testimony will be, (2) by whom it will be presented, and (3) its purpose.” *Id.*

(2) “[A]n informal offer of proof is inadequate if counsel (1) “merely summarizes the witness’ testimony in a conclusory manner,” or (2) offers unsupported speculation as to what the witness would say.” *Id.* at 875-76.
(3) “[I]t remains entirely within the trial court’s discretion whether to accept an informal offer of proof in lieu of the formal offer consisting of testimony from the witness stand.” Id. at 876.

(4) If the court fails to state on the record whether it accepts the informal offer of proof, the attorney must obtain such a ruling. Id. (“[G]iven how easy it is for counsel to obtain such a ruling from the court, we are disinclined to engage in speculation about whether the court was willing to accept an informal offer of proof if the record is not explicit on that point.”). Id.

C. Voir Dire.


2. Dual Purpose.

   a) Enables the trial court to select jurors who are free from bias or prejudice. People v. Gregg, 315 Ill. App. 3d 59, 65 (1st Dist. 2000).

   b) Ensures that “attorneys have an informed and intelligent basis on which to exercise their peremptory challenges.” Id.

3. Procedure.

   a) Prospective jurors (venirepersons) are ushered into the courtroom. Each one has completed a card with some basic information. Venirepersons are selected at random and asked to sit in a jury box.

   b) “The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching upon their qualifications to serve as jurors in the case on trial. The court . . . shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature and extent of the damages. Questions shall not directly or indirectly concern matters of law or instructions.” S. Ct. Rule 234.

   c) “[U]nder [Rule 234] as amended, the trial court must now allow counsel a reasonable opportunity to supplement the trial court’s own direct inquiry by counsel’s own direct oral inquiry.” Grossman v. Gebarowski, 315 Ill. App. 3d 213, 221 (1st Dist. 2000).

   d) “It is well established that limitation of voir dire questioning may constitute reversible error where such limitation denies a party a fair opportunity to probe an important area of potential bias or prejudice among prospective jurors.” Gregg, 315 Ill. App. 3d at 65.

4. Preserving objections.
a) Any objection to the manner in which the trial court conducts voir dire must be raised at trial and made in a post-trial motion.

b) If the objection is not raised at trial and in a post-trial motion, it is waived. See People v. Nieves, 193 Ill. 2d 513, 524 (2000) (By failing to object at trial and raise issue in post-trial motion, defendant waived issue of whether he was denied due process and fair trial by not being given opportunity to conduct voir dire of potential jurors before trial court excused them for cause.).

5. Questions to ask potential jurors in every case:
   a) Do you own your home or rent?
   b) Do you own rental property?
   c) Are you employed? In what capacity?
   d) Have you ever been involved in an eviction action? If so, were you the plaintiff or defendant? What happened?
   e) What do you know about LAF?
   f) Do you have an opinion about the fact that LAF provides free legal representation to people who cannot afford a lawyer?

6. Questions to ask in every subsidized housing case:
   a) Are you familiar with [the subsidized housing program at issue]?
   b) What do you know about the program?
   c) What do you think about the program?
   d) Have you ever had any experiences with a subsidized housing resident? If so, what was your experience?
   e) Do you have any feelings, positive or negative, about subsidized housing residents?

7. Questions to ask when your client is facing eviction for a child’s misconduct:
   a) Do you have children?
   b) How old are they?
   c) Do you always know what they are doing?

8. Questions to ask in when a police officer will testify against your client:
   a) Do you know any police officers?
b) Have you had any experiences with the police? If so, please describe the experience(s).

c) Do you think a police officer is more likely to tell the truth than an ordinary citizen?

9. Questions to ask in when your client is facing eviction for a crime:

a) 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.)


a) “Each side shall be entitled to 5 peremptory challenges.” 735 ILCS 5/2-1106(a).

b) “Each party may challenge jurors for cause.” 735 ILCS 5/2-1105.1.

(1) Establishing cause can be difficult. “Great weight is given to a prospective juror’s statement under oath that he can lay aside matters that might indicate bias and that he can render a verdict based on the evidence.” Lambie v. Schneider, 305 Ill. App. 3d 421, 430 (4th Dist. 1999).

(2) If you think you have cause to strike a potential juror, question the venireperson carefully until you can elicit an admission that he or she cannot be unbiased. “Mere suspicion of bias or impartiality is not evidence and does not disqualify a juror.” Roach v. Springfield Clinic, 157 Ill. 2d 29, 48 (1993).

(3) If the plaintiff moves to strike a potential juror for cause and you want to keep that person on the jury, you may question the juror in an effort to establish that he or she is unbiased.

D. Batson Challenges.

1. Purpose.

a) Prevent opposing counsel from using peremptory challenges to intentionally exclude jurors based on race.

b) In Batson v. Kentucky, 476 U.S. 79, 89 (1986), the United States Supreme Court held that, in a criminal case, the fourteenth amendment's equal protection clause prohibits a prosecutor from using a peremptory challenge to exclude a prospective juror solely on the basis of his or her race.
The rule announced in Batson – that the State may not use peremptory challenges to purposefully exclude jurors based on their race – applies with equal force to private litigants in civil cases.” Mack v. Anderson, 371 Ill. App. 3d 36, 43 (1st Dist. 2006).

2. Procedure.

a) Object during voir dire and before agreeing that the jury is acceptable.

b) Alleged that opposing counsel’s use of peremptory challenges violates your client’s right to equal protection under the law.

c) Request Batson hearing.


a) Informal. Attorneys are neither sworn-in nor subject to cross-examination.

b) Three-step process for evaluating claim of discrimination:

   1. Establish prima facie case that opposing counsel exercised peremptory challenges on basis of race by focusing on any of the following relevant factors:

      a) Your client and the excluded juror(s) are the same race.

      b) Pattern of strikes against members of one race.

      c) Disproportionate use of peremptory challenges against members of one race.

      d) Level of representation of minority race in the venire is significantly higher than level in the jury.

      e) Opposing counsel’s questions and statements during voir dire examination indicated racial bias.

      f) Excluded venirepersons shared race as only common characteristic.

      g) Race of your client, opposing party, and witnesses demonstrate that opposing counsel had motive for excluding venirepersons based on race.

   2. Burden then shifts to opposing party to articulate race neutral reason for excusing juror(s).

      a) Mere assertion of nondiscriminatory motive will not suffice.

      b) Explanation must be clear and reasonably specific, contain legitimate reasons for exercising the challenge, and be related to the case.
Nevertheless, explanation need not rise to level of challenge for cause.

(3) Trial court determines whether you have met burden of establishing intentional discrimination.

(a) Court evaluates opposing counsel’s stated reasons for using peremptory challenge(s) and contention that these reasons are pretextual.

(b) Best evidence will often be opposing counsel’s demeanor.


a) Preserve issue for appeal by ensuring that the race of the challenged jurors, the race of all the other jurors, and the race of the prospective jurors are a matter of record,

b) The trial court’s determination will be overturned if it is clearly erroneous. Mack, 371 Ill. App. 3d at 46 (trial court found that that defendant’s decision to use five peremptory challenges to exclude five black venirepersons did not violate Batson, and appellate court reversed this determination as clearly erroneous).

E. Excluding Nonparty Witnesses.

1. Always move to exclude nonparty witnesses.

2. Ensures that witnesses do not get opportunity to change their testimony to corroborate what another witness has said.

F. Opening Statement.

1. Be concise.

2. Have a clear theme.

3. Use plain language.

4. As a general rule, do not discuss the law.

5. Stick to the facts (e.g., the evidence will show, the witness will testify).


7. Do not promise more than you can deliver.

G. Motion for Directed Verdict—735 ILCS 5/2-1202.

1. Purpose.

a) Before putting on defense, win case by arguing that the plaintiff failed to establish a prima facie case.
b) *If the plaintiff failed to establish a necessary element of its prima facie case, you do not want to give the plaintiff a chance to supply the missing element while you are presenting your client’s defense.*

2. Procedure.

a) *Present (in writing if possible) at close of the plaintiff’s case.*

b) *If the court reserves its ruling, renew the motion at the end of the trial.*

c) *If the court denies the motion, renew it in a post-trial motion. Otherwise, you waive your right to challenge the trial court’s decision on appeal.*

H. Resting at Close of Plaintiff’s Case.

1. An unusual but potentially effective strategy.

2. The strategy is useful if you have been able to establish through cross-examination the facts supporting your defense(s), and you do not want to give the plaintiff an opportunity to strengthen its case through cross-examination of your witnesses.

I. Jury Instructions

1. 735 ILCS 5/2-1107; S. Ct. Rule 239.

2. Drafting the instructions.

   a) *Whenever Illinois Pattern Jury Instructions (IPI), Civil, contains an instruction that’s applicable to the case, it should be used.*

   b) *Access a copy of IPI Civil at: [http://www.state.il.us/court/CircuitCourt/CivilJuryInstructions/default.asp](http://www.state.il.us/court/CircuitCourt/CivilJuryInstructions/default.asp)*

   c) *If there is no relevant IPI available for a necessary instruction, draft an instruction that contains legal authorities for the proposed instruction.*

3. Conference on instructions.

   a) *Make sure a court reporter is present to preserve your record.*

   b) *Give an original and one copy of every instruction to the judge. Give another copy to opposing counsel.*

   c) *The copies must be numbered and identify the party that tendered them.*
d) 

S. Ct. Rule 239 provides that each instruction must contain a notation that reads:

(1) IPI No. ___; or
(2) IPI No. ___ Modified; or
(3) Not in IPI.

e) 
The judge writes “refused” on the margin of the original and copy of any instruction he rejects. He writes “given” on the margin of the original and copy of any instruction he accepts.

4. “Missing witness” or “adverse inference” instruction.

a) IPI 5.01.

b) This instruction “allows the jury to infer that any evidence not offered but within the control of a party is adverse to that party.” Lisowski v. MacNeal Memorial Hospital Assoc., 381 Ill. App. 3d 275, 284 (1st Dist. 2008).

c) The court should issue this instruction only if:

(1) The missing witness was under the control of the party adversely affected by the instruction;
(2) The witness could have been produced by reasonable diligence;
(3) The witness was not equally available to the party who requested the instruction;
(4) A reasonably prudent person would have produced the witness if he or she believed the testimony would be favorable; and
(5) There was no reasonable excuse for failing to produce the witness. Lisowski, 381 Ill. App. 3d at 284 (citing criteria established by the Illinois Supreme Court in Schaffner v. Chicago & North Western Trans. Co., 129 Ill. 2d 1, 22 (1989)).

J. Closing Argument.

1. Apply the law (as set forth in the jury instructions the judge has agreed to issue) to the facts.

2. Be flexible.

K. Polling the Jury.

L. Speaking to Jurors.
1. Extremely educational. Always take advantage of this opportunity.

2. Request permission from the trial court, which will then advise the jurors that you would like the opportunity to speak to them if they are willing.
XV. EVICTION PRACTICE—POST-JUDGMENT.

A. Sealing Court File.

1. Discretionary—735 ILCS 5/9-121(b).
   
a) The court may order that a court file in a forcible entry and detainer action be placed under seal if the court finds that:
   
   (1) The plaintiff's action is sufficiently without a basis in fact or law, which may include a lack of jurisdiction, or
   
   (2) That placing the court file under seal is clearly in the interests of justice, and that those interests are not outweighed by the public's interest in knowing about the record.

2. Mandatory—735 ILCS 5/9-121(c); 735 ILCS 5/15-1701(h)(6).
   
a) The court must place the file under seal when the forcible action has been brought against an occupant who would have lawful possession of the premises but for the foreclosure of a mortgage on the property.

B. Executing Orders for Possession.

1. Only the Sheriff may execute the order for possession. 55 ILCS 5/3-6019.
   
a) The Illinois General Assembly is currently considering a very bad bill—HB 5395—which would amend the Forcible Act to provide that the Sheriff must evict the tenant within 30 days after a judgment for possession is entered, or, if a motion to stay enforcement is granted, within 30 days after the stay expires. If the Sheriff does not evict the tenant within this timeframe, the plaintiff would be authorized to “utilize a third party, including, but not limited to, the local police, to execute the order for possession.”

2. Placing the order with the Sheriff.
   
a) There is a non-refundable filing fee of $60.50.
   
b) Two certified copies and two additional copies of the court order are required at the time of filing.
   
c) All changes, additions to and/or deletions from the order must be initialed by the issuing judge.
   
d) At the time of filing the plaintiff or the plaintiff’s attorney must complete an “eviction disclosure form.”
e) *The Sheriff the gives the plaintiff or the plaintiff’s attorney a receipt that contains a district number and a receipt number.*

3. Scheduling.

a) *Evictions are generally scheduled in order of filing and are separated into geographical areas.*

b) *Eviction scheduling information is available on the Cook County Sheriff’s Website at [www.cookcountysheriff.com](http://www.cookcountysheriff.com). Click on “Evictions Schedule” to view the schedule for the current day and next business day. The plaintiff can use the district number and receipt number to locate his place in line.*

c) *One business day prior to the eviction date, the Sheriff’s Office will call the plaintiff or the plaintiff’s attorney and state when the Sheriff will come to the subject premises.*

4. Performing the eviction.

a) *A representative of the plaintiff must be present on the day of the eviction.*

b) *The representative must meet the Sheriff’s personnel outside of the subject premises. Sheriff’s personnel will arrive in marked vehicles and are easily identifiable. The plaintiff or the plaintiff’s representative must approach the deputies and identify himself.*

c) *The plaintiff or the plaintiff’s representative must identify the entry door to the property to be evicted and, if the plaintiff or plaintiff’s representative does not have a key to the premises, sign a document authorizing forced entry.*

d) *The Sheriff’s personnel will remove all persons ordered evicted from the premise, but will not remove personal property.*

e) *The Sheriff’s personnel will then tender possession of the real property to the plaintiff or the plaintiff’s representative and post a “No Trespassing” order on the door.*

5. Moratorium against evictions.

a) *Every December the presiding judge of the Circuit Court of Cook County, First Municipal District, issues a General Order stating that the Sheriff may not execute eviction orders during the following periods and under the following circumstances:*

(1) *The two week period preceding and including New Year’s Day; and*
Whenever the outside temperature is 15 degrees Fahrenheit or colder; and

Whenever extreme weather conditions endanger the health and welfare of the tenants who face eviction.

C. Extending Period for Enforcement.

1. If the judgment for possession is not enforced within 120 days, the plaintiff must file a motion to extend the period for enforcement. 735 ILCS 5/9-117.
   
a) *This Section does not apply to any action to recover possession of a condominium.*

2. Potential responses to motion:
   
a) *Post-judgment agreement between parties;*

b) *Violation underlying initial case has been resolved or forgiven;*

c) *Other legal or equitable reason.*

D. Motion to Reconsider after Bench Trial.

1. 735 ILCS 5/2-1203.

2. “[T]he intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law.” Martinez v. River Park Place, 980 N.E.2d 1207, 1216 (1st Dist. 2012).

3. A timely filed motion stays enforcement of the judgment. 735 ILCS 5/2-1203(b).


E. Post-Judgment Motions after Jury Trial.

1. 735 ILCS 5/2-1202.

2. For a directed verdict. If, during the trial, the court denied or reserved ruling on a motion for a directed verdict, it must be renewed post-trial. Otherwise, it is waived.

3. For a judgment notwithstanding the verdict.

4. For a new trial.

5. All post-trial relief must be sought in a single motion—735 ILCS 5/2-1202(b).
a) Motion must be filed within 30 days after judgment—735 ILCS 5/2-1202(c).

b) A timely-filed motion stays enforcement of the judgment—735 ILCS 5/2-1202(d).

c) A timely-filed motion also extends the deadline for filing an appeal, but just once. S. Ct. Rule 303(a)(2).

F. Motion to Set Aside a Default Judgment.

1. Within 30 days—735 ILCS 5/2-1301(e).


b) “In the context of a typical motion to vacate a default, the plaintiff files a cause of action, the defendant fails to appear or otherwise plead, and the court ultimately enters a default judgment. Within 30 days of its issuance, the defendant moves to vacate it. In exercising its discretion, the court balances the severity of the penalty and the attendant hardship on the plaintiff if required to proceed to a trial on the merits.” Id.

c) “[W]hen a court is presented with a request to set aside a default, the overriding question is ‘whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits.’ Although relevant, the party need not necessarily show a meritorious defense and a reasonable excuse for failing to timely assert such defense.” Id. (citations omitted).

d) A timely filed motion stays enforcement of the judgment. 735 ILCS 5/2-1203(b).

2. After 30 days—735 ILCS 5/2-1401.

a) “A proceeding under section 2–1401 is initiated by the filing of a petition ‘supported by affidavit or other appropriate showing as to matters not of record.’” Paul v. Gerald Adelman & Assoc., 223 Ill. 2d 85, 94 (2006) (citation omitted).

b) “Generally, the petition must set forth allegations supporting the existence of a meritorious claim or defense; due diligence in presenting the claim or defense to the circuit court in the original action; and due diligence in filing the section 2–1401 petition.” Id.

c) The petition may not be filed more than two years after entry of the judgment. 735 ILCS 5/2-1401(c).
d) “One of the guiding principles . . . in the administration of section 2–1401 relief is that the petition invokes the equitable powers of the circuit court, which should prevent enforcement of a default judgment when it would be unfair, unjust, or unconscionable. Smith v. Airoom, 114 Ill. 2d 209, 225 (1986).

e) “The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.” 735 ILCS 5/2-1401(d).

(1) To stay enforcement of the judgment, the defendant must apply for “a certificate . . . that there is probable cause for staying further proceedings until the order of the court on the motion.” 735 ILCS 5/2-1305.

G. Vacating Agreed Orders.

1. Plaintiffs sometimes use agreed orders to take advantage of unrepresented defendants. See Long v. Shorebank Dev. Corp., 182 F.3d 548 (7th Cir. 1999) (reversing dismissal of tenant’s complaint alleging that owner of Section 8 project-based development and its attorneys filed forcible action to collect rent that tenant did not owe, used fraud to prevent her from contesting baseless eviction action in court, and knowingly misrepresented to court that tenant agreed to entry of order awarding the plaintiff possession of the premises.)


a) Facts.

(1) Ms. King lived with her two young children in a Section 8 project-based development and paid a reduced rent ($77 per month) equal to a percentage of her household income.

(2) In January 2013, she received notice that IDPA was terminating her cash assistance under the TANF Program effective the following month. She placed a copy of the IDPA notice in her property manager’s drop-box and assumed that her rent would be adjusted to $0 the following month to reflect the fact that she no longer had any income.

(3) In March she received a termination notice demanding the two months’ rent that had accrued since January. She spoke to her property manager, who denied receiving the IDPA notice in January. The property manager then stated that Ms. King could preserve her tenancy only by paying the rent demanded plus court costs. Not wanting to risk her subsidized tenancy by proceeding to trial and presenting her defenses, Ms. King decided to accept this offer.
(4) On the return date, Ms. King went to court pro se. She knew she could request a continuance to get an attorney, but she believed she did not need legal representation because she had already negotiated a “pay and stay” agreement with the property manager.

(5) Ms. King spoke to Plaintiff’s attorney, who stated that she could give Ms. King 15 days. Ms. King understood this to mean that she was getting 15 days to pay the rent demanded plus costs. She said she needed more time and asked for 30 days. Plaintiff’s attorney agreed to give her 30 days.

(6) When the case was called, the parties approached the bench. Plaintiff’s attorney informed the judge that the parties had an agreement. Plaintiff’s attorney then asked Ms. King to sign a form order. Across the top of the order Plaintiff’s attorney had written the word “Agreed.” Ms. King signed the order, believing that it afforded her the right to preserve her tenancy by paying Plaintiff the rent demanded plus costs within the next 30 days.

(7) The order, however, did not reflect Ms. King’s understanding of the agreement. It awarded Plaintiff not just the rent demanded plus costs, but possession of the premises. Enforcement of the judgment was stayed 30 days.

(8) Only when Ms. King tried to pay the rent plus costs did she learn from the property manager that she had signed what was effectively a “pay and move” agreement. She then came to LAF.
(9) LAF filed a motion to vacate the “agreed” order on the grounds that Ms. King had reasonably misunderstood its material terms, that there had been no meeting of the minds, and that she had a meritorious defense to the underlying forcible action (i.e., she did not owe any rent) so that vacating the agreed order would not be a useless act that merely postponed an inevitable eviction.

(10) Ms. King attached to her motion an affidavit in which she summarized her conversations with her property manager before and after the return date, and with Plaintiff’s attorney on the return date. She also asserted that neither Plaintiff’s attorney nor the judge had explained the order’s material terms to her. Plaintiff did not respond to this motion in writing, so there were no counter-affidavits.

(11) At the hearing on the motion, Plaintiff elicited from the property manager testimony that Ms. King played loud music at night and allowed a barred individual, her cousin, into her building. Ms. King repeatedly objected to this testimony on the grounds that it was irrelevant because these allegations had not been set forth in the termination notice on which the eviction action was based. The judge overruled this objection on the grounds that a forcible action is a small claims proceeding where the rules of evidence do not apply.

(12) The judge accepted Ms. King’s assertion that she did not understand the material terms of the order she signed. Nevertheless, said the judge, in 90% of the cases that are settled pursuant to the terms of an agreed order, the landlord’s represented by an attorney, the tenant is pro se, and the tenant doesn’t understand the order’s terms. The judge stated that he still enforces such orders. The judge then stated that he would have made an exception in Ms. King’s case and granted her motion to vacate but for Plaintiff’s allegations regarding loud music and Ms. King’s cousin.

(13) The judge then denied the motion to vacate, and Ms. King appealed. (The judge also denied Ms. King’s motion to stay enforcement of the judgment for possession pending the appeal, but the appellate court subsequently granted this motion.)

b) The appellate court’s holdings.

(1) A trial court’s decision to deny a motion to vacate is reviewed under an abuse of discretion standard.

(2) A motion to vacate an agreed order brought within 30 days after the order’s entry is judged under the same standard that applies to all motions brought pursuant to 735 ILCS 5/2-1301 motions. Such motions “are routinely granted in order to achieve substantial justice.”

(a) Four factors determine whether substantial justice has been achieved.
(i) Diligence in bringing the motion.

(ii) Existence of meritorious defenses to the underlying action.

(iii) Severity of the penalty resulting from the order or judgment.

(iv) Relative hardships stemming from granting or denying the motion to vacate.

(b) Given these considerations, the trial court’s decision to deny Ms. King’s motion to vacate constituted an abuse of discretion.

c) Helpful dicta from the appellate court’s decision.

(1) An agreed order is a contract governed by the principles of contract law, and questions regarding the construction, interpretation, and effect of a contract are reviewed de novo.

(a) There is no contract absent a meeting of the minds.

(b) A contract may be vacated on the grounds that it is procedurally and/or substantively unconscionable.

(i) A contract is procedurally unconscionable if some impropriety in the formation of the contract leave a party with no meaningful choice in the matter

(ii) A contract is substantively unconscionable if it is overly harsh or one-sided.

(2) By considering allegations that were not set forth in the termination notice on which the underlying forcible action was based, and that were raised for the first time at the hearing on the motion to vacate, the trial court deprived Ms. King of due process and violated the federal regulations governing her tenancy.

(3) Forcible actions are not small claims proceedings.

H. Motion to Vacate Judgment after Tenancy Reinstated.

1. 735 ILCS 5/12-183(g).

2. After obtaining a judgment for possession, the landlord reinstates the tenancy by signing a new lease agreement, or by accepting rent that accrued subsequent to the judgment’s entry.

3. If the landlord was awarded not just possession of the premises but also a money judgment, he does not reinstate the tenancy by accepting rent unless and until he accepts an amount that exceeds this judgment.
I. Motion to Vacate Judgment Entered without Personal Jurisdiction.

1. To enter a valid judgment, a court must have jurisdiction over both the subject matter and the parties. *BAC Home Loans Servicing, LP v. Mitchell*, 6 N.E.3d 162, 166 (2014).

2. Personal jurisdiction may be established either by service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction. *Id.*

3. A judgment entered by a court without jurisdiction over the parties is void and may be challenged at any time. *Id.*

4. Where a judgment is void for lack of personal jurisdiction when entered, it remains void despite subsequent submission by a party to the circuit court's jurisdiction. Accordingly, a party who submits to the court's jurisdiction—by, for instance, filing a motion to vacate without a motion to quash—does so only prospectively, and the appearance does not retroactively validate orders entered prior to that date. *Id.* at 171, overruling *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978 (2d Dist. 2008), and *Eastern Savings Bank, FSB v. Flores*, 977 N.E.2d 242 (1st Dist. 2012).
XVI. TENANTS IN FORECLOSURE.

A. The Problems.

1. From 2009-2013, banks filed more than 22,000 foreclosure proceedings against the owners of residential apartment buildings in Chicago.

2. These buildings contained more than 68,000 rental units and represented more than 10% of the rental housing stock in Chicago.

3. When banks acquire ownership of a foreclosed building, they try to evict the tenants as quickly as possible.
   
   a) One out of every ten forcible actions filed from 2009-2012 involved a unit in a foreclosed building.
   

4. The foreclosure crisis, therefore, led to a significant increase in the number of vacant properties, as well as a significant increase in the number of associated problems (such as crime).

5. Tenants are the innocent victims of the foreclosure crisis. They struggle to find new permanent homes—many need some form of temporary housing before completing their search—and they often pay significantly higher rents when they do find new homes.

B. The Solution.

1. Although there are no longer any federal protections—the Protecting Tenants at Foreclosure Act expired on December 31, 2014—state and local laws modeled on the PTFA provide tenants with adequate advance notice that they will have to move, allow tenants to stay in their homes until their leases expire, and encourage new owners to allow tenants to stay in the foreclosed properties.

C. State Laws.

1. Statutes.
   
   a) Illinois Mortgage Foreclosure Law, 735 ILCS § 5/15-1101 et seq.
   
   b) Forcible Entry and Detainer Act. 735 ILCS § 5/9-101 et seq.
2. Notice.

a) Within 21 days after confirmation of a foreclosure sale the purchaser of the property must make a good faith effort to identify all the occupants and serving them with written notice that:

   (1) Informs them of the foreclosure and change in ownership;

   (2) Provides the name, address, and telephone number of an individual or entity whom the occupants may contact with concerns about the mortgaged real estate, or to request repairs;

   (3) Includes the following language, or language that is substantially similar: “This is NOT a notice to vacate the premises. You may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights that you may have;”

   (4) Includes the name of the case, the case number, and the court where the order confirming the sale has been entered; and

   (5) Provides instructions on the method of payment of future rent, if applicable. 735 ILCS § 5/15-1508.5(a).

b) The notice must be served by delivering a copy to a household member who is at least 13 years old, or by sending a copy by first-class mail. 735 ILCS § 5/1508.5(a).

c) These same notice requirements apply to mortgagees placed in possession of the property while a foreclosure actions is pending, 735 ILCS § 5/15-1703(a-5), and to receivers, 735 ILCS § 5/15-1704(f).

d) A purchaser, mortgagee in possession, or receiver who fails to provide the requisite notice may not collect rent or terminate the tenancy. 735 ILCS § 5/1508.5(d)(i); 735 ILCS § 5/15-1703(a-5)(5)(j); 735 ILCS § 5/15-1704(f)(5)(j).

3. Bona fide lease.

a) The term “bona fide lease” means a lease of a dwelling unit in residential real estate in foreclosure for which:

   (1) the mortgagor or the child, spouse, or parent of the mortgagor is not the tenant;

   (2) the lease was the result of an arms-length transaction;

   (3) the lease requires the receipt of rent that is not substantially less than fair market rent for the property or the rent is reduced or subsidized pursuant to a federal, State, or local subsidy; and
(4) either (i) the lease was entered into or renewed on or before the date of the filing of the lis pendens on the residential real estate in foreclosure pursuant to Section 2-1901 of this Code or (ii) the lease was entered into or renewed after the date of the filing of the lis pendens on the residential real estate in foreclosure and before the date of the judicial sale of the residential real estate in foreclosure, and the term of the lease is for one year or less. 735 ILCS § 5/15-1224(a).

b) A written lease for a term exceeding one year that is entered into or renewed after the date of the filing of the lis pendens on the residential real estate in foreclosure pursuant to 735 ILCS § 2-1901 and before the date of the judicial sale of the residential real estate in foreclosure that otherwise meets the requirements set forth above in subsection (a) shall be deemed to be a bona fide lease for a term of one year. 735 ILCS § 5/15-1224(b).

c) An oral lease entered into at any time before the date of the judicial sale of the residential real estate in foreclosure that otherwise meets the requirements set forth above in subsection (a) shall be deemed to be a bona fide lease for a month-to-month term, unless the lessee proves by a preponderance of evidence that the oral lease is for a longer term. In no event shall an oral lease be deemed to be a bona fide lease for a term of more than one year. 735 ILCS § 5/15-1224(c).

d) A written or oral lease entered into on or after the date of the judicial sale of the residential real estate in foreclosure and before the date of the court order confirming the judicial sale that otherwise meets the requirements set forth above in subsection (a) shall be deemed to be a bona fide lease for a month-to-month term. 735 ILCS § 5/15-1224(d).
e) **Dwelling unit** “means a room or suite of rooms providing complete, independent living facilities for at least one person, including permanent provisions for sanitation, cooking, eating, sleeping, and other activities routinely associated with daily life.” 735 ILCS § 5/15-1202.5.

f) **Residential real estate in foreclosure** “means any real estate, except a single tract of agricultural real estate consisting of more than 40 acres, which is improved with a single family residence or residential condominium units or a multiple dwelling structure containing single family dwelling units for one or more families living independently of one another, for which an action to foreclose the real estate: (1) has commenced and is pending; (2) was pending when the bona fide lease was entered into or renewed; or (3) was commenced after the bona fide lease was entered into or renewed.” 735 ILCS § 5/15-1225.

g) Notwithstanding the above, the child, spouse of parent of a mortgagor may still have a bona fide lease if he or she can establish by a preponderance of the evidence that the lease otherwise meets the requirements of a bona fide lease. 735 ILCS § 5/15-1224(e).

4. Terminating a bona fide lease.

a) **To terminate a bona fide lease, the person or entity that acquires possession of the foreclosed property must follow the procedures set forth in the Forcible Act.** 735 ILCS § 5/15-1701(i).

   (1) Entry of a judgment of foreclosure does not affect a bona fide lease. 735 ILCS § 5/15-1506(i)(3).

   (2) An order of possession entered in foreclosure action may not be enforced against a tenant with a bona fide lease. 735 ILCS § 5/15-1508(g).

   (3) No person or entity that acquires possession of foreclosed property may file against a tenant with a bona fide lease a supplemental petition for possession under the foreclosure action. 735 ILCS § 5/15-1701(h)(1).

b) **The procedure for terminating a bona fide lease is set forth in Section 9-207.5 of the Forcible Act.**

   (1) The lease may be terminated only:

   (a) At the end of the term of the bona fide lease, by no less than 90 days’ written notice; or

   (b) In the case of a bona fide lease that is for a month-to-month or week-to-week term, by no less than 90 days’ written notice.
Notwithstanding these provisions, however, the lease may be terminated prematurely upon no less than 90 days’ advance written notice if the owner is going to use the property as his or her primary residence.

Nothing in this section prohibits the new owner from terminating the lease for cause (e.g., nonpayment of rent or some other lease violation) upon less than 90 days’ notice.

5. Sealing Court File when Eviction Arises from Foreclosure.

a) The court must place the file under seal when the forcible action has been brought against an occupant who would have lawful possession of the premises but for the foreclosure of a mortgage on the property. 735 ILCS 5/9-121(c); 735 ILCS 5/15-1701(h)(6).

D. RLTO.

1. Within 7 days after receiving a foreclosure complaint, the owner must provide all the tenants with written notice that a foreclosure action has been filed. RLTO, § 5-12-095(a).

   a) The written disclosure must identify the court in which the foreclosure action is pending, the case name, and case number, and shall include the following language: "This is not a notice to vacate the premise. This notice does not mean ownership of the building has changed. All tenants are still responsible for payment of rent and other obligations under the rental agreement. The owner or landlord is still responsible for their obligations under the rental agreement. You shall receive additional notice if there is a change in owner."

2. Before a tenant initially enters into a rental agreement for a dwelling unit, the owner must disclose in writing that he is named in a foreclosure complaint. Id.

3. If the owner fails to comply with this section, the tenant may terminate the rental agreement by written notice. This notice shall state that the agreement will terminate on a specific date later than 30 days after the date of the notice. In addition, if a tenant in a civil legal proceeding establishes that a violation of this section has occurred, the tenant shall be entitled to recover $200.00 in damages plus attorneys’ fees. RLTO, § 5-12-095(b).

E. KCRO.


   a) Commonly known as the Keep Chicago Renting Ordinance (KCRO).

   b) The Chicago City Council passed the KCRO on June 5, 2013.
c) The KCRO went into effect on September 24, 2013, and was amended on August 15, 2015.

2. Purpose and scope.

a) The stated purpose of the KCRO is to preserve, protect, maintain and improve rental property and prevent occupied buildings from becoming vacant after foreclosure. KCRO, § 5-14-010.

b) Subject to the following exceptions, the KCRO regulates any person or entity that acquires a property through a foreclosure sale or through a deed in lieu of foreclosure. KCRO, §5-14-030.

(1) The KCRO does not regulate:

(a) A person or entity who acquired a foreclosed property prior to the effective date of the KCRO (September 24, 2013);

(b) Bona fide third-party purchasers, defined as “any person who, through an arms length transaction, purchases or is otherwise transferred title to, a foreclosed rental property from an owner.”

(c) Non-profit lenders;

(d) Receivers;

(e) Any person who purchases a foreclosed property with the intention of using the property as his or her primary residence.

3. Protections for all tenants.

a) Notice of change in ownership—KCRO, § 5-14-040.

(1) Such notice must:

(a) Identify the new owner, provide contact information for the new owner, and inform the tenant about the right to a lease renewal or relocation assistance (see below);

(b) Be provided within 21 days after the new owner acquires the foreclosed property, or within 7 days after the new owner determines the tenant’s identity;

(c) Identify the date on which it was delivered;

(d) Be delivered to a member of the tenant’s household who is at least 13 years old. It must also be posted on the main entrance of each unit in the foreclosed property; and

(e) Be in English, Spanish, Polish and Chinese.
(2) Tenant Information Disclosure Form—KCRO, § 5-14-045.

(a) Owners are required to include, in the notice of change of ownership required by § 5-14-040, a Tenant Information Disclosure Form.

(b) The tenant has 21 days to complete and return this form. (If the tenant qualifies for an extended response time, the 21-day period is extended to 42 days.)

(c) The tenant’s failure to meet this deadline does not relieve the owner of his obligation to offer a “qualified tenant” (see below) either a lease renewal or relocation assistance.

(d) Within 21 days after the tenant returns or should have returned the Tenant Information Disclosure Form, the owner must notify the tenant in writing whether the owner will extend or renew the lease or provide a replacement unit, or pay relocation assistance.

(e) If the owner offers to extend or renew the lease or provide a lease for a replacement unit, and the tenant fails to respond to this offer within 21 days (or 42 days if the tenant qualifies for an extended response time), the owner doesn’t have to extend or renew the lease or provide a lease for a replacement unit.

(3) The new owner may not collect rent until after providing the proper notice.

4. Protections for “qualified tenants.”

a) A qualified tenant is a person who “is a tenant in a foreclosed rental property on the day that a person becomes the owner of that property,” and has a bona fide lease agreement to use the rental unit as his or her principal residence. KCRO, § 5-14-020.

(1) A lease is bona fide if:

(a) The tenant is not the mortgagor (although the tenant may be the mortgagor’s child, spouse, or parent if the tenant does not live with the mortgagor)

(b) The lease is the result of an arms-length transaction; and

(c) The rent is not substantially less than the fair market rent. This exception does not apply if the rent is reduced pursuant to a federal or state rental assistance program.

b) Lease renewal or relocation assistance—KCRO, § 5-14-050.

(1) New owner must either:
(a) Extend or renew existing bona fide lease agreement, and increase rent by no more than 2% per year; or

(b) Give the tenant a relocation assistance payment of $10,600 no later than seven days after the tenant vacates the premises.

(2) Relocation assistance.

(a) The owner may deduct from the relocation fee only an amount equal to any unpaid rent that was not validly withheld.

(b) The owner does not have to pay relocation assistance to:

   (i) A tenant who does not meet the definition of a qualified tenant; or

   (ii) A tenant who rejects the owner’s offer to extend or renew the existing lease agreement; or

   (iii) A tenant against whom the owner has obtained a judgment for possession.

(3) Protections for tenants residing in illegal units.

(a) If a qualified tenant resides in a unit that “is not lawful or legal under this code,” the owner must offer relocation assistance or a lease for a replacement rental unit.

5. Penalties for violating the KCRO.

a) Damages and reasonable attorneys’ fees for violations of §§ 5-14-040 and 050.

b) Double the $10,600 relocation assistance payment plus reasonable attorneys’ fees for violating the relocation assistance provisions. KCRO, § 5-14-050(f).

c) Not less than $500 or more than $1,000 for other violations. Each day that a violation exists shall constitute a separate and distinct offence. KCRO, § 5-14-100.
XVIII. PUBLIC HOUSING.

A. Overview.

1. Owned and operated by public housing authorities (PHAs).

2. The Illinois PHAs were created by the Housing Authorities Act, 310 ILCS 10/1 et seq.

3. Subsidies are provided pursuant to an Annual Contributions Contract (ACC) between HUD and the PHA.

4. Rental assistance runs with the unit.

5. Endless lease may be terminated only for good cause shown.

B. Authorizing Statute.

   a) Section 1436a—Restriction on use of assisted housing by non-resident aliens.
   b) Section 1437—Declaration of policy and public housing organization.
   c) Section 1437a—Rental payments.
   d) Section 1437d(k)—Administrative grievance procedure regulations: grounds of adverse action, hearing, examination of documents, representation, evidence, decision; judicial hearing; eviction and termination procedures.
   e) Section 1437d(l)—Lease; terms and conditions; termination.
   f) Section 1437d(s)—Authority to require access to criminal records.
   g) Section 1437d(t)—Obtaining information from drug abuse treatment facilities.
   h) Section 1437e—Designated housing for elderly and disabled families.
   i) Section 1437j—Labor standards and community service requirement.
   j) Section 1437n—Eligibility for low-income housing.
   k) Section § 1437p—Demolition and disposition of public housing.
   l) Section § 1437r—Public housing resident management.

C. Implementing Regulations.
1. 24 C.F.R. Part 5.

   a) Subpart B addresses procedures for disclosing and obtaining information about income.

   b) Subpart C addresses pet ownership.

   c) Subpart D defines important terms.

   d) Subpart E addresses restrictions on non-citizen eligibility.

   e) Subpart F explains how to calculate the family’s share of the rent.


   a) Part 960—Admission to, and Occupancy of, Public Housing.

   b) Part 966—Public Housing Lease and Grievance Procedure.
      
      (1) Subpart A governs the lease.
      
      (2) Subpart B governs the grievance procedure.
      
      (3) Section 966.4(4) governs the eviction process.

D. Other Authorities.


2. ACC available at www.hud.gov/offices/adm/hudclips


E. Admission.

1. Eligibility—24 C.F.R. § 960.201.

   a) Must be a “family,” as that term is defined in 24 C.F.R. §5.403.
      
      (1) “Family” is defined to include, among other things:
      
      (a) A single person; and
      
      (b) A remaining member of a tenant family.

   b) Generally, every family member must be a citizen or have eligible immigration status. If any family members are not citizens and do not have eligible immigration status, the assistance is prorated. 42 U.S.C. § 1436a(a); 24 C.F.R. Part 5, Subpart E.

   c) Must be low income.
2. **PHA** must deny admission to a family whose household member was evicted within the past three years from federally assisted housing for drug-related criminal activity. 24 C.F.R. § 960.204(a).

   a) **Two exceptions:**

   (1) “The evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program approved by the PHA;” or

   (2) “The circumstances leading to the eviction no longer exist (for example, the criminal household member has died or is imprisoned).”

   b) **PHA must establish standards that prohibit admission to applicants who are currently engaged in criminal drug-related activity, whose illegal drug use or alcohol use poses a threat to other residents, who have been convicted of methamphetamine production, or who are subject to a lifetime sex offender registration requirement.** 24 C.F.R. § 960.204(a)(2).

3. Use of criminal records.

   a) **Before denying an application for admission on the basis of a criminal record, the PHA must provide the applicant with a copy of the record and an opportunity to dispute its accuracy.** 24 C.F.R. § 960.204(c).


   a) **Applicant must be promptly informed of denial and provided with opportunity for an informal hearing.** 42 U.S.C. § 1437d(c)(3); 24 C.F.R. § 960.208

F. **Lease Agreement.**

1. Endless lease.

   a) **The lease automatically renews itself at the end of every term unless it is terminated for good cause.** 24 C.F.R. § 966.4(a)(2).

2. Prohibition against unreasonable terms.

   a) **The governing statute provides that “[e]ach public housing agency shall utilize leases which . . . do not contain unreasonable terms and conditions.”** 42 U.S.C. § 1437d(f)(2).

   b) **The implementing regulation requires tenants “to abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of the housing project and the tenants . . .”** 24 C.F.R. § 966.4(f)(4).

3. **Tenant obligations are set forth at 24 C.F.R. § 966.4(f).**
G. Community Service Requirement

1. 24 C.F.R. Part 960, Subpart F.

2. Except for any family member who is an exempt individual (see below), each adult resident of public housing must:
   
   a) Contribute 8 hours per month of community service (not including political activities); or
   
   b) Participate in an economic self-sufficiency program for 8 hours per month.

3. Violation of the service requirement is grounds for nonrenewal of the lease at the end of the twelve month lease term, but not for termination of tenancy during the course of the twelve month lease term.

4. An “exempt individual” is any adult who:
   
   a) Is 62 years or older;
   
   b) Is blind or disabled; or
   
   c) Is a primary caretaker of such an individual;
   
   d) Is engaged in work activities;
   
   e) Meets a social security or welfare program’s requirements for exemption from work activities; or
   
   f) Is receiving assistance from and complying with the terms of a social security or welfare program.

H. Proposed Ban on Smoking.


2. The proposed rule would require each PHA to implement a smoke-free policy no later than 18 months after the effective date of the final rule.

3. The PHA must prohibit lit tobacco products in all living units, indoor common areas in public housing, and in PHA administrative office building.

4. The ban must also extend to all outdoor areas within 25 feet of housing and administrative buildings.

5. HUD is proposing the rule to improve the indoor air quality in housing, benefit housing residents and PHA staff, reduce the risk of catastrophic fires, and lower overall maintenance costs.
Residents and tenants’ advocates were given 90 days to comment on the proposed rule.

I. Rental Assistance Demonstration.

1. Purpose.

   a) For many years, Congress has provided inadequate funding for public housing units. As a result, these units have not been properly maintained, they need more than $26 billion in repairs, and an average of 10,000 units are lost every year because they have fallen into disrepair and become unsafe.

   b) To address this problem, Congress enacted the Rental Assistance Demonstration (RAD) in 2012 to preserve and improve public housing buildings. RAD is the voluntary, permanent conversion of public housing to the Section 8 housing program (discussed in more detail below in the sections addressing the Section 8 project-based rental-assistance and project-based voucher programs). Unlike the public housing program, the Section 8 housing program allows for more funding flexibility, including the use of other funding sources like tax credits, so there will be more money available to maintain and improve existing public housing buildings. RAD also guarantees strong tenant protections that tenants had under the public housing program.

2. Authorizing statute and notices.


      (1) RAD tenants shall, at a minimum, retain all rights provided under sections 6 and 9 of the U.S. Housing Act.

   b) HUD Notice PIH 2012-32 (REV-2).

   c) Both the authorizing statute and the HUD Notice, provide a strong foundation for the enforcement of tenant protections during the conversion process.

   d) The legislative history also indicates that Congress intended to “ensure that the demonstration does not adversely impact tenants, and stipulates that all residents living in converted properties will maintain their existing rights.” S. Rpt. 112-83, 112th Cong., 1st Sess. (Sept. 21, 2011), at 108.

3. Tenant protections.

   a) No rescreening.

   b) No permanent displacement, and right to return.
c) Relocation rights.
d) Transfer rights.
e) Endless lease may be terminated only for good cause.
f) Grievance rights.
g) Right to organize.
XIX. PUBLIC HOUSING—RENT.

A. Choice of Rents.

2. Flat rent, as determined in accordance with 24 C.F.R. § 960.253(b).
3. Income-based rent.
   a) A family may switch from a flat-rent to an income-based rent at any time “if the family is unable to pay flat rent because of financial hardship.” 24 C.F.R. § 960.253(f).

B. Income-Based Rent.

2. The family pays the highest of:
   a) 30% of monthly “adjusted income;”
   b) 10% of monthly income; or
   c) The minimum rent.

C. Adjusted Income.

1. “Adjusted income” is equal to “annual income” minus the mandatory deductions. 42 U.S.C. § 1437a(b)(5); 24 C.F.R. § 5.611.

D. Annual Income.

1. There is an important conflict between the governing statute and the implementing regulation.
   a) The statute defines income as “income from all sources of each member of the household, . . . except that any amounts not actually received by the family . . . may not be considered as income under this paragraph.” 42 U.S.C. § 1437a(b)(4).
   b) The implementing regulation has no such restriction.

(1) The regulation defines “annual income” to include “all amounts, monetary or not, which: . . . Go to, or on behalf of, the family head or spouse (even if temporarily absent) or to any other family member.” 24 C.F.R. § 5.609(a).
In *Booker v. Johnson*, 2010 WL 2572044, *6* (S.D. Ohio), a case involving the HCV Program, the court found that HUD exceeded its authority by removing this restriction from the implementing regulation.

2. **Annual income includes, but is not limited to:**
   
   a) **The full amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips and bonuses, and other compensation for personal services;**
   
   b) **The full amount of periodic amounts received from Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts;**
   
   c) **Payments in lieu of earnings, such as unemployment and disability compensation, and worker's compensation;**
   
   d) **Welfare assistance payments.**
   
   e) **Periodic and determinable allowances, such as alimony and child support payments;**
   
   f) **Check the regulations for a complete list of payments that may be counted toward a family's annual income.**

3. **Exclusions from annual income—24 C.F.R. § 5.609(c).**
   
   a) **Income from employment of children (including foster children) under the age of 18 years;**
   
   b) **Payments received for the care of foster children or foster adults;**
   
   c) **Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker’s compensation);**
   
   d) **Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member;**
   
   e) **Income of a live-in aide;**
   
   f) **The full amount of student financial assistance paid directly to the student or to the educational institution;**
   
   g) **Temporary, nonrecurring or sporadic income (including gifts);**
   
   h) **Earnings in excess of $480 for each full-time student 18 years old or older (excluding the head of household and spouse);**
   
   i) **Adoption assistance payments in excess of $480 per adopted child;**
Deferred periodic amounts from supplemental security income and social security benefits that are received in a lump sum amount or in prospective monthly amounts.

Check the regulations for a complete list of exclusions.

E. Deductions.
1. 24 C.F.R. § 5.611(a).
2. $480 for each dependent;
3. $400 for any elderly family or disabled family;
4. Any reasonable child care expenses necessary to enable a member of the family to be employed or to further his or her education.
5. Check the regulations for a complete list of deductions.

F. Minimum Rent.
1. 42 U.S.C. § 1437a(a)(3); 24 C.F.R. § 5.630.
2. The minimum rent is $50. 24 C.F.R. § 5.630(a)(2).
3. Financial hardship exemption to the minimum rent.
   a) Grounds—24 C.F.R. § 5.630(b)(1).
      (1) When the family has lost eligibility for or is awaiting an eligibility determination for a Federal, State, or local assistance program;
      (2) When the family would be evicted because it is unable to pay the minimum rent;
      (3) When the income of the family has decreased because of changed circumstances, including loss of employment;
      (4) When a death has occurred in the family; and
      (5) Other circumstances determined by the responsible entity or HUD.
   b) Assessing family’s request for a hardship exemption—24 C.F.R. § 5.630(b)(2)(i) and (iii).

G. Utility Allowances.
1. If the tenant pays an income-based rent, the total tenant payment may be reduced by a utility allowance. 24 C.F.R. § 5.632.
2. If the household income is so low that the allowance exceeds the tenant’s share of the rent, the PHA may send the reimbursement to the tenant or directly to the utility company. 24 C.F.R. § 960.253(c)(3).

H. Earned Income Disregard.

1. 24 C.F.R. § 960.255.

2. Overview.

   a) The EID requires, under the circumstances set forth below, the PHA to exclude from a family’s annual income the money that a family member receives from a new job.

3. Eligibility.

   a) A family residing in public housing is qualified to take advantage of the earned income disregard when:

      (1) The family’s annual income increases because a household member who had been unemployed for at least a year gets a job; or

      (2) The family’s annual income increases because a household member is participating in an economic self-sufficiency or other job training program; or

      (3) The family’s income increases, as a result of new employment or increased earnings of a family member, during or within six months after the family received assistance under a social security or welfare program.

4. Operation.

   a) Initial twelve month exclusion.

      (1) PHA must disallow 100% of income from new job.

   b) Second twelve month exclusion and phase-in.

      (1) PHA must disallow 50% of income from new job.

I. Welfare Sanctions.

1. 24 C.F.R. § 5.615.

2. A PHA will not reduce a family’s rent if the household income decreased because the family:

   a) engaged in welfare fraud; or
b) failed to comply with economic self-sufficiency program or work activity requirements.

J. Annual & Interim Reexaminations.


2. Required reexaminations.
   a) For families who pay an income-based rent, the PHA must conduct a reexamination of family income and composition at least annually and must make appropriate adjustments in the rent after consultation with the family and upon verification of the information.
   b) For families who choose flat rents, the PHA must conduct a reexamination of family composition at least annually, and must conduct a reexamination of family income at least once every three years.

3. Interim reexaminations.
   a) A family may request an interim reexamination of family income or composition because of any changes since the last determination.
   b) The PHA must make the interim reexamination within a reasonable time after the family request.
   c) The PHA must adopt policies prescribing when and under what conditions the family must report a change in family income or composition.

4. PHA reexamination policies.
   a) The PHA must adopt admission and occupancy policies concerning conduct of annual and interim reexaminations in accordance with this section, and shall conduct reexaminations in accordance with such policies.

K. Effective Date of Adjustment.

1. Decreases.
   a) Effective on the first of the month following the reported change. Public Housing Occupancy Guidebook, § 13.3.

2. Increases.
   a) “Rent increases (except those due to misrepresentation) require the same notice as other rent increases (established in state law) and become effective as stated in the lease.” Public Housing Occupancy Guidebook, § 13.3.

L. Family Income and Verification.
1. 24 C.F.R. § 960.259.

2. The family must supply any information that the PHA or HUD determines is necessary in administration of the public housing program, including submission of required evidence of citizenship or eligible immigration status.

3. The family must supply any information requested by the PHA or HUD for use in a regularly scheduled reexamination or an interim reexamination of family income and composition in accordance with HUD requirements.

M. Upfront Income Verification.

1. UIV is the verification of income, before or during a family reexamination, through an independent source that systematically and uniformly maintains income information in computerized form for a large number of individuals.

2. HUD now requires PHAs to use HUD's centralized Enterprise Income Verification (EIV) System to validate tenant reported income and inform tenants of the PHA's capability and intent to compare tenant-reported information with UIV data.

N. Moving to Work Program.

1. In 1999, Congress created the MTW Demonstration Program for public housing authorities.

2. PHAs selected for the program are permitted to seek exemption from many existing Public Housing and Housing Choice Voucher program rules found in the United States Housing Act of 1937 in pursuit of the three statutory objectives:

   a) Reduce cost and achieve greater cost effectiveness in Federal expenditures;

   b) Give incentives to families with children where the head of household is working, is seeking work, or is preparing for work by participating in job training, educational programs, or programs that assist people to obtain employment and become economically self-sufficient; and

   c) Increase housing choices for low-income families.
XX. PUBLIC HOUSING—TERMINATING THE LEASE.

A. Grounds.

1. 24 C.F.R. § 966.4(l)(2).

2. Serious or repeated violation of material lease terms, including:
   a) Nonpayment of rent; and
   b) Violation of household obligations set forth in 24 C.F.R. § 966.4(f).

3. Financial ineligibility for the program.

4. Other good cause, including:
   a) Criminal activity or alcohol abuse (see below); or
   b) Discovery after admission into the program of facts that render the tenant ineligible for public housing; or
   c) Discovery after admission into the program that the tenant made material false statements or engaged in fraud during the application process; or
   d) Failure to comply with the community service requirement. (This violation warrants termination only at the end of a lease term).

B. Termination Notice.

1. 24 C.F.R. § 966.4(l)(3).

2. No less than 14 days for nonpayment of rent.

3. No less than 10 days for violations other than nonpayment. (State law determines the length of the notice period.)

4. Must state specific grounds for termination.

5. Must advise the tenant of grievance rights. (These rights are reviewed in more detail in a separate section below).

   a) When the PHA is required to afford the tenant the opportunity for a hearing, the tenancy shall not terminate until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed. 24 C.F.R. § 966.4(l)(3)(iv).
b) When the PHA is not required to afford the tenant the opportunity for a hearing, and the PHA has decided to exclude such grievance from the PHA grievance procedure, the termination notice must state that the tenant is not entitled to a grievance hearing on the termination.

C. Terminations for Criminal Activity.

1. 24 C.F.R. § 966.4(l)(5).

2. Grounds.
   a) Methamphetamine production.
   b) Drug-related criminal activity on or off the premises.
   c) Any crime that threatens other residents’ or management’s health, safety, or right to peaceful enjoyment of the premises.
   d) Any crime that threatens the health or safety of, or right to peaceful enjoyment of their premises by, people living in the immediate vicinity.
   e) Fleeing to avoid prosecution, custody, or confinement for a felony.

   a) Neither conviction nor even arrest is necessary.
   b) The State’s failure to prove guilt beyond a reasonable doubt in the related criminal case does not preclude the PHA from establishing guilt by a preponderance of the evidence in the civil eviction proceeding.

   a) “[T]he PHA may consider all circumstances relevant to a particular case such as 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.”
   b) PHA’s failure to consider such circumstances may constitute an abuse of discretion. See Newark Housing Authority v. Martinez-Vega, 34 A.3d 1271, 1277 (N.J. Sup. Ct. Law Div. 2012).

5. Alternatives to eviction.
XXI. PUBLIC HOUSING—GRIEVANCE PROCEDURE.

A. Generally.

1. The PHA must adopt a grievance procedure. 24 C.F.R. § 966.52(a).

2. This procedure must be included in, or incorporated by reference into, every lease agreement. 24 C.F.R. § 966.52(b).

3. The PHA must give a copy of the grievance procedure to each tenant and resident organization. 24 C.F.R. § 966.52(d).

B. “Grievance” Defined.

1. A “grievance” means “any dispute which a tenant may have with respect to PHA action or failure to act in accordance with the individual tenant's lease or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status.” 24 C.F.R. § 966.53(a).

C. Informal Settlement Of Grievance.

1. 24 C.F.R. § 966.54.

2. Any grievance shall be personally presented, either orally or in writing, to the PHA office or to the office of the project in which the tenant resides so that the grievance may be discussed informally and settled without a hearing.

3. A summary of such discussion shall be prepared within a reasonable time and one copy shall be given to the tenant and one retained in the PHA's tenant file.

4. The summary shall specify the names of the participants, dates of meeting, the nature of the proposed disposition of the complaint and the specific reasons therefor, and shall specify the procedures by which a hearing may be obtained if the complainant is not satisfied.

D. Grievance Hearing.

1. 24 C.F.R. § 966.55.

2. The hearing request must be submitted in writing and within the time set forth in the written summary of the informal discussion.

E. Grievances in the Context of Eviction Actions.

1. Excluding certain evictions from the administrative grievance procedure.

   a) HUD has issued a “due process determination” that Illinois law precludes a tenant from being evicted without first getting the opportunity for a hearing that satisfies the basic elements of due process.
Accordingly, Illinois PHAs may exclude from their administrative grievance procedures any grievance concerning a termination of tenancy that involves:

1. Criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises of other residents or employees of the PHA;
2. Any violent or drug-related criminal activity on or off such premises; or
3. Any criminal activity that resulted in a felony conviction of a household member.

A tenant who is facing eviction for any other reason is entitled to a grievance hearing. 24 C.F.R. § 966.53(a).

Submitting a timely request for a grievance hearing extends the lease term until the grievance process ends.

“When the PHA is required to afford the tenant the opportunity for a hearing under the PHA grievance procedure for a grievance concerning the lease termination . . . the tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.” 24 C.F.R. § 966.4(l)(3)(iv).
XXII. PUBLIC HOUSING IN CHICAGO.

A. Overview.

1. The Chicago Housing Authority (CHA) administers the Public Housing Program in Chicago.

   a) *It also administers the Housing Choice Voucher Program, the Section 8 Moderate Rehabilitation Program, and the Section 8 Project-Based Voucher Program. (These programs are all discussed in separate sections below.)*

2. Founded in 1937, CHA is a municipal corporation that owns and operates all public housing in Chicago.

3. The agency’s main office is located at 60 East Van Buren, Chicago.

4. Website: [www.thecha.org](http://www.thecha.org)

5. CHA is the third largest PHA in the nation (after the New York City and Puerto Rico Housing Authorities).

B. In the Beginning.

1. Prior to WWII, CHA built just four public housing projects, all comprised of low-rise buildings.

   a) *Three projects (Jane Addams Homes, Julia C. Lathrop Homes, and Trumbull Park Homes) were for white families.*

   b) *The fourth project (Ida B. Wells Homes) was for black households.*

   c) *This racial segregation was actually mandated by a federal policy (the “Neighborhood Composition Rule”), which required that the tenants in a public housing development be of the same race as the people in the surrounding area.*

2. CHA established stringent criteria for admission, interviewed applicants (sometimes at home), screened 28,000 families to find the 2,424 it selected for its first three “whites-only” projects, and admitted few of the City’s poorest families. The goal was to serve the working poor as opposed to the neediest households.

C. World War II.

1. During the war, public housing that had initially been created for low income families was repurposed for defense workers. Most of these new residents were not poor.
2. One project with 1,500 units (Altgeld Gardens) was designed exclusively for black workers.


1. This law provided substantial funding for public housing, but Chicago’s City Council rejected CHA’s proposal to build such housing on open land throughout the City.

2. White Aldermen did not want public housing in their wards, so CHA started building only in black neighborhoods and adjacent to existing projects and, for the most part, the agency built high-rises.


1. Although CHA officials recognized that high-rise buildings did not provide the best environment for families with children, the agency felt that the high cost of land in Chicago would make more preferable housing types prohibitively expensive.


3. Nevertheless, CHA kept building skyscrapers. In 1962, for instance, it completed construction of Robert Taylor Homes, which was at the time the largest public housing development in the country with 28 high-rise buildings containing over 4,000 units. It was part of “the State Street Corridor,” a narrow but four miles long stretch of public housing that included Stateway Gardens, Harold Ickes Homes, Dearborn Homes, and Hilliard Homes.


F. Gautreaux.

1. Between 1954 and 1967, CHA constructed more than 10,300 public housing units. Only 63 of these units, or 0.61%, were built outside poor, racially segregated areas.

2. In 1966, a public housing resident and community organizer named Dorothy Gautreaux filed the nation’s first public housing desegregation lawsuit. In Gautreaux v. Chicago Housing Auth., 265 F. Supp. 852, 853 (N.D. Ill. 1967), she and her fellow plaintiffs alleged that, since 1950, CHA had selected sites for public housing projects “almost exclusively within neighborhoods the racial composition of which was all or substantially all Negro at the time the sites were acquired, for the purpose of, or with the result of, maintaining existing patterns of urban residential segregation by race.”
3. As a result of this lawsuit, CHA was prohibited from constructing new public housing in areas of the City that were predominantly African-American unless they built an equal number in racially diverse areas.

G. The Brooke Amendment.

1. Prior to 1969, CHA primarily served the least poor of Chicago’s low-income households – those who earned 50-80% of the area median income – and actively tried to resist housing too many of the poorest families.

2. As working class families left public housing, however, CHA found it increasingly difficult to attract new working class families. Between 1962 and 1966, CHA tried to reverse this trend and keep out the poorest families by eliminating income-based rents and introducing fixed rents.

3. In 1969, however, Congress fundamentally altered the Housing Act of 1937 by passing the first of the so-called Brooke Amendments, which required public housing residents to pay no more than 25% of their household income as rent. (This was later raised to 30%.)

4. The Brooke Amendment marked the end of CHA’s fixed rent policy, and helped make public housing less appealing to working class households and more attractive to the very poorest families.

5. As more very low income families (many headed by single mothers) moved into the high rises, the buildings quickly developed a youth-to-adult ratio of 2-1. This created less desirable living conditions, which motivated families that could afford market rents to leave public housing, which led to a higher concentration of poverty in the high rises, which diminished CHA’s financial resources, which made it harder for CHA to maintain its properties, which created less desirable living conditions and a vicious cycle that (combined with poor leadership from CHA) led to the deterioration of much of the housing stock.

H. A Decade of Disorder.

1. By 1980, public housing had become the housing of last resort for the poor, occupied primarily by households that earned or received less than 50% of the area median income.

2. CHA was in a state of disarray characterized by mismanagement and neglect, and the federal government threatened on two separate occasions to take it over.
3. Crime was a contributing problem. In 1986, “violent crime reported at Chicago Housing Authority developments jumped by 31 percent . . . more than twice the citywide increase.” The most violent project was Rockwell Gardens, where nearly eight violent crimes were reported for every 100 residents. Patrick Reardon and Stanley Ziemba, “Surge in Violent Crime Hits CHA Hardest,” *Chicago Tribune*, March 20, 1987.

4. CHA’s 1988 annual report noted that, “from 1981 to 1988 eight executive directors and five different chairmen headed the CHA. The results: a breakdown of good managerial practices, high staff turnover and low staff morale. The CHA had become an ineffective organization in need of overhaul.”

I. The Death of Dantrell Davis.

1. On October 13, 1992, a sniper in a tenth-floor vacant apartment in a Cabrini high rise shot and killed seven-year-old Dantrell Davis while the first grader was holding his mother's hand as he walked to school. He was the third Cabrini resident from Jenner Elementary School to have been shot to death that year.

2. Another Cabrini resident confessed to the shooting, saying that it was an accident; he had been aiming not at Dantrell but at rival gang members.

3. Dantrell’s murder, which shocked not just the City but the entire nation, was a catalyst for major change at CHA.

   a) It prompted CHA’s executive director, Vince Lane, to call on Governor Jim Edgar and Mayor Richard M. Daley to deploy the National Guard to secure Cabrini. Mick Dumke, “The shot that brought the projects down,” *Chicago Reader*, October 13, 2012.

   b) It also prompted the Chicago Tribune to call for the demolition of the CHA high-rises. “Tear Down The Cha High-rises,” *Chicago Tribune*, November 15, 1992. The editorial board also stated, however, that CHA should not start the demolition process “without first securing replacement housing for each and every tenant.”

4. Less than a week after Dantrell’s death, Mayor Daley (who was conspicuously absent from Dantrell’s funeral) called for “a long-term master plan for public housing in Chicago.” Mick Dumke, “The shot that brought the projects down,” *Chicago Reader*, October 13, 2012.

5. By this point, it was clear that such a “master plan” would involve the demolition of at least some CHA high rises.

J. HUD Takes Control.

1. On May 28, 1995, CHA’s entire board resigned and ceded the nation’s second-largest and most troubled housing agency to the Federal Government.
2. Two days later, HUD took control of the city's 40,000 public housing units in the largest-ever Federal takeover of a housing agency.


4. Three months later, CHA announced what would soon be formally known as the Plan for Transformation.

K. The Plan for Transformation.

1. The Plan for Transformation called for the demolition of CHA’s high-rise developments, the comprehensive rehabilitation of all scattered-site, senior and lower-density family properties, and the construction of new mixed-income developments. (See below for a list of demolished high-rises, renovated developments, and mixed-income developments.)

2. By the time the Transformation is complete, CHA will have:
   
   a) Demolished about 22,000 public housing units;
   
   b) Rehabilitated more than 17,000 public housing units; and
   
   c) Constructed approximately 7,700 public housing units in mixed-income developments that will also include more than 8,300 units of “affordable” and market rate-housing.

3. To help CHA realize its goals under the Plan for Transformation, HUD allowed CHA to participate in its Moving to Work (MTW) Demonstration Program.

L. CHA & Moving to Work.

1. HUD granted CHA’s MTW application in February 2000.

2. MTW designation allowed CHA to develop its Plan for Transformation free from many of the constraints imposed by the Housing Act of 1937 and HUD’s implementing regulations.

3. The MTW agreement with HUD guaranteed that CHA would receive almost $1.6 billion over the next ten years to implement its Plan for Transformation. (The 2010 deadline has now been pushed back to 2015.)


1. In 2010, HUD authorized CHA to use project-based vouchers (discussed below in the chapter on Section 8 Project-Based Housing) to meet its goal of creating 25,000 new or renovated housing units.

2. The use of project-based vouchers is controversial for two reasons:
a) Housing advocates fear that the Section 8 PBV developments will be built in racially-segregated, low-income communities; and

b) Under the Section 8 PBV Program, private property owners enter into 30-year contracts with HUD, so when the contracts expire the owners may opt-out of the Program. (The opt-out process is described below in the chapter on Section 8 Project-Based Housing.)

N. Relocation Rights Contract.

1. Every lease compliant family residing in a CHA unit as of October 1, 1999, who was forced to relocate as a result of the demolition or renovation process, has a right to return to a newly constructed or rehabilitated unit after redevelopment is completed.

2. Relocation options:

   a) Temporary housing choice voucher. Preserves right to return.

   b) Move into public housing unit that has not yet been rehabilitated. Preserves right to return.

   c) Permanent housing choice voucher. No right to return.

3. As of 2011, only 11% of relocated public housing residents with a “right to return” had returned to the new mixed-income developments. Many simply left the City. See Robert Chaskin, Why Do So Few Residents Return to Mixed-Income Developments? Insight into Resident Decision-Making, February 2012


O. Demolished Developments.

1. Cabrini-Green High Rises (former home of Curtis Mayfield).
2. Robert Taylor Homes (birthplace of Mr. T).
3. Ida B. Wells Homes (birthplace of Lou Rawls).
4. Stateway Gardens.
5. Madden Park Homes.
6. Prairie Courts.
10. Clarence Darrow Homes.
11. Lakefront Properties.
12. Jane Addams Homes.
15. Grace Abbott Homes.
17. Harrison Courts.
18. LeClaire Courts.

P. Renovated Developments.

1. Francis Cabrini Rowhouses.
   
   a) 25% renovated.

   b) The Rowhouses were the subject of a federal lawsuit: Cabrini-Green Local Advisory Council v. CHA, 2014 WL 683710 (N.D. Ill. 2014) (asserting that CHA’s refusal to maintain the Rowhouses as 100% public housing violates the agency’s duty to affirmatively further fair housing).

   (1) After promising to rehabilitate the Rowhouses, CHA displaced the residents by temporarily relocating some to developments on Chicago’s South Side and by issuing temporary housing vouchers to others. Almost all the families found themselves in racially segregated and economically depressed neighborhoods with limited opportunities.

   (2) After rehabilitating just one quarter of the units, CHA announced that it would convert the Rowhouses into a mixed-income development where only a small percentage of the units would be reserved for public housing residents.

   (3) This new plan eliminated several hundred units of low-income housing in an opportunity area where residents had access to good schools, transportation, and jobs. It also forced the displaced families to remain in high-poverty, segregated neighborhoods, thereby perpetuating segregation.

   (4) Together with Sidley Austin, LAF filed on behalf of the Cabrini Green Local Advisory Council a federal lawsuit alleging a violation of the Fair Housing Act.
(5) On September 18, 2015, after more than two years of litigation, the parties negotiated a settlement that requires CHA to maintain no less than 40% of the currently vacant and unrehabilitated units as public housing and no less than 15% of these units as affordable housing, and to bring 1,800 units of subsidized housing to the Near North Side.

3. Wentworth Gardens.
4. Bridgeport Homes.
5. Trumbull Park Homes.
6. Dearborn Homes.
7. Altgeld Gardens Homes.
8. Racine Courts.
10. Lowden Homes.
12. Lake Parc Place.

Q. Mixed-Income Developments.

1. Overview.
2) Mixed-income developments include apartments, townhouses, duplexes, condos, and single-family homes in racially and economically diverse neighborhoods throughout the city.

(1) Ideally, one third of the units are set aside for CHA leaseholders, another third are affordably priced, and another third are market rate.

(2) In 2012, however, more than a decade after CHA embarked on its Plan for Transformation, former CHA CEO Charles Woodyard announced that “developments would no long need to adhere to the one-third, one-third, one-third rule and that decisions would be made on a case-by-case basis.” Becky Vlamis, “CHA considers new math for mixed-income equation,” May 7, 2012 [http://www.wbez.org/blogs/bez/2012-05/cha-considers-new-math-mixed-income-equation-98847](http://www.wbez.org/blogs/bez/2012-05/cha-considers-new-math-mixed-income-equation-98847)
(3) Now, “some developments skew too heavily toward one or other income levels. At some developments, one level of income may be missing entirely.” Natalie Moore, “CHA not living up to promises of mixed-income housing,” September 21, 2012 http://www.wbez.org/news/housing/cha-not-living-promises-mixed-income-housing-102522.

b) Working groups comprised of resident leaders, CHA staff, city officials and community organizations establish site-specific and often stringent criteria for all tenants who want to rent or purchase a home in these developments. These requirements vary by site, but usually include employment/income verification, 30-hour per week work requirements, credit history screening, drug-screening, and comprehensive background checks.

c) The results of the mixed-income experiment have been mixed. See Sara Olkon, CHA mixed-income building has class clash, Chicago Tribune, June 30, 2009 (noting tensions between public housing residents and condo owners at Westhaven Park Tower).

2. Specific developments:

a) Oakwood Shores

(1) Replaced Ida B. Wells, Madden Park, and Clarence Darrow Homes.

b) Westhaven Park.

(1) This is the second phase of the redevelopment plan for Henry Horner Homes. (The first phase was completed before the Plan for Transformation, and all the units created during this first phase were set aside for public housing residents.)

c) Roosevelt Square

(1) Replaced Jane Addams Homes, Robert Brooks Homes, Loomis Courts, and Grace Abbott Homes, together known as ABLA.

d) Legends South

(1) Replaced Robert Taylor Homes.

e) Park Boulevard

(1) Replaced Stateway Gardens.

f) Jazz on the Boulevard.

(1) Replaced Lakefront Properties.
g) Jackson Square at West End.
   (1) Replaced Rockwell Gardens.

h) Lake Park Crescent.
   (1) Replaced Lakefront Properties.

i) Parkside of Old Town.
   (1) Replaced Cabrini high-rises and mid-rises.

j) Archer Courts.

k) North Town Village.

l) Old Town Square.

m) Hilliard Towers Apartments.

n) River Villages.

o) Renaissance North.

R. Other CHA Housing.
   1. More than 60 scattered-site developments.
   2. More than 40 senior properties.

S. The Plan Forward.
   1. “Plan Forward” is what CHA calls the next stage of the Plan for Transformation
   2. CHA unveiled Plan Forward in April 2013.

T. Special CHA Lease Provisions.
   1. “Innocent tenant” defense—Section 16(f).
      a) In 1996, HUD issued a policy directive, PIH 96-16, on the requirement that public housing leases allow termination of housing assistance if household members or their guests engage in any drug-related or other criminal activity that “affects the health, safety, and peaceful enjoyment of the premises” by other residents (42 U.S.C. § 1437d(l)(6)). The directive became known as the “one strike and you’re out” policy, and it encouraged housing authorities to “root out criminals” aggressively.
b) LAF, representing the Central Advisory Council—the central board of the local advisory councils that represent CHA residents—negotiated with CHA and convinced the agency to adopt the innocent-tenant defense.

c) 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.”

d) In 2002, the United States Supreme Court affirmed the constitutionality of Section 1437d(l)(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.”).

e) On May 17, 2011, CHA reversed course and proposed eliminating the “innocent tenant” provision from all its leases.

(1) 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.

(2) The ACLU took the lead on challenging the drug-testing proposal, while LAF took the lead on the “innocent tenant” issue.

f) 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. LAF, therefore, focused on a public advocacy campaign.

g) 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.

h) 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.

2. Work requirement—Section 21.
a) This requirement applies to all families residing in traditional public housing.

b) The work requirement is not authorized under the Housing Act of 1937, so CHA used its authority under the MTW Demonstration Program to obtain a statutory waiver from HUD.

c) Every adult must work 20 hours per week unless she is exempt or eligible for Safe Harbor consideration.

d) Residents are exempt if they are:

   (1) Age 62 or older.

   (2) Blind or disabled.

   (3) The primary caretaker for someone who is blind or disabled.

   (4) A single parent and the primary caretaker for a child age one or younger.

   (5) The primary caretaker for a child under age 13, and in a household with two or more adults and one parent is working.

   (6) Receiving TANF and have an active Responsibilities and Service Plan.

e) A resident may request Safe Harbor consideration when she is making a good faith effort to comply with the work requirement but cannot comply because she is:

   (1) Awaiting approval for SSDA or SSI;

   (2) Suffering from a temporary medical condition;

   (3) Recently separated from work;

   (4) A victim of domestic violence;

   (5) The caregiver for a domestic violence victim; or

   (6) Unable to find child care.

f) Safe Harbor status must be reviewed every 90 days.

g) A resident who is denied Safe Harbor status may request a grievance hearing.

1. As mentioned above, many mixed-income developments have mandatory drug-testing policies.

2. In 2013, a public housing resident filed a class action complaint against CHA for violating the U.S. Constitution and the Illinois Constitution by conducting warrantless and suspicionless drug-testing as a condition of occupancy in public housing units in the Parkside mixed-income development.

3. The Seventh Circuit held that mandatory drug testing required by the private owners of the mixed-income development did not implicate the Fourth Amendment's prohibition against unreasonable searches and seizures. *Peery v. Chicago Housing Auth.*, 791 F.3d 788 (7th Cir. 2015)

   a) Judge Posner wrote that mandatory drug testing required by private landlords as a condition for all tenants, including those tenants who received subsidized housing vouchers from city housing authority, to be permitted to renew their leases in privately-owned apartment buildings did not constitute “state action,” and therefore, did not implicate the Fourth Amendment's prohibition against unreasonable searches and seizures.

   b) Even though CHA did not disapprove of the drug testing and likely requested and approved of such testing, it did not require drug testing as condition for tenants to obtain vouchers or reside in private housing, and CHA permitted other private landlords who did not require drug testing to provide housing to public housing residents.
XXIII. OTHER COOK COUNTY PHAs.

A. Housing Authority of Cook County (HACC).

1. HACC administers not just the public housing program but also the Housing Choice Voucher Program and the Section 8 Project-Based Voucher Program. (These programs are discussed in separate sections below.)

2. Provides housing in 24 communities located within suburban Cook County.

3. Each community has specific Management and Maintenance personnel.

4. Four types of housing:
   a) **Family communities.**
   b) **Scattered sites.**
   c) **Elderly designated communities for tenants who are elderly (age 62 or older) and near elderly (ages 50-61 years).**
   d) **Elderly/Disabled designated communities for elderly tenants and adults who are disabled.**

5. HACC’s main office is located at 175 West Jackson Boulevard, Suite 350, Chicago (tel: 312/663-5447). Closed to the public on Wednesdays.

6. Website: [www.thehacc.org](http://www.thehacc.org)
   a) **Policies and plans.**
   b) **Forms and documents.**

B. Oak Park Housing Authority.

1. Together with its affiliate, the Oak Park Residence Corporation, OPHA owns and operates three apartment buildings that serve elderly and disabled tenants. It also administers the Housing Choice Voucher Program, which is discussed in a separate section below.

2. Website: [www.aokparkha.org](http://www.aokparkha.org)

C. Maywood Housing Authority.

   a) **Cicero Housing Authority.**
XXIV. SECTION 8 PROJECT-BASED PROGRAMS.

A. Overview.

1. Private owners enter into contracts with HUD – usually in exchange for loans with exceptionally low interest rates – and HUD sends them subsidy payments equal to the difference between the tenant's share of the rent and the approved contract rent.

2. Rental assistance runs with the unit.

3. Endless lease agreements may be terminated only for good cause shown.

4. Owner may opt out of the program when the contract with HUD expires.

B. Specific Programs.

1. New Construction.

2. Substantial Rehabilitation.

3. Moderate Rehabilitation.
   
   a) Administered by the same public housing authorities that administer the Public Housing, HCV, PBV, and VASH Programs.

4. State Housing Agencies Program.

5. Loan Management Set-Aside Program.


C. Authorizing Statutes.

1. 42 U.S.C. § 1436a—Restriction on use of assisted housing by non-resident aliens.

   
   a) Section 1437f(a)—Authorization for assistance payments
   
   b) Section 1437f(c)—Contents and purposes of contracts for assistance payments; amount and scope of monthly assistance payments.
   
   c) Section 1437f(c)(8)—Opt-out provisions.
   
   d) Section 1437f(d)—Required provisions and duration of contracts for assistance payments.
   
   e) Section 1437f(f)—Definitions.
f) Section 1437f(k)—Verification of income

g) Section 1437f(t)—Enhanced vouchers

h) Section 1437f(v)—Extension of expiring contracts.

D. Implementing Regulations.

1. 24 C.F.R. Part 5.
   a) Subpart I governs the procedure for denying or terminating assistance for criminal activity. See below.

2. For specific programs:
   c) Moderate Rehabilitation—24 C.F.R. Part 882.

E. HUD Handbook 4350.3 Rev. 1.

1. Occupancy Requirements of Subsidized Multifamily Housing Programs.


3. The Handbook does not govern the Moderate Rehabilitation and Project-Based Voucher Programs.

4. The Handbook is not binding, but it is entitled to notice. Burroughs v. Hills, 741 F.2d 1525, 1529 (7th Cir. 1984).

F. Project-Based Contract Administrator.

1. National Housing Compliance.


3. Conducts performance-based contract administration in Illinois for HUD.

G. Admission

2. **Eligibility.**

   a) **Must be a “family” as that term is defined in 24 C.F.R. § 5.403.**

      (1) “Family” is defined to include, among other things:

      (a) A single person; and

      (b) A remaining member of a tenant household.

   b) **Must be a citizen or have eligible immigration status. See 24 C.F.R. Part 5, Subpart E.**

   c) **Must be a low-income family.**

3. **Mandatory denials.**

   a) **Must deny admission to applicant whose household member was evicted within the past three years from federally assisted housing for drug-related criminal activity. 24 C.F.R. § 5.854 (a).**

      (1) Two exceptions:

      (a) “The evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program approved by the PHA;” or

      (b) “The circumstances leading to the eviction no longer exist (for example, the criminal household member has died or is imprisoned).”

   b) **Must deny admission to applicant whose household member is subject to a lifetime registration requirement under a State sex offender registration program. 24 C.F.R. § 5.856.**

   c) Owner “must establish standards that prohibit admission to federally assisted housing if [the owner determines it has] reasonable cause to believe that a household member’s abuse or pattern of abuse of alcohol interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.” 24 C.F.R. § 5.857.

4. **Permissive denials—24 C.F.R. § 5.855.**

   a) **Owner may deny admission to an applicant whose household member is currently engaged in, or has during a reasonable time before the admission decision engaged in:**

      (1) Drug-related criminal activity;

      (2) Violent criminal activity;
(3) Other criminal activity that threatened the health, safety, or right to peaceful enjoyment of other residents;

(4) Other criminal activity that threatened the health or safety of the owner or its employees.

b) “[A] household member is ‘currently engaged in’ the criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current.” 24 C.F.R. § 5.855(c)(2).

c) Exercising discretion—24 C.F.R. § 5.852.

(1) When the owner is permitted but not required to deny admission, the owner may consider:

   (a) The seriousness of the offending action;

   (b) The effect on the community of denial or the failure of the owner to take such action;

   (c) The extent of participation by the leaseholder in the offending action;

   (d) The effect of denial of admission on household members not involved in the offending action;

   (e) The demand for assisted housing by families who will adhere to lease responsibilities;

   (f) The extent to which the leaseholder has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending action; and

   (g) The effect that a decision to grant the application will have on the integrity of the program.

(2) The owner may also require the applicant to bar the offender in order to be admitted into the program.

(3) In cases involving the use of illegal drugs, the owner may consider evidence of rehabilitation.

H. Lease Agreement.

1. HUD’s Model Lease for Subsidized Programs.

   a) For programs covered by Handbook 4350.3, HUD requires owners to use a lease containing certain provisions. Owners can satisfy this requirement by using the model lease. Access a copy at www.hud.gov. The model lease is also Appendix 4-A of Handbook 4350.3.
b) Paragraph 2 of the lease provides that the agreement automatically renews itself at the end of every term unless it is terminated pursuant to ¶ 23 for good cause shown.

c) Paragraph 11 provides that the tenant agrees to pay market rent for any period during which the unit has been rendered uninhabitable as a result of the tenant’s “carelessness, misuse, or neglect.”

d) Paragraph 23(c) provides that any notice of termination of tenancy must:

(1) Specify the date of termination;

(2) State the grounds for termination with enough detail for the tenant to prepare a defense; and

(3) Inform the tenant that she has ten days to discuss the proposed termination with the landlord. “If the Tenant requests the meeting, the landlord agrees to discuss the proposed termination with the Tenant.”

2. Statutory prohibition against unreasonable lease terms.

a) Leases used in covered properties may “not contain unreasonable terms and conditions.” 12 U.S.C. § 1715z-1(b)(3).


a) Owners are encouraged to develop a set of House Rules, which may be set forth in an attachment to the HUD Model Lease. HUD Handbook 4350.3 REV-1, ¶ 6-9.

b) “Owners, however, must be careful not to develop restrictive rules that limit the freedom of tenants. If owners develop house rules for a property, these rules must be consistent with HUD requirements for operating HUD subsidized projects, must be reasonable, and must not infringe on tenants’ civil rights.” HUD Handbook 4350.3 REV-1, ¶ 6-9 A 2.

c) “House rules must . . . [b]e related to the safety, care, and cleanliness of the building or the safety and comfort of the tenants.” HUD Handbook 4350.3 REV-1, ¶ 6-9 B 1 a.

d) “Reasonable house rules are within the bounds of common sense. They are not excessive or extreme, and most importantly, they are fair.” HUD Handbook 4350.3, REV-1, ¶ 6-9 B 1 e (I).

4. Tenancy addendum required in the MR and PBV Programs.
a) In the Moderate Rehabilitation Program, the owners must attach, as an addendum to the lease, a tenancy addendum that is a form entitled HUD-52517-D.

b) In the Project-Based Voucher Program, “the lease must include a HUD-required tenancy addendum. The tenancy addendum must include, word-for-word, all provisions required by HUD.” 24 C.F.R. § 982.356(b)(3).

I. Rent.

1. The family pays the highest of:
   (1) 30% of monthly adjusted income;
   (2) 10% of monthly income;
   (3) The minimum rent.

2. As in the public housing and HCV programs (see above), the procedures for calculating a family’s “adjusted income,” “annual income,” and “deductions” are set forth in 24 C.F.R. §§ 5.609 and 5.611.

3. Minimum rent.
   a) Up to $50 per month for the Moderate Rehabilitation Program;
   b) $25 per month for all other Section 8 programs.

4. Financial hardship exemption to the minimum rent.
   a) Grounds -- 24 C.F.R. § 5.630(b)(1).
      (1) This is the same provision that governs the public housing and HCV programs.
      (2) Assessing family’s request for a hardship exemption – 24 C.F.R. § 5.630(b)(2)(ii) and (iii).

5. The total tenant payment may be reduced by a utility allowance. 24 C.F.R. §§ 5.632 and 5.634(a).

J. Recertifications.

1. For the Moderate Rehabilitation Program, the procedure is set forth at 24 C.F.R § 882.515. This section focuses on the other Section 8 project-based programs, and the procedure governing these programs is set forth in 24 C.F.R. § 5.657 and in Chapter 7 of Handbook 4350.3.

2. Annual recertifications.
a) **Must be completed by the tenant’s recertification anniversary date (the first day of the month in which the tenant moved into the property).** Handbook 4350.3, § 7-5.

b) **Owners must provide tenants with the Initial Notice and three subsequent reminder notices during the recertification process.** Handbook 4350.3, § 7-7(B).

(1) Initial notice. Provided upon the initial execution of the lease and at each annual recertification. Informs tenants of duty to recertify annually.

(2) First reminder notice. Issued no less than 120 days prior to the recertification anniversary date. Must inform the tenant that if she fails to provide the required information before the recertification anniversary date, the tenant may either face eviction if she lives in a Section 202 or Section 811 project (though eviction should be “pursued only as a last resort for enforcing compliance”), or lose her rental assistance and become responsible for:

   - (a) Section 236 market rent in a 236 project; or
   - (b) 110% of BMIR rent in a BMIR project; or
   - (c) The full contract rent in a Section 8 project-based development.

(3) Second reminder notice. Issued “approximately 90 days” prior to the tenant’s recertification anniversary date. Must contain all the information set forth in the first notice.

(4) Third reminder notice. Issued no less than 60 days prior to the recertification anniversary date. Must contain all the information set forth in the first notice.

c) **Copies of all the notices must be retained in the tenant’s file.**

d) **Effective date of rent adjustments.**

(1) Changes take effect on the recertification anniversary date.

(2) If the tenant recertified in a timely manner but the owner failed to complete the verification process in time to give the tenant 30-days’ advance written notice of a rent increase, the increase may not take effect until after 30-day notification period has expired.

e) **Extenuating circumstances when the tenant fails to comply.**
The owner must inquire whether extenuating circumstances (e.g., tenant hospitalized, tenant out of town for family emergency, tenant on military duty overseas) prevented the tenant from providing all the required information in a timely manner.

If the tenant provides evidence of extenuating circumstances, the owner must consider this evidence and issue a written decision. If the decision is unfavorable, the decision must inform the tenant of her right to meet with the owner within the next ten days.

f) **Reinstating assistance after it has been terminated for tenant’s noncompliance with recertification procedures.**

(1) Assistance should be reinstated if:

(a) Assistance is available at the property;

(b) The tenant submits the required information; and

(c) The owner determines that the tenant qualifies for assistance.

3. **Interim recertifications.**

a) **The family must notify the owner when:**

(1) A family member vacates the unit;

(2) The family proposes adding a new member to the unit;

(3) An adult family member who reported that he or she was unemployed at the last recertification gets a job; and

(4) The family’s monthly income increases by $200 or more.

b) **The family may request an interim recertification when a change occurring subsequent to the last recertification would reduce the family’s share of the rent.**

c) **The owner may refuse to process an interim recertification when the tenant reports a decrease in income only when:**

(1) The tenant deliberately caused the decrease (e.g., by quitting a job) in order to qualify for a lower rent; or

(2) The decrease will last less than one month.

4. **Effective date of rent adjustments after interim recertifications.**

a) **Governed by HUD Handbook, § 7-13.**
b) Decreases become effective the month after the tenant provides verification of the change in income or household size that warrants the decrease.

c) Increases become effective the month following the end of the 30 days’ advance notice period (though the owner may impose a retroactive increase if the family failed to report an increase in income in a timely manner).

K. No Grievance Rights.

1. Unlike the regulations governing the public housing and HCV programs, the regulations governing the Section 8 project-based programs do not afford tenants the right to grievance hearings.

L. Terminating the Lease.

1. Regulations governing the eviction procedure for specific programs:


   b) Substantial Rehabilitation—24 C.F.R. § 880.607. (See 24 C.F.R. § 881.601, which states that “the provisions of part 880, subpart F, of this chapter apply to projects assisted under this part.”)

   c) Moderate Rehabilitation—24 C.F.R. § 882.511.

   d) State Housing Agencies Program—24 C.F.R. § 880.607. (See 24 C.F.R. § 883.701, which states that “the provisions of part 880, subpart F, of this chapter apply to projects assisted under this part.”)


   g) Section 202/8—24 C.F.R. Part 247.


   a) Crime must be committed “on or near” the premises.

3. Terminations for other criminal activity—24 C.F.R. § 5.859.

   a) The owner may terminate the family’s tenancy for:

      (1) Any crime that threatens another resident’s or property management’s health, safety or right to peaceful enjoyment of the premises.
Any crime that threatens the health or safety of a person residing in
the immediate vicinity of the premises, or that threatens such a person’s
right to peaceful enjoyment of their premises.

b) The owner may terminate the tenancy if the tenant is:

(1) “Fleeing to avoid prosecution, or custody or confinement after
conviction, for a crime, or attempt to commit a crime, that is a felony under
the laws of the place from which the individual flees, or that, in the case of
the State of New Jersey, is a high misdemeanor;” or

(2) “Violating a condition of probation or parole imposed under
Federal or State law.”


a) Must threaten other residents’ health, safety, or right to peaceful
enjoyment of the premises.


a) Neither conviction nor even arrest is necessary.

b) The State’s failure to prove guilt beyond a reasonable doubt in the
related criminal case does not preclude the owner from establishing guilt by
a preponderance of the evidence in the civil eviction proceeding.


a) When the owner is permitted but not required to terminate the lease,
the owner may consider:

(1) The seriousness of the offending action;

(2) The effect on the community of denial or the failure of the owner
to take such action;

(3) The extent of participation by the leaseholder in the offending
action;

(4) The effect of denial of admission on household members not
involved in the offending action;

(5) The demand for assisted housing by families who will adhere to
lease responsibilities;

(6) The extent to which the leaseholder has shown personal
responsibility and taken all reasonable steps to prevent or mitigate the
offending action; and
The effect that a decision to grant the application will have on the integrity of the program.

b) The owner may allow the family to stay if they bar the offender.

c) In cases involving the use of illegal drugs, the owner may consider evidence of rehabilitation.

M. Opting Out.

1. Beginning in the late 1980s, an increasing number of subsidized unit owners became eligible to prepay their mortgages, or to terminate or not renew their section 8 project-based assistance contracts with HUD.

2. Congress therefore enacted new laws to protect tenants in assisted units in the event the owner sought to convert the previously subsidized units to market-rate housing.

a) An early protection was a notice requirement, now codified at 42 U.S.C. § 1437f(c)(8).

(1) “Not less than one year before termination of any contract under which assistance payments are received under this section, . . . an owner shall provide written notice to the Secretary and the tenants involved of the proposed termination.” 42 U.S.C. § 1437f(c)(8)(A).

(2) “The notice shall also include a statement that, if the Congress makes funds available, the owner and the Secretary may agree to a renewal of the contract, thus avoiding termination, and that in the event of termination the Department of Housing and Urban Development will provide tenant-based rental assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they currently reside.” Id.

N. Enhanced Vouchers.

1. Overview.

a) When an owner follows the proper procedure for opting-out of its contract with HUD, the residents receive either regular vouchers under the HCV Program, or “enhanced vouchers.”

b) A family that elects an “enhanced voucher” may remain in its dwelling unit and continue paying the same reduced rent.

c) In these situations, the PHA uses a higher payment standard that covers the full market rent and enables the PHA to approve units that would be unaffordable to a family with regular assistance under the HCV Program.
d) If and when the family vacates the unit, it receives a regular voucher.

   
a) This statute makes the payment standard equal to the rent for the dwelling unit.
   
b) Accordingly, a tenant with an enhanced voucher continues to pay just 30% of the household’s adjusted income even when the rent exceeds the otherwise applicable payment standard.

3. Interpreting the statute.
   
a) The Secretary of HUD has interpreted 42 U.S.C. § 1437f(t)(1)(B) to mean that eligible tenants have a “right to remain,” enforceable against owners who would seek to evict them, so long as they pay their portion of the rent as calculated by the PHA.
   
b) “Every federal court to consider the question to date has agreed with the Secretary’s construction of 42 U.S.C. § 1437f(t)(1)(B).” Park Village Apts., Tenants Assoc. v. Mortimer Howard Trust, 636 F.3d 1150, 1156 (9th Cir. 2011) (collecting cases).

4. HUD’s Policy Guide.
   
a) Confirms that § 1437f(t)(1)(B) affords tenants with enhanced vouchers the right to remain, and owners must honor that right. HUD Section 8 Renewal Policy: Guidance for the Renewal of Project–Based Section 8 Contracts (Jan. 15, 2008), at 8–1, 11–3B.
XXV. SECTION 8 TENANT-BASED ASSISTANCE.

A. Overview.

1. HUD enters into Annual Contributions Contracts with local PHAs and makes payments to these PHAs on behalf of low-income tenants.

2. Tenant-based assistance may be used for any of the following programs, all of which are discussed later and in more detail in this outline:
   a) The Housing Choice Voucher program.
   b) Homeownership under the HCV program.
   c) Veterans Affairs Supportive Housing (VASH) program.
   d) Project-Based Vouchers.

3. With the demolition of many public housing developments, and with owners of Section 8 project-based developments exercising their option to opt-out of their contracts with HUD (see below), the tenant-based assistance programs are fast becoming the federal government’s primary vehicle for providing rental assistance to low-income families.
XXVI. HOUSING CHOICE VOUCHER (HCV) PROGRAM.

A. General Operation.

1. PHA issues voucher to an eligible applicant family. Before the voucher expires, the family must locate a dwelling unit in the private housing market and submits a request for tenancy approval (RFTA) to the PHA. (If the family fails to locate a suitable unit before the voucher term expires, and the family has not been able to obtain an extension on the voucher term, the family loses its right to participate in the HCV program.)

2. By submitting the RFTA to the PHA, the family “stops the clock” on the voucher term.

3. The PHA then inspects the unit to ensure it complies with housing quality standards (HQS), and negotiates a reasonable rent with the owner.

4. If the PHA rejects the unit, the clock resumes ticking on the voucher term and the family continues to look for a suitable unit.

5. If the PHA approves the unit, the family signs a lease agreement with the owner, and the owner signs a housing assistance payments (HAP) contract with the PHA.

6. The family pays a reduced rent that is calculated by the PHA and equal to a percentage of the family’s adjusted gross household income, and the PHA pays the difference between the family’s contribution and the total rent by sending the owner monthly housing assistance payments.

7. The lease may be terminated by either the owner or the family without good cause at the end of the initial term or at the end of any successive term. At all other times, good cause is required for termination.

8. Provided the family has not committed a serious lease violation or breached its obligations under the program, it may move with continued assistance to another unit.

9. The PHA may, for good cause, terminate the HAP contract.

10. The PHA may, for good cause, terminate the family’s assistance under the program. The family may challenge the termination by submitting a timely request for an informal administrative hearing. If the family submits such a request, its assistance remains in effect pending the resolution of the hearing process.

11. For another summary of the HCV program, see Khan v. Bland, 630 F.3d 519, 523-24 (7th Cir. 2010).

B. HCV Program Guidebook 7420.10g.

C. Administrative Plans.

1. “The PHA must adopt a written administrative plan that establishes local policies for administration of the program in accordance with HUD requirements.” 24 C.F.R. § 982.54(a).

2. “The administrative plan states PHA policy on matters for which the PHA has discretion to establish local policies.” Id. (emphasis added).

3. “The administrative plan must be in accordance with HUD regulations and requirements.” 24 C.F.R. § 982.54(b).

4. “The PHA must administer the program in accordance with the PHA administrative plan.” 24 C.F.R. § 982.54(c).

D. Admission.

1. Governed by 24 C.F.R. Part 982, Subpart E.

2. Eligibility—24 C.F.R. 982.201(a).
   a) Must be a “family,” as that term is defined in 24 C.F.R. §5.403.
      (1) “Family” is defined to include, among other things:
         (a) A single person; and
         (b) A remaining member of a tenant household.

   b) Must be a citizen or have eligible immigration status. See 24 C.F.R. Part 5, Subpart E.

   c) Must be financially eligible.

3. Waiting lists—24 C.F.R. § 982.204.


5. Mandatory denials.
   a) PHA must deny admission to a family whose household member was evicted within the past three years from federally assisted housing for drug-related criminal activity. 24 C.F.R. § 982.553(a)(1)(i).
      (1) Two exceptions:
         (a) “The evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program approved by the PHA;” or
(b) “The circumstances leading to the eviction no longer exist (for example, the criminal household member has died or is imprisoned).”

b) Household member is subject to a lifetime registration requirement under a State sex offender program. 24 C.F.R. § 982.553(a)(2)(i).

c) Failure to sign or submit consent forms or proof of citizenship or eligible immigration status. 24 C.F.R. § 982.552(b)(3) and (4).

d) Failure to meet eligibility requirements for individuals enrolled at an institution of higher education. 24 C.F.R. § 982.553(b)(5).

6. Permissive denials.

a) Generally—24 C.F.R. § 982.552(c).


(1) Family member is currently engaged in, or has during a reasonable time before the admission engaged in:

(a) Drug-related criminal activity;

(b) Violent criminal activity;

(c) Other criminal activity that threatened the health, safety, or right to peaceful enjoyment of other residents or persons residing in the immediate vicinity of the premises;

(d) Other criminal activity that threatened the health or safety of an owner or PHA employees.

(2) Use of criminal record.

(a) Before denying an application for admission on the basis of a criminal record, the PHA must provide the applicant with a copy of the record and an opportunity to dispute its accuracy. 24 C.F.R. § 982.553(d).


a) “The PHA may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.”

b) PHA may bar the offender and let the innocent family members continue to participate in the HCV Program.
c) In cases involving alcohol abuse or illegal drug use, PHA may consider evidence of rehabilitation.

d) In cases involving a person with disabilities, the PHA decision is “subject to consideration of reasonable accommodation.”


a) The PHA must issue a written decision that:

(1) Sets forth the reason(s) for the denial; and

(2) Informs the applicant of right to request an informal review. 24 C.F.R. § 982.554(a).

E. Issuing Voucher.

1. When a family enters the program for the first time, or when a participant family wants to move to another unit, the PHA issues a voucher to the family. The family may then search for a unit. 24 C.F.R. § 982.302(a).

2. “For each family, the PHA determines the appropriate number of bedrooms under the PHA subsidy standards (family unit size).” 24 C.F.R. § 982.402(a)(2).


F. Determining Family Unit Size.

1. The PHA must establish subsidy standards that determine the number of bedrooms needed for families of different sizes and compositions. 24 C.F.R. § 982.402(a).

2. The subsidy standards must provide for the smallest number of bedrooms needed to house a family without overcrowding.

a) “The dwelling unit must have at least one bedroom or living/sleeping room for each two persons. Children of opposite sex, other than very young children, may not be required to occupy the same bedroom or living/sleeping room.” 24 C.F.R. § 982.401(d)(2)(ii).

3. A child who is temporarily away from the home because of placement in foster care is considered a member of the family for the purpose of determining the family unit size.

4. A family that consists of a pregnant woman (with no other persons) must be treated as a two-person family.

5. Any approved live-in aide must be counted in determining the family unit size.
6. In determining family unit size for a particular family, the PHA may grant an exception to its established subsidy standards if the PHA determines that the exception is justified by the age, sex, health, handicap, or relationship of family members or other personal circumstances.

G. Voucher Term.

1. Initial term must be at least 60 days—24 C.F.R. § 982.303(a).
   a) PHA may extend this term one or more times—24 C.F.R. § 982.303(b)(1).
   b) PHA must extend term if necessary to make the HCV Program accessible to a family with a disability—24 C.F.R. § 982.303(b)(2).

2. Suspending the voucher term.
   a) Effective September 15, 2015, HUD amended the regulations governing the HCV program to define “suspension” to mean that, “[t]he term on the family’s voucher stops from the date that the family submits a request for PHA approval of the tenancy, until the date the PHA notifies the family in writing whether the request has been approved or denied.” 24 C.F.R. § 982.4.
   b) HUD also amended 24 C.F.R. § 303(c) to provide that, “[t]he PHA must provide for suspension of the initial or any extended term of the voucher from the date that the family submits a request for PHA approval of the tenancy until the date the PHA notifies the family in writing whether the request has been approved or denied.”

H. Selecting a Unit.

1. When the family finds a unit, it must submit to the PHA an RFTA together with a copy of the lease and the HUD-prescribed tenancy addendum, described in more detail below.

2. The RFTA must be submitted during the term of the voucher.

I. Prohibiting Discrimination.

1. The problem.
   a) As public housing developments get demolished, and as the owners of Section 8 project-based developments exercise their right to opt-out of expiring contracts for Section 8 assistance (see below), the HCV Program is fast becoming the federal government’s primary vehicle for providing rental assistance to low-income tenants.
b) The HCV program only works, however, if tenants are able to find landlords in the private housing market who are willing to rent to them.

c) Many landlords do not want to rent to voucher-holders because of preconceived and inaccurate notions about the poor.

2. The solution.

a) Laws that prohibit discrimination against voucher-holders.

b) Both Chicago and Cook County prohibit discrimination against voucher-holders.

(1) Chicago.

(a) The Chicago Fair Housing Ordinance prohibits source of income discrimination. Chicago Municipal Code, Title 5, Chapter 8, § 030.

(b) In Godinez v. Sullivan-Lackey, 352 Ill. App. 3d 87, 91 (1st Dist. 2004), the court held that assistance under the HCV Program is a “source of income” within the meaning of the Fair Housing Ordinance.

(c) The Chicago Commission on Human Relations enforces the Chicago Fair Housing ordinance.

(2) Cook County.

(a) The Cook County Human Rights Ordinance has long prohibited “source of income” discrimination, but there used to be an exception which excluded voucher-holders from that protected class.

(b) That exception was eliminated effective August 8, 2013.

(c) The Cook County Commission on Human Rights enforces the Cook County Human Rights ordinance.

c) No federal preemption.

(1) “Nothing in [24 C.F.R. Part 982] is intended to pre-empt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder.” 24 C.F.R. § 982.53(d).

J. Approving the Unit.

1. 24 C.F.R. § 982.305.

2. The PHA must inspect the unit to ensure it complies with housing quality standards (HQS), which are set forth at 24 C.F.R. § 982.401.
3. The PHA must also confirm that the total rent for the unit is reasonable. The
procedure for making this determination is set forth at 24 C.F.R. § 982.507.

K. Security Deposits.

1. “The PHA may prohibit security deposits in excess of private market
practice, or in excess of amounts charged by the owner to unassisted tenants.” 24
C.F.R. § 982.313(b).

2. Many voucher-holders struggle to pay security deposits that are equal to a
full month’s market rent.

3. The owner may not withhold from the security deposit the amount of any
subsidy payments that the PHA abated because the subsidy is not considered rent.
Glenn v. Lucas, 2015 IL App (1st) 140530-U. Even though this unreported decision
may not be cited, it warrants review, and not just because LAF represented the
plaintiff-appellee.

L. Lease Agreement.

1. Must be in writing. 24 C.F.R. § 983.308(b)(1).

2. Must specify the utilities that are to be supplied by the owner, and what
utilities are to be supplied by the tenant. 24 C.F.R. § 983.308(d)(5).

3. Must include the HUD-prescribed tenancy addendum. 24 C.F.R. §
983.308(b)(2).

M. HUD Tenancy Addendum.

1. 24 C.F.R. § 982.308(f).

2. The addendum is Part C of the HAP Contract (discussed in more detail
below).

3. Addendum provisions:

a) PHA calculates the family’s share of the rent, which is called the
“rent to owner.”

b) The owner may neither charge nor accept from the family or any
other source more than the “rent to owner.”

(1) Illegal side-payments.

(a) Owners sometimes demand more than the “rent to owner.”

(b) Families sometimes accede to this demand because they are scared or
unaware of their rights.
(c) The owner must immediately return to the family any excess rent payment.

(2) Remedies.

(a) State court.

(i) The family has the right to enforce any addendum provisions against the owner. See below.

(ii) Accordingly, the family may raise by claim or defense the owner’s violation of the prohibition against demanding or collecting excess rent payments.

(b) Federal court – Qui Tam Action.

(i) The False Claims Act, 31 U.S.C. §§ 3729-3733 (FCA) provides for civil penalties against “[a]ny person” who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.”

(ii) “Although the Attorney General may sue under the FCA, so may a private person, known as a relator, in a qui tam action brought ‘in the name of the Government,’ but with the hope of sharing in any recovery.” Cook County, Illinois v. U.S. ex rel. Chandler, 538 U.S. 119, 122 (2003).

(iii) “The relator must inform the Department of Justice of her intentions and keep the pleadings under seal for 60 days while the Government decides whether to intervene and do its own litigating.” Id.

(iv) “If the claim succeeds, the defendant is liable to the Government for a civil penalty between $5,000 and $10,000 for each violation, treble damages (reducible to double damages for cooperative defendants), and costs.” Id.

(v) “The relator’s share of the ‘proceeds of the action or settlement’ may be up to 30 percent, depending on whether the Government intervened and, if so, how much the relator contributed to the prosecution of the claim. The relator may also get reasonable expenses, costs, and attorney’s fees.” Id. at 122-23.
The owner of a dwelling unit assisted under the HCV Program who accepts side-payments from the family may be liable for significant damages under the FCA. Coleman v. Hernandez, 490 F. Supp. 2d 278 (D. Conn. 2007) (owner liable for total of side payments plus a civil penalty of $5,500 for each of six violations); United States ex rel. Sutton v. Reynolds, 564 F. Supp. 2d 1183 (D. Or. 2007).

4. “The tenant shall have the right to enforce the tenancy addendum against the owner, and the terms of the tenancy addendum shall prevail over any other provisions of the lease.” 24 C.F.R. § 982.308(f)(2).

N. Housing Assistance Payments Contract.

1. 24 C.F.R. Part 982, Subpart J.

2. The PHA must execute this contract with the owner of the assisted unit no later than 60 days after the beginning of the lease term. 24 C.F.R. § 982.305(c).

3. This contract requires the PHA to send the owner monthly housing assistance payments (HAPs) equal to the difference between the total rent and the family’s contribution.

4. The HAP contract requires the owner to, among other things, maintain the assisted unit in compliance with HQS. 24 C.F.R. § 982.452(b)(2).

O. Abating HAPs.

1. If the owner violates any of its obligations under the HAP contract, including the obligation to maintain the unit in accordance with housing quality standards, the PHA may abate the subsidy payments or even terminate the HAP Contract. 24 C.F.R. § 982.453.

2. The family is not responsible for the abated HAPs.

a) “The family is not responsible for payment of the portion of the rent to owner covered by the housing assistance payment under the HAP contract between the owner and the PHA.” 24 C.F.R. §§ 982.310(b)(1) and 982.451(b)(iii).

b) “The PHA failure to pay the housing assistance payment to the owner is not a violation of the lease between the tenant and the owner. During the term of the lease the owner may not terminate the tenancy of the family for nonpayment of the PHA housing assistance payment.” 24 C.F.R. § 982.310(b)(2).

3. During the abatement process, the family remains responsible for its share of the rent.
4. “The HAP contract terminates automatically 180 calendar days after the last housing assistance payment to the owner.” 24 C.F.R. § 982.455.

   a) If the family remains in the unit after the HAP Contract is terminated, the owner may hold the family responsible for the total rent only after first serving the family with 30 days’ advance written notice of the increase in rent.

   (1) Renaissance Equity Holdings v. Bishop, 2011 WL 488721, *2 (Civil Court, King County 2011) (“It is well established that upon termination of the subsidy, a tenant will not be liable for the subsidy portion of the rent unless there is a new agreement in which the tenant agrees to pay the full rent.”).

   (2) Licht v. Moses, 813 N.Y.S.2d 849, 851 (N.Y. App. Term. 2006) (“In the absence of a new agreement, after the termination of the subsidy, in which the tenant agrees to pay the non-tenant share of the rent, a nonpayment proceeding will not lie to recover that portion of the rent, even in those instances in which the Section 8 subsidy has been properly terminated.”).

   (3) Livecchi v. Pyatt, 2003 WL 21246096, *7 (County Court, Monroe County 2003) (if PHA had terminated the HAP Contract, owner would have been legally entitled to increase tenant’s monthly rent payments, but only after first complying with state law by giving the tenant notice of the proposed rent increase “at least one month before the expiration of the term.”).

P. Payment Standards.

1. 24 C.F.R. § 982.503.

2. The payment standard is defined as “the maximum monthly assistance payment for a family assisted in the voucher program (before deducting the total tenant payment by the family).” 24 C.F.R. § 982.4.

3. The payment standard is based on fair market rents (FMRs) and unit size.

   a) HUD publishes FMRs for each market area in the United States.

   b) The PHA must adopt a payment standard schedule that establishes voucher payment standard amounts for each FMR area in the PHA jurisdiction.

   c) For each FMR area, the PHA must establish payment standard amounts for each “unit size.”

   d) Unit size is measured by the number of bedrooms.
4. The payment standard is set between 90 percent and 110 percent of the FMR for that unit size, though HUD may approve exceptions to this rule.

5. A family may reside in a dwelling unit with more bedrooms than its “family unit size.” 24 C.F.R. § 982.402(d). In that situation, however, the payment standard will still be based on the “family unit size.” 24 C.F.R. § 982.402(c). Accordingly, the family may end up paying more rent than it can really afford. See below.

Q. Rent.

1. When the total rent for the assisted unit is below the payment standard -- 24 C.F.R. §§ 5.628 and 982.515(b).
   
   a) **The family pays the highest of:**
   
   (1) 30% of monthly adjusted income;
   
   (2) 10% of monthly income;
   
   (3) The minimum rent.

2. When the total rent for the assisted unit is above the payment standard -- 24 C.F.R. §§ 5.628 and 982.515(b).

   a) **The family pays the amount by which the rent exceeds the payment standard plus the highest of:**
   
   (1) 30% of monthly adjusted income;
   
   (2) 10% of monthly income;
   
   (3) The minimum rent.

   b) **A family that resides in a unit with more bedrooms than its “family unit size” will pay more (perhaps significantly more) than 30% of its adjusted gross income for rent.**

3. As in the public housing program (see above), the procedures for calculating a family’s “adjusted income,” “annual income,” and “deductions” are set forth in 24 C.F.R. §§ 5.609 and 5.611.


   a) **During the initial lease term at an assisted unit, the family’s contribution may not exceed 40% of the family’s adjusted monthly income.**

   b) **After the initial lease term at the same assisted unit, all bets are off.**

5. Minimum rent.
a) *The regulations governing minimum rents in the public housing program (see 24 C.F.R. § 5.630) apply to the HCV Program.*

R. Regular and Interim Re-Examinations.

1. 24 C.F.R. § 982.516.

2. The PHA must reexamine the family’s household income and composition at least annually.

3. In between regular reexaminations, the family may request an interim determination or composition, and the PHA “must make the interim determination within a reasonable time after the family request.” 24 C.F.R. § 982.516(b)(2).

4. “At the effective date of a regular or interim reexamination, the PHA must make appropriate adjustments in the housing assistance payment.” 24 C.F.R. § 982.516(d)(2).

S. Family Obligations.

1. 24 C.F.R. § 982.551.

2. The family must supply the PHA with information necessary to establish that they are eligible for continued assistance under the HCV Program.

3. The family is responsible for an HQS breach caused by the family as described in 24 C.F.R. §982.404(b), which provides as follows:

   a) *The family is responsible for an HQS breach if:*

      (1) The family fails to pay for any utilities that the owner is not required to pay for, but which are to be paid by the tenant;

      (2) The family fails to provide and maintain any appliances that the owner is not required to provide, but which are to be provided by the tenant; or

      (3) Any member of the household or guest damages the dwelling unit or premises (damages beyond ordinary wear and tear).

   b) *If the family has caused a breach of the HQS, the PHA must take prompt and vigorous action to enforce the family obligations. The PHA may terminate assistance for the family in accordance with §982.552.*

4. The family must allow the PHA to inspect the unit at reasonable times and after reasonable notice.

5. The family may not commit any serious or repeated violation of the lease.
6. The family must notify the PHA and the owner before the family moves out of the unit.

7. The family must promptly give the PHA a copy of any owner eviction notice. See also 24 C.F.R. § 982.314(d)(1).

8. The assisted unit must be the family’s only residence.

9. The family must promptly inform the PHA of the birth, adoption or court-awarded custody of a child.
   
   a) The family must request PHA approval to add any other family member as an occupant of the unit.
   
   b) No other person may reside in the unit (except for a foster child or live-in aide who has been approved by the PHA).

10. The family must promptly notify the PHA if any family member vacates the assisted unit. See Rodriguez v. Chicago Housing Authority, 2015 IL App (1st) 142458 (2015) (finding that recipient violated her obligation to promptly notify CHA that her son had vacated the premises by failing to inform CHA about his absence until 3½ months after he moved out, and remanding case back to CHA for a hearing as to the appropriate sanction).

11. The family must promptly notify the PHA of its absence from the unit.

12. The family must not commit fraud, bribery or any other corrupt or criminal act in connection with the programs.

13. No family member may engage in drug-related criminal activity or violent criminal activity or other criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises.

14. The family must not abuse alcohol in a way that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises.

15. The family may not receive any other housing subsidy.

T. Lease Termination (by the Owner).

1. 24 C.F.R. § 982.310.

2. Grounds.
   
   a) At the end of the initial or any successive definite term.
   
   (1) The owner may refuse to renew the lease without good cause.
(a) Prior to 1996, an owner could not refuse to renew the family's lease without good cause.

(b) In 1996, however, Congress repealed the “endless lease” provision by eliminating the “good cause” requirement for nonrenewal, though it retained the requirement for termination of a tenancy during the term of the lease (see below). Pub. L. No. 104-134, § 203(c)(2), 110 Stat. 1321, 1321–281 (1996).


(2) If the owner decides not to renew the lease, the family may request “moving papers” so it can relocate to another assisted unit.

b) During the lease term.

(1) The owner may terminate the lease only for:

(a) A serious violation (including but not limited to failure to pay rent or other amounts due under the lease) or repeated violations of the terms and conditions of the lease;

(b) Violation of federal, State, or local law that imposes obligations on the tenant in connection with the occupancy or use of the premises or

(c) Other good cause, which includes:

(i) The family's failure or refusal to accept the offer of a new lease or revision;

(ii) A family history of disturbing neighbors or destroying property, or of living or housekeeping habits that damage the assisted unit;

(iii) The owner’s desire to use the unit for personal or family use, or for a purpose other than as a residential rental unit; or

(iv) A business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental).

c) The PHA’s failure to issue housing assistance payments to the owner does not constitute good cause for terminating the family’s tenancy.

(1) The family is not responsible for the housing assistance payments. 24 C.F.R. § 982.310(b)(1).

(2) The PHA’s failure to pay the housing assistance payment to the owner is not a violation of the lease between the tenant and the owner. 24 C.F.R. § 982.310(b)(2).
(3) During the term of the lease the owner may not terminate the tenancy of the family for nonpayment of the PHA housing assistance payment. \textit{Id.}

d) \textit{Termination notice.}

(1) When the owner is terminating the tenancy for cause, the owner must give the tenant a written notice that specifies the grounds for termination. 24 C.F.R. § 982.310(e)(1)(i).

(2) The owner must give the PHA a copy of any termination notice. 24 C.F.R. § 982.310(e)(2)(ii).

(3) Remember that the family is also responsible for giving the PHA a copy of this notice. \textit{See} 24 C.F.R. §§ 982.314(d)(1) and 551(g).

e) \textit{Issuing HAPs during and after eviction action—}24 C.F.R. § 982.311(b).

(1) If the owner has commenced the process to evict the tenant, and if the family continues to reside in the unit, the PHA must continue to send the owner the housing assistance payments until the owner has obtained a judgment for possession of the assisted unit.

(2) The PHA \textit{may} continue such payments until the family moves from or is evicted from the unit.

U. \textbf{Moving with Continued Assistance.}

1. 24 C.F.R. § 982.314.

2. A family may request moving papers and relocate a new assisted unit when:

   a) \textit{The PHA has terminated the HAP contract for the owner's breach.}

   b) \textit{The owner and the family have mutually agreed to terminate the lease.}

   c) \textit{The owner has given the tenant a notice to vacate, or has commenced an action to evict the tenant, or has obtained a court judgment or other process allowing the owner to evict the tenant.}

(1) If the owner is evicting the tenant for cause, however, the PHA will likely deny permission to move. 24 C.F.R. §§ 982.314(e)(2) and 982.552.
If the family is evicted from an assisted for a serious violation of the lease agreement, the PHA must terminate the family's assistance under the program. 24 C.F.R. § 982.552(b)(2). (This regulatory provision is discussed in more detail below in the section on terminating a family’s assistance under the HCV Program.)

d) The tenant has notified the PHA and the owner of the family’s intent to terminate the lease.

1. The family may terminate the tenancy without good cause at the end of the initial or any successive definite term.

2. During the lease term, the family may terminate the tenancy only if:

   a) The assisted unit no longer complies with HQS; or

   b) A family member is or has been the victim of domestic violence, dating violence, or stalking, and the move is needed to protect the health or safety of the family. In such circumstances, the family may move without first notifying the PHA.

V. Portability.

1. A family has the right to receive assistance outside the initial PHA jurisdiction, anywhere in the United States, in the jurisdiction of another PHA that administers the HCV program. 24 C.F.R. § 982.353.

2. The portability procedures are set forth at 24 C.F.R. § 982.355.

W. Family Break-Up.

1. 24 C.F.R. § 982.315.

2. If the family break-up results from an occurrence of domestic violence, dating violence, or stalking, the PHA must ensure that the victim retains assistance.

3. The PHA is bound by any determination that a court makes in a divorce proceeding regarding the disposition of property.

4. Otherwise, the PHA retains discretion to determine which members of an assisted family continue to receive assistance.

   a) The PHA administrative plan sets forth the PHA policy in this area.

   b) The PHA should consider the interest of minor children or of ill, elderly, or disabled family members.
XXVII. HCV—TERMINATING THE FAMILY’S ASSISTANCE.

A. Mandatory Terminations.

1. “The PHA must terminate program assistance for a family evicted from housing assisted under the program for serious violation of the lease.” 24 C.F.R. § 982.552(b)(2).
   
   a) Because of this regulatory provision, it is important to carefully consider any case involving a voucher-holder who is facing eviction from an assisted unit for cause.
   
   b) The tenant need not be physically evicted from the premises to be subject to a mandatory termination of assistance.

2. “The PHA must immediately terminate assistance for a family under the program if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.” 24 C.F.R. § 982.553(b)(1)(ii).

3. “The PHA must . . . terminate program assistance for a participant, if any member of the family fails to sign and submit consent forms for obtaining information in accordance with [24 C.F.R. Part 5, subparts B and F].” 24 C.F.R. § 982.552(b)(3).


5. “The PHA must . . . terminate assistance if any family member fails to meet the eligibility requirements concerning individuals enrolled at an institution of higher education as specified in 24 C.F.R §5.612.” 24 C.F.R. § 982.552(b)(5).

B. Permissive Terminations.

1. 24 C.F.R. §§ 982.552(c) and 982.553(b).

2. If the family violates any of its obligations under the HCV Program.

3. If any member of the family has been evicted from federally assisted housing in the last five years;

4. If a PHA has ever terminated assistance under the program for any member of the family.
5. If any member of the family has committed fraud, bribery, or any other corrupt or criminal act in connection with any Federal housing program.

6. If the family currently owes rent or other amounts to the PHA or to another PHA in connection with Section 8 or public housing assistance.

7. If the family has not reimbursed the PHA for amounts paid to an owner under a HAP contract for rent, damages to the unit, or other amounts owed by the family under the lease.

8. If the family violates the terms of a repayment agreement with the PHA.

9. If a family participating in the FSS program fails to comply, without good cause, with the family's FSS contract of participation.

10. If the family has engaged in or threatened abusive or violent behavior toward PHA personnel.

11. If a welfare-to-work family fails, willfully and persistently, to fulfill its obligations under the welfare-to-work voucher program.

12. If the family has been engaged in:
   a) Drug-related criminal activity.
   b) Violent criminal activity.
   c) Alcohol abuse that poses a threat to other residents' health, safety, or right to quiet enjoyment of the premises.

C. Consideration of Circumstances.

1. When the PHA is authorized but not required to terminate assistance, “[t]he PHA may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.” 24 C.F.R. § 982.552(c)(2)(i).

2. PHA may bar the offender and let the innocent family members continue to participate in the HCV Program. 24 C.F.R. § 982.552(c)(2)(ii).

3. In cases involving alcohol abuse or illegal drug use, PHA may consider evidence of rehabilitation. 24 C.F.R. § 982.552(c)(2)(iii).

4. In cases involving a person with disabilities, the PHA decision is “subject to consideration of reasonable accommodation.” 24 C.F.R. § 982.552(c)(2)(iv).

D. Advance Written Notice of Termination Required
1. 24 C.F.R. § 982.555(c)(2).

2. The notice must:
   a) State the grounds for termination;
   b) Inform the family of its right to request an informal hearing; and
   c) Set forth the deadline for making this request.

3. Sufficiency of notice.
   a) Provide enough information to enable a defense.
      (1) The purpose of the written notice is “to inform the tenant of the allegations so that he can prepare a defense.” Driver v. Housing Auth. of Racine County, 289 Wis. 2d 727, 739 (Wis. App. 2006).
      (2) “Thus, notice should be ‘sufficiently specific . . . to enable [the] applicant to prepare rebuttal evidence to introduce at his hearing appearance.’” Edgecomb v. Housing Auth. of Vernon, 824 F. Supp. 312, 314-15 (D. Conn. 1993) (notice alleging only that family violated the prohibition against engaging in drug-related criminal activity or violent criminal activity, including criminal activity by any family member, was insufficient).
      (3) “A notice that does not indicate the nature of the proscribed acts or when the acts were committed is insufficient.” Jones v. Lansing Housing Comm’n, 2003 WL 26118817, at *6 (W.D. Mich. 2003).
   b) The notice may not merely cite the regulations that were allegedly violated.
      (1) “[A] notice that merely parrots the broad language of applicable regulations is insufficient.” McCall v. Montgomery Housing Auth., 809 F. Supp. 2d 1314, 1325 (M.D. Ala. 2011) (notice that set forth language from the regulation the tenant allegedly violated without explaining how the tenant violated this regulation was insufficient).
   c) Can the PHA cure an impossibly vague notice?
      (1) Probably not.
      (a) Courts have determined that recognizing an “actual notice” exception to the regulatory requirement of written prehearing notices would invite PHAs to avoid fully complying with federal regulations if they believed a recipient already knew the alleged basis for his or her termination from the program. See Driver, 289 Wis. 2d at 743-46; Pratt v. Housing Authority for City of Camden, 20063 WL 2792784, at ** 9-10 (D.N.J. Sept. 27, 2006).
(2) On the other hand.

(a) When a notice is impermissibly vague on its face, the PHA may be able to cure this deficiency by attaching to the notice documents that provide the necessary information, or by letting the tenant attend a pre-hearing conference where she can discuss the reasons for termination and provide any information she wants the PHA to consider. Nalubega v. Cambridge Housing Auth., 2013 WL 5507038 at *18 (citing Goldberg for the principle that “a system which conveys notice by a combination of a written letter and an oral conference ‘to inform a recipient about the precise questions raised about his continued eligibility ... is probably the most effective method of communicating with recipients.’”).

E. Challenging Proposed Terminations of Assistance.

1. Request an informal hearing.

   a) Submit the request before the deadline set forth in the termination notice.

   b) If the family submits a timely request, the PHA may not terminate the family’s assistance unless and until it issues a written decision upholding the initial decision to terminate. 24 C.F.R. § 982.555(a)(2).

2. Discovery.

   a) By the family.

      (1) “The family must be given the opportunity to examine before the PHA hearing any PHA documents that are directly relevant to the hearing. . . . If the PHA does not make the document available for examination on request of the family, the PHA may not rely on the document at the hearing.” 24 C.F.R. § 982.555(e)(2)(i).

   b) By the PHA.

      (1) “The PHA hearing procedures may provide that the PHA must be given the opportunity to examine at PHA offices before the PHA hearing any family documents that are directly relevant to the hearing. . . . If the family does not make the document available for examination on request of the PHA, the family may not rely on the document at the hearing.” 24 C.F.R. § 982.555(e)(2)(ii).

3. Representation.

   a) The family may be represented by a lawyer or other representative, so law students can represent tenants at these hearings. 24 C.F.R. 982.555(e)(3).

4. Evidence.
a) “Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.” 24 C.F.R. § 982.555(e)(5).

b) The evidence must, however, have some indicia of reliability. Kurdi v. DuPage County Housing Authority, 161 Ill. App. 3d 988, 993 (2d Dist. 1987) (setting forth six-part test for measuring reliability of hearsay evidence).

F. Informal Hearing Decisions.

1. 24 C.F.R. § 982.555(e)(6).

2. The person who conducts the hearing must issue a written decision, stating briefly the reasons for the decision.

3. Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing.

4. A copy of the hearing decision shall be furnished promptly to the family.

G. Challenging the Termination of an Applicant’s Right to Participate in the Program for Failing to “Lease Up” Before the Voucher Expires.

1. If an applicant is found eligible for and receives a voucher but fails to find a suitable unit before the voucher term expires, the applicant loses his or her right to participate in the HCV program and is not afforded the right to request an informal review or hearing.

2. Can an applicant challenge the PHA’s refusal to extend the voucher term?

3. What if the applicant has lost her opportunity for rental assistance through no fault of her own? See Luvert v. Chicago Housing Authority, 2015 WL 6856980, *3 (N.D. Ill. 2015) (the applicant, who had been on the waiting list for nine years before getting a voucher, was diligent in looking for a suitable unit, but one unit failed an HQS inspection and the owner of another unit backed out at the last minute).

4. The due process argument.

   a) In Luvert, the court held that an applicant for assistance has no protected property interest in the potential for participation in the HCV program.

   b) Accordingly, the PHA did not violate due process when it denied her request for an extension of the voucher term without notice and an opportunity to be heard.

   c) The court acknowledged the harshness of this outcome.
“For all its humanly compelling elements, . . . the problem with Luvert's lawsuit is that housing assistance is not distributed on the basis of individual worth and so can be withheld on bases unrelated to individual culpability.” *Luvert, 2015 WL 6856980,* *3.*

Citing *Eidson v. Pierce*, 745 F.2d 453, 457 (7th Cir. 1984), the court stated that , “[a]t the heart of this case is the fact that there are not enough Section 8 housing units to accommodate all who are eligible and willing to take them. This case thus involves the processes used to allocate these limited and valuable benefits among a large number of eligible applicants. At issue are the rights not only of those plaintiffs who were denied Section 8 benefits but also of those who received those benefits in the plaintiffs' stead.” *Id.*

“Administering such a system,” said the court, “is bound to necessitate some harsh choices, a need that in turn gives to some unfeeling policies. No doubt CHA’s use-it-or-lose-it approach to the Voucher Program is one such policy. It operates on the implicit premise that the next family called from the waiting list will be more successful in locating an acceptable unit, with a corollary presumption that the disappointed family could have been more diligent in its search. It gives families only one opportunity to rebut the latter presumption—in their request for an extension. But a case manager's decision not to grant that extension is not subject to even an internal review, let alone an impartial reexamination.” *Id.*

5. **The fair housing argument.**

*a* PHAs have a duty under the Fair Housing Act to affirmatively further fair housing.

*b* It takes time to find housing in what are called “opportunity areas” – neighborhoods that have superior schools and access to good jobs and transportation.

*c* A PHA’s refusal to extend voucher terms, therefore, can make it very difficult for applicants to find housing outside of racially-segregated, economically depressed areas.

*d* Might this constitute a violation of the FHA?

6. **Reasonable accommodations.**

*a* If an applicant’s inability to find a suitable unit before the voucher term expires is directly related to the applicant’s disability, the applicant can request an extension as a reasonable accommodation. *(Reasonable accommodation requests are discussed in much more detail below in Section XXXIV.)*
b) The PHA must extend the voucher’s term if necessary to make the HCV Program accessible to a family with a disability—24 C.F.R. § 982.303(b)(2).

c) The request for a reasonable accommodation should be submitted before the voucher term expires.
XXVIII. HCV—CONTESTING TERMINATIONS PROCEDURALLY.

A. Section 1983.

1. Overview.


2. Using § 1983 to enforce Constitutional rights.

   a) Voucher-holders may allege a violation of the Fourteenth Amendment when their rental assistance is terminated without due process of law.

      (1) “In procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.” Zinermon v. Burch, 494 U.S. 113, 126 (1990) (emphasis in original).

      (2) “Before a PHA may terminate a participant from a Section 8 program, the participant is entitled to the constitutionally mandated minimum amount of procedural due process.” Rayburn v. City of Phoenix Housing Dept., 2008 WL 8871872, *4 (D. Ariz. 2008).

   b) “A procedural due process violation actionable under § 1983 occurs when: (1) the offending conduct was committed by someone who acted under the color of state law; (2) the actions deprive the plaintiff of a constitutionally protected property interest; and (3) the alleged deprivation occurred without due process of law.” Guerrero v. City of Kenosha Housing Auth., 2012 WL 139390 (E.D. Wis. January 18, 2012) (recognizing § 1983 claim alleging that the PHA terminated plaintiff’s assistance under the HCV Program without due process of law).

   (1) Establishing state action.

      (a) Brezina v. Dowdell, 472 F. Supp. 82, 85 (N.D. Ill. 1979) (denying PHA’s motion to dismiss §1983 claim alleging that PHA terminated, without due process, plaintiff’s assistance under what is now the HCV Program).
(b) Ferguson v. Metro. Dev. & Housing Agency, 485 F. Supp. 517, 521 (M.D. Tenn. 1980) (PHA’s conduct of terminating a tenants’ assistance under what is now the HCV Program without pre-termination hearings “constitutes state action within the meaning of the Fourteenth Amendment”).

(2) Establishing a constitutionally protected property interest.

(a) In Simmons v. Drew, 716 F.2d 1160, 1162 (7th Cir. 1983), the Seventh Circuit analogized assistance under what is now the HCV Program to job tenure, noting that both are property interests that the government may not terminate without due process.

(b) Brezina, 472 F. Supp. at 85 (N.D. Ill. 1979) (“Benefits like those provided under the [United States Housing Act of 1937] are a matter of statutory entitlement for persons qualified to receive them, and those persons must receive due process before the benefits are terminated.”).

(3) Establishing a violation of due process.

(a) In Matthews v. Eldridge, 424 U.S. 319, 335 (1976), the United States Supreme Court identified the factors to be considered in determining what process is due where a protected property interest is in jeopardy:

(i) “the private interest that will be affected by the official action;”

(ii) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and

(iii) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

(b) “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” 146 at 333.

(c) In Simmons, 716 F.2d at 1164, the Seventh Circuit recognized the validity of § 1983 claim that PHA violated plaintiff’s constitutional right to due process by terminating her assistance without a hearing.

(d) In Basco, 514 F.3d at 1184, the plaintiff prevailed on a § 1983 claim alleging that PHA violated her constitutional right to due process by relying at administrative bearing on legally insufficient evidence to terminate her assistance under the HCV Program.
In Rayburn, the court found that the PHA violated a mentally and physically disabled voucher-holder’s rights under the Fourteenth Amendment by failing to send her known legal representative a copy of the hearing notice. 2008 WL 8871872 at *5 (“While Defendant is not obligated to go out of its way to locate a participant before terminating her voucher, it may not affirmatively conduct itself in a manner that makes process inaccessible.”).


a) Overview.

(1) A plaintiff seeking to use § 1983 to enforce his or her rights under a federal statute “must assert the violation of a federal right, not merely a violation of federal law.” Blessing v. Freestone, 520 U.S. 329, 340 (1997) (emphasis in original).

(2) The Supreme Court has established a three-part test to determine whether a statute gives rise to a federal right:

(a) Congress must have intended that the provision in question benefit the plaintiff;

(b) The plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence; and

(c) The statute must unambiguously impose a binding obligation on the states. Id. at 340-41.

(3) In Gonzaga University v. Doe, 536 U.S. 273, 286 (2002), the Court clarified Blessing by stating that the key inquiry is whether Congress unambiguously created a private cause of action in the statute. (“where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit . . . .”).

b) Applying Blessing and Gonzaga to the United States Housing Act.

(1) In Stubenfield v. Chicago Housing Authority, 2013 WL 6182913 (N.D. Ill. November 16, 2013), the United States District Court for the Northern District of Illinois found that Section 1437d(l)(2) of the United States Housing Act – which states that PHAs must utilize leases that do not contain unreasonable terms and conditions – provides plaintiffs with a private right of action enforceable through § 1983).

(2) Stubenfield involved a statute governing the public housing program as opposed to the HCV Program, but the court’s analysis is instructive for Illinois advocates who are trying to use § 1983 to enforce rights under the federal statutes that govern the HCV Program.
Relying to a large extent on *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012) – which was, in turn, informed by the Supreme Court’s decisions in *Blessing* and *Gonzaga* – the court found that 42 U.S.C. § 1437d(l)(2):

(a) benefits a specific group of individuals;

(b) is phrased in “mandatory rather than precatory terms;” and

(c) provides tenants of public housing important substantive and procedural rights by mandating that housing authorities contract with them in a particular way.

The court concluded that Section 1437d(l)(2) gave plaintiffs the right to a lease free from unreasonable terms and conditions. Accordingly, the court held, their suit challenging a lease provision that authorized a mandatory drug-testing policy alleged an infringement of a federal right actionable under § 1983.

c) Specific decisions addressing § 1983 claims to enforce rights under HCV statutes.

(1) Favorable.


(b) *Loving v. Brainerd Housing & Redev. Auth.*, 2009 WL 284289, *8* (D. Minn. February 5, 2009) (denying PHA’s motion to dismiss § 1983 claim alleging that PHA violated federal statute and implementing regulations governing HCV Program by relying on evidence acquired from unnamed HUD officials after the hearing, by making factual determinations contrary to the preponderance of the evidence, and by relying on documents that were not provided to tenant in advance of the hearing).

(2) Unfavorable.

(a) Unfortunately, two of the worst decisions come from the Northern District of Illinois.

(a)   *Keith* is a very poorly-reasoned decision, in which the court also held that the only way to ever challenge a PHA decision to terminate assistance under the HCV Program is by filing a petition for certiorari in state court. *Id.* See below.

(ii)   *In Thomas v. Butzen*, 2005 WL 2387676, *11 (N.D. Ill. 2005)*, the court held that 42 U.S.C. § 1437f(o) — which governs the HCV Program — “does not create a private right of action or contain any indication that Congress intended it to confer enforceable rights on plaintiffs.”

(a)   The plaintiff in *Butzen* was pro-se, and it does not appear that the court carefully considered the arguments in favor of finding that the federal statute provides voucher-holders with a private right of action enforceable through § 1983.

4.   Timing.

   a)   “Section 1983 claims arising in Illinois are governed by a two-year statute of limitations.” *Kelly v. City of Chicago*, 4 F.3d 509, 511 (7th Cir. 1993).

   b)   “Section 1983 claims ‘accrue when the plaintiff knows or should know that his or her constitutional rights have been violated.’” *Id.* (citation omitted).

5.   File in federal or state court.

6.   Prevailing plaintiff may collect attorneys’ fees.

B.   Petitions for Certiorari.

1.   Purpose.

   a)   “The purpose of *certiorari* review is to have the entire record of the inferior tribunal brought before the court to determine, from the record alone, whether the tribunal proceeded according to applicable law.” *Reichert v. Court of Claims*, 203 Ill. 2d 257, 260 (2003).

   b)   Accordingly, a petition should be filed only when there is a record to review (i.e., when the PHA held a hearing).

      (1)   If the family wants to challenge the termination of its assistance and no hearing was held — either because the family was not afforded the right to a hearing or because the family failed to request a hearing in a timely manner — the family must file either a Section 1983 action or a complaint for declaratory relief (see below).
2. File in state court.

3. Why not an Administrative Review Action?
   
   a) Illinois PHAs operate under the Housing Authorities Act, 310 ILCS 10/1 et seq.
   
   b) The Housing Authorities Act does not adopt the Administrative Review Law (735 ILCS 5/3–101 et seq. (West 2012), and provides no other method of judicial review of a PHA’s final administrative decision.
   
   c) Accordingly, the proper vehicle to seek a judicial review of a PHA’s final administrative decision is by means of a common law writ of certiorari. See Rodriguez v. Chicago Housing Authority, 2015 IL App (1st) 142458, ¶ 12 (2015); Carroll v. Chicago Housing Authority, 2015 IL App (1st) 133544, ¶ 19 (2015).

   
   a) “The circuit court possesses no greater authority to review the actions of an administrative agency by means of a writ of certiorari than it possesses when its review is governed by the Administrative Review Law.” Rodriguez, at ¶ 13.
   
   b) The standards of review in either instance are essentially the same. Id.; Carroll, at ¶ 19.
   
   c) Courts, therefore, treat petitions for certiorari like any other appeal from a decision of the circuit court in an administrative review action, and review the decision of the administrative agency, not the decision of the circuit court. Id.

5. Timing.
   
   a) “[S]ix months has been established as the limitation period during which the writ of certiorari must be filed, unless a reasonable excuse is shown for the delay.” Connolly v. Upham, 340 Ill. App. 387, 391 (1st Dist. 1950).
   
   b) The passage of the six-month deadline does not by itself bar relief.

   (1) A PHA arguing that laches precludes a family from proceeding on a petition that was filed after the six-month deadline must show that it was materially prejudiced by the delay. Cf. Richter v. Collinsville Township, 97 Ill. App. 3d 801, 804 (5th Dist. 1981) (passage of time by itself does not bar relief in form of mandamus and, if defendant does not establish that he has been materially prejudiced by delay, plaintiff is not guilty of laches).

6. Is a petition for certiorari the sole remedy?
a) In Kelley, 2011 WL 1467188 at *2, the court stated that there is just one way to challenge a PHA’s final administrative decision to terminate assistance under the HCV Program: The family must, within six months after the date of the decision, file a petition for certiorari in state court.

b) Kelley is subject to challenge.

(1) In Chesir v. Housing Auth. of Milwaukee, 801 F. Supp. 244, 248 (E.D. Wis. 1992), the PHA argued that the plaintiffs could not maintain their § 1983 action because they had “not exhausted their state common law certiorari remedies.”


C. Seeking Injunctive Relief.

1. Purpose.

a) An injunction is necessary to keep the rental assistance flowing pending the resolution of the judicial challenge. If the injunction is not issued, the owner of the assisted unit will seek the total rent from the tenant. The tenant, who cannot afford market rent, will then be evicted for nonpayment.

2. Federal standard.

a) “To win a preliminary injunction, the moving party must demonstrate that (1) it has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied; and (2) there is some likelihood of success on the merits of the claim. If the moving party meets this threshold burden, the court weighs the competing harms to the parties if an injunction is granted or denied and also considers the public interest.” Korte v. Sebelius, 735 F.3d 654, 665 (7th. Cir. 2013).

(1) No adequate remedy at law.

(a) The tenant faces eviction from the only decent housing she can afford, and thus homelessness.

(b) Monetary damages cannot compensate the tenant for this injury.

(2) Irreparable harm.

(b) Jones v. Lansing Housing Commission, 2003 WL 26118817, *8 (W.D. Mich. 2003) (quadriplegic with history of brain trauma would suffer irreparable harm if her rental assistance under the HCV program was not immediately restored).

(c) Basham v. Freda, 805 F. Supp. 930, 932 (M.D. Fla. 1992) (denial of motion could render tenants homeless, and defendants’ contention that tenants could just move in with their grandmother was “misplaced”).

(3) Some likelihood of success on the merits. (This demands a case-specific analysis.)

(4) Balance of harms.

(a) “It would be difficult to argue that the modest amount of money and administrative inconvenience a preliminary injunction would cost the [PHA] outweighs the injury [the tenant] would suffer if she were compelled to remain homeless.” Jackson, 971 F. Supp. at 565.

(b) The Jackson court also noted that granting an injunction in these cases does not harm the public interest. “In light of its worthy purpose, it seems entirely reasonable to construe the program liberally in favor of those whom it seeks to serve. Surely the public interest would not be disserved by granting an injunction which would restore a roof over the heads of a family whose greatest transgression was a failed attempt to move to another county.” Id.

(5) Public interest.

(a) In Basham, the court noted the public interest in the proper administration of what is now the HCV Program. 805 F. Supp. at 932.

(b) “This Court finds that there is a great public interest in guaranteeing that those in financial need are not unreasonably terminated from public assistance benefits. However, the Court recognizes that Defendants also have an obligation to the public at large to maintain the proper administration of the Program. Consequently, in addition to the public interest in the reasonable termination of public assistance benefits, there is a great public interest in providing Section 8 housing benefits to other needy individuals who desire it and would use it in a lawful manner, if Plaintiffs were properly terminated from the Program.”

(c) Nevertheless, said the court, “[i]t is not sufficient to find that this factor weighs in favor of Defendants.”

   a) “A party requesting a preliminary injunction must demonstrate: (1) a clearly ascertained right in need of protection; (2) irreparable harm in the absence of an injunction; (3) no adequate remedy at law for the injury; and (4) the likelihood of success on the merits.” People ex rel. Klaeren v. Village of Lisle, 202 Ill. 2d 164, 177 (2002).

   (1) Clearly ascertained right in need of protection.

      (a) In a case involving the Section 8 Certificate Program, which became the HCV Program, the Seventh Circuit Court of Appeals stated, “it is plain that just as job tenure is a species of property protected by the Fourteenth Amendment, so too is ‘program tenure,’ the right of certificate holders to participate in a rent assistance program by seeking out persons willing and able to rent them housing pursuant to the rules of the program.” Simmons, 716 F.2d at 1162.

      (b) Brezina v. Dowdall, 472 F. Supp. 82, 85 (N.D. Ill. 1979) (“Benefits like those provided under the [United States Housing Act of 1937] are a matter of statutory entitlement for persons qualified to receive them, and those persons must receive due process before the benefits are terminated.”).

   (2) Irreparable harm. (See above.)

   (3) No adequate remedy at law. (See above.)

   (4) Likelihood of success on the merits. (As stated above, this calls for a case-specific analysis.)

D. Consolidating Judicial Challenges with Forcible Actions.

1. If the state court denies the petition for injunctive relief and the owner moves to evict the family for nonpayment of the subsidy payments, move to consolidate the forcible action with the case challenging the PHA’s final administrative decision to terminate assistance.

2. Consolidation is governed by section 2-1006 of the Code of Civil Procedure, which states: “An action may be severed, and actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right.” 735 ILCS 5/2-1006.
3. “Consolidation is proper when the cases 'are [of] the same nature, arise from the same act or event, involve the same or like issues, and depend largely upon the same evidence.' A court has discretion in choosing whether to consolidate.” LaSalle National Bank v. Helry Corp., 136 Ill. App. 3d 897, 905 (1st Dist. 1985) (citations omitted); see also Clore v. Fredman, 59 Ill. 2d 20, 28 (1974) (ordering that, on remand, tenants’ suit for injunctive relief against landlord and Environmental Protection Agency be consolidated with landlord's forcible action against tenants because the cases contained “common questions of law and fact, which could have and should have been readily determined at the same time.”).

4. Procedure for consolidating cases.
   
   a) **Cook County Circuit Court General Order 3.1,1.6—Consolidation of Cases.**
      
      (1) A motion to consolidate cases pending in the Chancery Division shall be heard by the Presiding Judge of the Division.
      
      (2) Consolidated cases shall be assigned to the calendar to which the case with the lowest docket number was assigned.
      
      (3) A motion to consolidate a case pending in the Chancery Division with a case pending in any other Division or District of the Circuit Court of Cook County shall be heard pursuant to General Order 12 of the Circuit Court of Cook County.

   b) **Cook County Circuit Court General Order 12.1—Any Action in County Department.**
      
      (1) The Assignment Judge of the Law Division, County Department, hears motions for the consolidation of actions pending in:
      
      (a) Different Departments of the Court;
      
      (b) Different Divisions of the County Department; and
      
      (c) The Law Division.
XXIX. HCV—CONTESTING TERMINATIONS SUBSTANTIVELY.

A. Fraud vs. Mistake.

1. 24 C.F.R. §982.551(b) provides that the family must:

   a) Supply any information that the PHA or HUD determines is necessary in the administration of the program, including submission of required evidence of citizenship or eligible immigration status.

   b) Supply any information requested by the PHA or HUD for use in a regularly scheduled reexamination or interim reexamination of family income and composition.

   c) Disclose and verify social security numbers, and must sign and submit consent forms for obtaining information.

2. “Any information supplied by the family must be true and complete.” 24 C.F.R. § 982.551(d).

3. The PHA may terminate a family’s assistance for failing to provide accurate information. 24 C.F.R. § 982.552(c)(1)(i).

4. The PHA must, however, determine whether the failure constituted fraud or a mistake. Only fraud warrants the termination of assistance. See Lipscomb v. Housing Authority of the County of Cook, 2015 IL App (1st) 142793, ¶¶ 29-33 (remanding matter to HACC to consider, inter alia, whether recipient’s failure to timely report her children’s absence from assisted unit was a mistake or an intentional act designed to deceive HACC so she could receive benefits to which she was not entitled).

   a) This mandate is set forth in the Housing Choice Voucher Program Guidebook, Chapter 22.2.

   (1) “It is important that PHA staff recognize the differences between unintentional and intentional misreporting.

   (2) “Particularly in cases of intentional misreporting, PHA staff must be able to evaluate the special circumstances and seriousness of the case to determine whether it is a case of fraud. PHAs must also establish policies and procedures for fair and consistent treatment of cases of intentional misreporting, abuse, and fraud.”

   (3) “A policy that clearly defines circumstances under which a family or owner would be terminated from the program, but also allows the PHA to consider mitigating circumstances before terminating, is best.”

The Guidebook “sets up an enforcement duality under which fraud and intentional abuse of the voucher program by tenants is dealt with harshly through immediate termination of the tenant's participation in the voucher program. On the other hand, tenants who make unintentional mistakes are given a reasonable period of time to repay amounts by which they were overpaid, while continuing to participate in the voucher program. The distinction implies the need for an inquiry and determination regarding the causes of the tenant's particular failure.”

The McClarty court then clarified that, “[f]raud . . . exists when a person makes a knowing, material representation with the intent of inducing reliance by another, and that the other person relied upon that misrepresentation to his or her detriment.” 963 N.E.2d at 186.

B. Decision Based on Hearsay Evidence that has No Indicia of Reliability.

1. Hearsay may be admissible.

   a) “Although the rules of evidence are not strictly applied in administrative hearings, there are due process limits on the extent to which an adverse administrative determination may be based on hearsay evidence.” Basco v. Machin, 514 F.3d 1177, 1182 (11th Cir. 2008).

   b) Accordingly, “hearsay may constitute substantial evidence in administrative proceedings as long as factors that assure the ‘underlying reliability and probative value’ of the evidence are present.” Id.

2. It must have some indicia of reliability.

   a) “While hearsay is generally admissible in an administrative proceeding, an agency may not rely on hearsay where it is immaterial, irrelevant, or unreliable.” Miles v. Housing Authority of Cook County, 2015 IL App (1st) 141292, at ¶ 40 (2015), citing Kurdi, 161 Ill. App. 3d at 993.

   b) In deciding whether hearsay statements are reliable, a court should consider:

      (1) the declarant’s possible bias;
      (2) whether statements are signed and sworn, or anonymous, oral, or unsworn;
      (3) whether the statements are contradicted by other evidence;
      (4) the declarant’s availability and whether the party may subpoena the declarant;
      (5) the credibility of the declarant or witness testifying to the hearsay;
whether the hearsay is corroborated. *Id.*

3. May a hearing officer rely *exclusively* on hearsay evidence?
   
   a) *In Kurdi,* the Illinois Appellate Court held that “any factual determination based on hearsay and unsupported by other competent evidence in the record must be reversed.” 161 Ill. App. 3d at 994.
   
   b) *Kurdi* may be sufficient authority for Illinois advocates, but for a thorough review of decisions from other jurisdictions that come down on both sides of the issue, see *Woods v. Willis,* 515 Fed. Appx. 471, 482-84 (6th Cir. 2013).

C. Uncontested Testimony Improperly Rejected.

1. Absent the one exception set forth below, “the unimpeached and uncontested testimony of a witness cannot be arbitrarily disregarded by a finder of fact.” *Bucktown Partners v. Johnson,* 119 Ill. App. 3d 346, 353 (1st Dist. 1983) (in a forcible action, trial court committed reversible error by disregarding tenant’s uncontested and unimpeached testimony that all money in her bank account came from public assistance payments.).
   
   a) Exception to the rule: Unimpeached testimony may be disregarded if it is inherently improbable. *Id.*
   
   b) “Under Illinois law, a witness’ testimony is inherently improbable if it is ‘contrary of the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate the falsity of the testimony . . . .’” *Id.* at 354 (citations omitted).

2. In *Carroll v. Chicago Housing Authority,* 2015 IL App (1st) 133544, ¶ 26 (2015), the appellate court held that the hearing officer erred by disregarding the recipient’s uncontested statement that she successfully completed an alcohol abuse program. “[T]he conclusion that her testimony lacked credibility on this issue where no contrary evidence was presented and the failure to provide a *pro se* plaintiff an opportunity to furnish further evidence to support her statement factors into our firm conviction that a mistake was made.”

D. PHA Exceeded Authority by Imposing Additional Criteria.

1. In their administrative plans, PHAs sometimes expand the definition of “program violations” to include activities that are not identified as violations in the federal statutes or regulations. That is not permissible.
a)  **Cain v. Alleghany Housing Auth.**, 986 A.2d 947, 951 (Pa. Commw. Ct. 2009) (PHA may not expand, beyond those enumerated in the governing federal regulations, the bases for terminating assistance under the HCV Program).  

b)  **Chesir**, 801 F. Supp. at 252 (E.D. Wis. 1992) (“Where local policies . . . impose criteria in addition to that in the federal statutes and regulations, the local rule must fall.”).

E.  **VAWA Defense.**

1. As discussed in more detail below in the section addressing domestic violence and housing, the Violence Against Women Reauthorization Act of 2013 – PL 113-4, 2013 S 47 (VAWA), prohibits PHAs from terminating a family’s assistance for an act of domestic violence when a family member was the victim.

2. The VAWA protections are specifically incorporated by reference in 24 C.F.R. Part 5, Subpart L – “Protection for Victims of Domestic Violence, Dating Violence, or Stalking in Public and Section 8 Housing.”

F.  **Failure to Consider Mitigating Circumstances.**

1. When a PHA has the authority to terminate, but is not required to terminate, a family’s assistance, “[t]he PHA may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.” 24 C.F.R. § 982.552(c)(2)(i).

2. “While Subsection (c) does not limit the agency to consideration of the listed ‘circumstances,’ the agency must consider some circumstances particular to the individual case, otherwise section 982.552’s distinction between mandatory and discretionary terminations becomes meaningless.”  **Gaston v. CHAC**, 375 Ill. App. 3d 16, 24 (1st Dist. 2007) (emphasis added) (reversing decisions to terminate assistance under the HCV Program because the hearing officer failed to consider any mitigating circumstances).

3. Citing **Gaston**, the appellate court recently remanded a case to a PHA so the hearing officer could consider whether mitigating circumstances precluded the agency from terminating a recipient’s assistance for failing to timely report her adult children’s absence from the assisted unit.  **Lipscomb v. Housing Authority of the County of Cook**, 2015 IL App (1st) 142793, ¶ 28. The court’s analysis, set forth below, deserves more than a mere summary.
a) “Although the hearing officer including the following statement in his ‘Order and Decision’, ‘[n]o information was submitted in mitigation that Ms. Lipscomb or members of her family were disabled, had any medical conditions, or were military veterans or victims of domestic violence[,]’ this statement is problematic where the record clearly indicates the presence of at least one mitigating factor—that there were minor children in the household at the time benefits were terminated.”  *Id.*

b) “There is absolutely nothing in the record indicating that this factor was considered by the hearing officer despite the fact that it appears within the documents that were submitted as evidence before the hearing officer.”  *Id.*

c) “As such, we remand for consideration of mitigating factors relevant to this case with respect to [the recipient’s] failure to timely report when her son and daughter moved out of the household.”  *Id.*

G. Failure to Consider a “Reasonable Accommodation.”

1. (See the separate section below on reasonable accommodations for a more detailed discussion of this issue.)

2. “If the family includes a person with disabilities,” any decision to terminate the family’s assistance must be “subject to consideration of reasonable accommodation.”  24 C.F.R. § 982.552(c)(2)(iv).

3. In *Gaston*, the court held that the hearing officer's failure to consider a reasonable accommodation, when the record contained “a number of references to [the tenant’s] disabled status,” constituted reversible error.  375 Ill. App. 3d at 24.

H. Penalty Disproportionate to Offense.

1. “[A] reviewing court, in determining whether an administrative finding is against the manifest weight of the evidence, should consider the severity of the sanction imposed.”  Abrahamson v. Illinois Dept. of Professional Regulation, 153 Ill. 2d 76, 99 (1992); see also *Kafin v. Dept. of Professional Regulation*, 972 N.E.2d 1191 (1st Dist. 2012) (revocation of psychiatrist's medical license for violating the Medical Practice Act by engaging in a personal and sexual relationship with patient was overly harsh in light of mitigating circumstances); *Jacquelyn’s Lounge, Inc. v. License Appeal Com’n of City of Chicago*, 277 Ill. App. 3d 959, 966 (1st Dist. 1996) (“a reviewing court . . . may overturn sanctions imposed by an agency which have been determined to be overly harsh in view of mitigating circumstances.”).

2. In each of the following cases, all from New York (oh, to practice there!), the court found that terminating the family's assistance was disproportionate to the violation:


c) **Davis v. NYC Dept. of Housing & Preservation**, 58 A.D.3d 418 (N.Y. App. Div. 2009) (tenant intentionally failed to disclose son’s SSI benefits on recertification form, but she had three minor children and omission had no effect on amount of subsidy she received).

d) **Williams v. Donovan**, 60 A.D.3d 594 (N.Y. App. Div. 2009) (73-year-old tenant failed to report her son’s income, but she had a long and previously unblemished record as HCVP participant).

e) **Gray v. Donovan**, 58 A.D.3d 488 (N.Y. App. Div. 2009) (Family failed to report adult children’s income, but family had participated in HCV Program for years without incident and there was no evidence in record that omission affected amount of subsidy they received).


h) **Moreta v. Cestero**, 926 N.Y.S.2d 258 (N.Y. Sup. Ct. 2011) (family failed to provide PHA with requested documentation: six as opposed to four paystubs, as well as letter from assisted unit’s owner).

I. Termination Erroneously Characterized as Mandatory.

1. The regulations governing the HCV Program provide that, “[t]he PHA must terminate program assistance for a family evicted from housing assisted under the program for serious violation of the lease.” 24 C.F.R. § 982.552(b)(2).

2. This mandatory termination provision, however, should not apply when:

   a) **The tenant is evicted from a unit that is not currently assisted under the HCV Program; or**

   b) **The owner is awarded possession of the premises pursuant to the terms of an agreed order. In such a case, the tenant may have faced eviction for a serious violation of the lease, but the court has not found that the tenant committed this violation.**
3. Even when the trial court has addressed the merits of the forcible action and awarded the owner possession of the assisted unit, a hearing officer may have a duty to look beyond the judgment and consider whether the breach that led to this judgment actually constituted a serious lease violation. *Gray v. Alleghany Housing Auth.*, 8 A.3d 925, 930 (Pa. Commw. Ct. 2010) (“the hearing officer wrongly applied Section 982.552(b)(2) in holding that an eviction, *ipso facto*, established a serious lease violation.”).

J. Decision Precludes Meaningful Review.

1. This argument is most persuasive when:

   a) *There is no hearing transcript because the PHA did not record the administrative proceeding; and/or*

   b) *The hearing decision does not set forth the facts and conclusions essential to its decision with clarity and completeness.*

2. A recent Illinois Appellate Court opinion confirms that a hearing officer’s decision is inadequate unless it facilitates meaningful review.

   a) *In Miles v. Housing Authority of Cook County*, 2015 IL App (1st) 141292, HACC challenged the circuit court’s decision to reverse a final administrative decision to terminate the appellee’s assistance under the HCV program, but did not provide the appellate court with any record of the informal hearing. The court found that HACC’s failure precluded meaningful review.

   b) *The court’s analysis, set forth below, warrants more than a mere summary.*

   (1) “An administrative agency has the obligation to make and present a record to permit judicial review of its decision, whether that judicial review takes place under a common-law writ of *certiorari* or pursuant to the Administrative Review Law.” *Id.* at ¶ 23.

   (2) “In the context of the Administrative Review Law, which governs judicial review of most administrative decisions, we have held the lack of a complete record against the agency or board even when the administrative body was the appellee, not the appellant.. We did so because it was the duty of the administrative agency under the Administrative Review Law to ‘present the court of review with the entire record of proceedings, including the evidence it considered.’ The duty on the agency exists ‘so that the trial court may properly perform its judicial review function.’” *Id.* (citations omitted).
“We see no reason for demanding anything less in the context of a
_certiorari_ petition. . . . We do not think it is asking too much of an
administrative body whose decision is subject to judicial review to provide
an adequate record for the court, so that the judiciary can perform its task
of ensuring that the administrative body complied with due process and
supported its decision with competent evidence.”  _Id._ at ¶ 24.

“Ultimately, in reviewing the factual findings of an administrative
body, our mandate is the same under either _certiorari_ or the Administrative
Review Law. When called on to review the administrative body’s findings of
fact, we must determine whether they are against the manifest weight of the
evidence. But we cannot perform this function when we cannot compare
the evidence against the administrative findings of fact in the first place,
because the evidence does not exist. This is not even a circumstance where
we could remand to the trial court to order the administrative body to
furnish a complete record because it would be a fruitless exercise—the
HACC did not create a full record in the first place.”  _Id._ at ¶ 25 (emphasis in
original).

“This problem with a lack of a record is manifestly on display in
this action. HACC did not transcribe or record the proceedings. Counsel
for HACC told the trial court that HACC was not required to do so. Maybe
not, but the lack of any transcript deprives us of any first-hand knowledge
of [the appellee’s] testimony. The hearing officer, in the findings of fact,
gave a bullet-point summary of her testimony, but we have no way to
compare that summary to her actual testimony. We have no idea what [the
appellee] said or did not say; we must take the hearing officer’s word for
it..”  _Id._ at ¶ 26.
THE VASH PROGRAM.

A. Purpose.

1. Provide homeless veterans with rental assistance under the HCV Program, as well as case management and clinical services from the Department of Veterans Affairs.

B. Authorizing Statute.


C. Implementing Regulations.

1. Generally, the HUD-VASH Program is administered in accordance with 24 C.F.R. Part 982, the federal regulations that govern the HCV Program.

2. The 2008 Consolidated Appropriations Act (Public Law 110-161) allows HUD to waive or specify alternative requirements for any statutory or regulatory provision affecting the HCV program in order to effectively deliver and administer assistance under the HUD-VASH Program.

3. The alternative requirements are established in the HUD-VASH Operating Requirements, which were published in the Federal Register on May 6, 2008. See Notice FR-5596-N-01, 77 FR 17086-17090.

D. Special Rules.

1. VA case managers refer eligible families to the PHA for assistance. The PHA must accept these referrals.

2. VA case managers screen all families in accordance with VA screening criteria. By agreeing to administer the HUD-VASH Program, the PHA relinquishes its authority to determine eligibility.

   a) With one exception (see below), the PHA may not deny assistance under 24 C.F.R. § 982.552 (violation of HCV Program requirements) or § 982.553 (criminal activity and alcohol abuse).

   b) Exception: PHA must deny assistance if any member of the household is subject to a lifetime registration requirement under a state sex offender program. However, if the sex offender is not the veteran, the household may receive assistance if they agree to remove the sex offender.

3. Termination of assistance.

   a) HUD “strongly encourages” PHAs to consider mitigating circumstances before terminating assistance under the HUD-VASH Program.
b) PHAs should consider “the case manager and the impact that ongoing case management services can have on mitigating the conditions that led to the potential termination.”

c) The PHA can terminate assistance “only for program violations that occur after the family’s admission to the voucher program.”

4. The initial term of the voucher must be at least 120 days.

E. Fair Housing.

1. When HUD-VASH recipients include veterans with disabilities or family members with disabilities, HUD’s reasonable accommodation requirements apply.
XXXI. PROJECT-BASED VOUCHER (PBV) PROGRAM.

1. Overview.

   a) The PBV program is administered by a PHA that already administers the tenant-based voucher program under an annual contributions contract with HUD. 24 C.F.R, § 983.5(a).

   b) The rental assistance is “attached to the structure.” 24 C.F.R, § 983.5(a).

   c) The PHA selects, from families who are participants in the PHA’s tenant-based voucher program and families who have applied for admission to the program, the families who will receive PBV assistance. 24 C.F.R, § 983.251(a).

   d) The PHA may not penalize a family who chooses not to take a project-based unit or who is ineligible for the unit because of the owner’s selection process. 24 C.F.R, § 983.251.

2. Rent.

   a) The tenant’s pays an amount equal to 30% of its adjusted gross income.

3. Family’s right to move.

   a) The family may terminate the assisted lease at any time after the first year of occupancy. 24 C.F.R, § 983.261(a).

      (1) The family must give the owner advance written notice of intent to vacate (with a copy to the PHA).

   b) The PHA must then offer the family the opportunity for continued tenant-based rental assistance. 24 C.F.R, § 983.261(b).

   c) If the family terminates the assisted lease before the end of one year, the family relinquishes its right to continued tenant-based assistance. 24 C.F.R, § 983.261(d).

4. Owner termination of tenancy.

   a) Subject to the exception described below, the procedure set forth at 24 CFR § 982.310 applies. 24 C.F.R, § 983.257(a).

   b) “Good cause” for eviction does not include a business or economic reason or desire to use the unit for an individual, family, or non-residential rental purpose.
XXXII. **OTHER FEDERAL HOUSING PROGRAMS.**

A. **Section 202 Supportive Housing for the Elderly.**

1. **Purpose.**
   
   a) *To enable elderly persons to live with dignity and independence by expanding the supply of supportive housing that is designed to accommodate the special needs of elderly persons, and that provides a range of services that are tailored to the needs of elderly persons occupying such housing.* 12 U.S.C. § 1701q(a).

   b) *Although the Section 202 program originally developed housing to serve the elderly and persons with disabilities, properties developed through the current Section 202 Capital Advance program serve only elderly persons. The Section 811 Program (see below) now serves persons with disabilities.*

2. **Authorizing statute.**
   

3. **Implementing regulations.**
   
   a) *24 C.F.R. Part 891.*

4. HUD Handbook 4350.3 also governs the program.

5. “The term ‘elderly person’ means a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.” 12 U.S.C. § 1701q(k).

6. **Terminating the tenancy.**
   

   b) *The lease, therefore, may not be terminated without good cause.*

B. **Section 811 Supportive Housing for Persons with Disabilities.**

1. **Purpose—**42 U.S.C. § 8013(a).
   
   a) *To enable persons with disabilities to live with dignity and independence within their communities by expanding the supply of supportive housing that:*

      (1) is designed to accommodate the special needs of such persons;

      (2) makes available supportive services that address the individual health, mental health, and other needs of such persons; and
(3) promotes and facilitates community integration for people with significant and long-term disabilities.

2. Authorizing statute.
   
   a) 42 U.S.C. § 8013.

3. Implementing regulations.
   
   a) 24 C.F.R. Part 891.

4. HUD Handbook 4350.3 also governs the program.

   
   a) Income based.

   b) Equal to the higher of 30% of adjusted monthly income or 10% of monthly income.

   
   a) The federal statute provides that an owner may not terminate the tenancy or refuse to renew the lease of a tenant of a rental dwelling unit assisted under this section except:

   (1) for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause; and

   (2) by providing the tenant, not less than 30 days before such termination or refusal to renew, with written notice specifying the grounds for such action.

   b) 24 C.F.R. Part 247 also governs the eviction process. 24 C.F.R. § 891.770(b).

C. Section 221(d)(3) Below Market Interest Rate Program.

1. Overview.
   
   a) The BMIR Program insured and subsidized mortgage loans to facilitate the construction or substantial rehabilitation of multifamily rental or cooperative housing for low- and moderate-income families. The reduced mortgage interest rate, usually from 1% to 3%, resulted in lower operating costs for these projects and therefore reduced rents.

   b) Families living in Section 221(d)(3) BMIR projects are considered subsidized because the reduced rents for these properties are made possible by subsidized mortgage interest rates.
2. **Authorizing statute.**
   
a) *Section 221(d)(3) of the National Housing Act, 12 U.S.C. §§ 1715l(d)(3) and (d)(5).*

3. **Implementing regulations.**
   
a) *24 C.F.R. Parts 221, 245, 247, 248 and 290.*

4. **HUD Handbook 4350.3 also governs the program.**

5. **Flat rent – 42 U.S.C. § 8013(d)(3).**
   
a) *Not income-based.
   
b) *Rent must be approved by HUD.*

6. **Terminating the tenancy.**
   

**D. Section 236 Program.**

1. **Overview.**
   
a) *The Section 236 program, established by the Housing and Urban Development Act of 1968, combined federal mortgage insurance with interest reduction payments to the mortgagee for the production of low-cost rental housing.*

   b) *Under this program, HUD provided interest subsidies to lower a project’s mortgage interest rate to as low as 1 percent. This program no longer provides insurance or subsidies for new mortgage loans, but existing Section 236 properties continue to operate under the program.*

   c) *The interest reduction payment results in lower operating costs and subsequently a reduced rent structure.*

2. **Authorizing statute.**
   
a) *Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1.*

3. **Implementing regulations.**
   
a) *24 C.F.R. Parts 200, 236, 247, 248 and 290.*

4. **HUD Handbook 4350.3 also governs the program.**

5. **Basic and market rent.**
a) The basic rent is the rent that the owner must collect to cover the property’s operating costs given the mortgage interest reduction payments made to the property.

b) The market rent represents the rents needed to cover operating costs if the mortgage interest were not subsidized.

c) All tenants pay at least the basic rent for their property and, depending on their income level, may pay a rent up to the market rent.

d) Tenants paying less than the market rent are considered assisted tenants.

6. Terminating the tenancy.


E. Rent Supplement Program.

1. Overview.

a) HUD, with no local housing authority involvement, makes rent supplement payments to private nonprofit or limited-profit landlords on behalf of low-income tenants in newly constructed or substantially rehabilitated housing.

2. Authorizing statute.


3. Implementing regulations.


4. HUD Handbook 4350.3 also governs the program.

5. Rent.

a) 30% of adjusted household income.

6. Terminating the tenancy.


F. Continuum of Care Program.

1. Creation.
a) The Act to Prevent Mortgage Foreclosures and Enhance Mortgage Credit Availability Act was signed into law on May 20, 2009 (Public Law 111-22).

b) Division B of this law is the Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (HEARTH Act).

c) The HEARTH Act created the Continuum of Care Program by combining three separate homeless assistance programs into a single grant program. The three consolidated programs are:

(1) The Section 8 Moderate Rehabilitation Single Room Occupancy (SRO) Program.

   (a) Governed by 24 C.F.R. Part 882.

   (b) HUD enters into annual contribution contracts with PHAs, which make rental assistance payments to participating landlords on behalf of homeless individuals who rent rehabilitated units.

(2) The Shelter Plus Care (S+C) Program.

   (a) Governed by 24 C.F.R. Part 582.

   (b) The S+C Program is designed to link rental assistance to supportive services for hard-to-serve homeless persons with disabilities—primarily those who are seriously mentally ill; have chronic problems with alcohol, drugs, or both; or have AIDS and related diseases—and their families.

      (i) The program provides grants to be used for rental assistance for permanent housing for homeless persons with disabilities.

      (ii) Rental assistance grants must be matched in the aggregate by supportive services that are equal in value to the amount of rental assistance and appropriate to the needs of the population to be served.

   (c) Rental assistance is provided through four components described in §582.100.

(3) The Supportive Housing Program.

   (a) Governed by 24 C.F.R. Part 583.

   (b) The Supportive Housing program is designed to promote the development of supportive housing and supportive services, including innovative approaches to assist homeless persons in the transition from homelessness, and to promote the provision of supportive housing to homeless persons to enable them to live as independently as possible.

   (c) Funds may be used for:
(i) Transitional housing to facilitate the movement of homeless individuals and families to permanent housing;

(ii) Permanent housing that provides long-term housing for homeless persons with disabilities;

(iii) Housing that is, or is part of, a particularly innovative project for, or alternative methods of, meeting the immediate and long-term needs of homeless persons; or

(iv) Supportive services for homeless persons not provided in conjunction with supportive housing.

2. Overview.

   a) The Continuum of Care Program awards grants to recipients who provide rental assistance and supportive services to eligible tenants.

3. Authorizing statute.

   a) Subtitle C of Title IV of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11381-11389.

4. Implementing regulations.

   a) 24 C.F.R. Part 578.

5. Termination of assistance – 24 C.F.R. § 578.91.

   a) The recipient may terminate assistance to a program participant who violates program requirements or conditions of occupancy. Termination does not bar the recipient from providing further assistance at a later date to the same individual or family.

   b) In terminating assistance to a program participant, the recipient must provide a formal process that recognizes the rights of individuals receiving assistance under the due process of law. This process, at a minimum, must consist of:

      (1) Providing the program participant with a written copy of the program rules and the termination process before the participant begins to receive assistance;

      (2) Written notice to the program participant containing a clear statement of the reasons for termination;

      (3) A review of the decision, in which the program participant is given the opportunity to present written or oral objections before a person other than the person (or a subordinate of that person) who made or approved the termination decision; and
(4) Prompt written notice of the final decision to the program participant.

c) Hard-to-house populations.

(1) Recipients that are providing permanent supportive housing for hard-to-house populations of homeless persons must exercise judgment and examine all extenuating circumstances in determining when violations are serious enough to warrant termination so that a program participant’s assistance is terminated only in the most severe cases.

G. Housing Opportunities for People with AIDS.

1. Overview.

   a) HOPWA provides “grantees” with “the resources and incentives to devise long-term comprehensive strategies for meeting the housing needs of persons with acquired immunodeficiency syndrome and families of such persons.” 42 U.S.C. § 12901.

2. Authorizing statute.

   a) 42 U.S.C. § 12901 et seq.

3. Implementing regulations.

   a) 24 C.F.R. Parts 91 and 574.

4. Termination of assistance – 24 C.F.R. 574.310(e).

   a) Grounds.

   (1) Surviving family members.

      (a) “With respect to the surviving member or members of a family who were living in a unit assisted under the HOPWA program with the person with AIDS at the time of his or her death, housing assistance and supportive services under the HOPWA program shall continue for a grace period following the death of the person with AIDS . . . that period may not exceed one year from the death of the family member with AIDS.”

   (2) For violation of requirements.

      (a) Assistance “may be terminated if the participant violates program requirements or conditions of occupancy. Grantees must ensure that supportive services are provided, so that a participant’s assistance is terminated only in the most severe cases.” (Emphasis added.)
(i) In Garden View, LLC v. Fletcher, 394 Ill. App. 3d 577, 586 (1st Dist. 2009), the defendant argued that his violation—possession of 0.4 grams of marijuana—did not fall into the category of “most severe cases,” and therefore did not warrant the termination of his lease agreement.

(ii) The court disagreed. Defendant’s argument, said the court, “equates ‘most severe’ as the quantity of a violation as opposed to the nature of the violation. To narrow the interpretation to the former would render an absurd result in the legislation, which this court cannot do in interpreting statutory language. . . . Thus, we cannot conclude that the statutory provision requires a certain amount of any illegal drug be found in the apartment before a lease termination is considered ‘the most severe case.’” Id.


(1) “In terminating assistance to any program participant for violation of requirements, grantees must provide a formal process that recognizes the rights of individuals receiving assistance to due process of law.”

(2) This process must, at minimum, consist of:

(a) Serving the participant with a written notice containing a clear statement of the reasons for termination;

(b) Permitting the participant to have a review of the decision, in which the participant is given the opportunity to confront opposing witnesses, present written objections, and be represented by their own counsel, before a person other than the person (or a subordinate of that person) who made or approved the termination decision; and

(c) Providing prompt written notification of the final decision to the participant.

(3) Grantees must comply with this procedure. Cotton v. Alexian Bros. Bonaventure House, 2003 WL 22110501, *5 (N.D. Ill. 2003) (a pre-termination hearing is required except in cases of emergencies, in which case a post-termination hearing satisfies the due process requirement.).

H. Low Income Housing Tax Credit Program.

1. Purpose.

a) The purpose of the LIHTC Program is to encourage the development of low-income rental housing through the allocation of tax credits pursuant to Section 42 of the Internal Revenue Code (IRC).

2. Overview.
a) The program is administered not by HUD, but by the Department of Treasury.

b) The federal government allocates tax credits, and state housing agencies (which must report to the IRS) distribute the credits and monitor recipient projects for compliance with program requirements. Treas. Reg. §§ 1.42-1, 1.42-5.

c) In return for receiving the tax credits, the taxpayer/landlord must commit to maintain the project as low-income housing for 30 years. The 30-year term is composed of an initial 15-year compliance period and an additional 15-year “extended use period.” IRC § 42(h)(6).

(1) The statute allows owners to opt-out by requesting that the state housing agency find a “qualified contract” purchaser to buy the property during the fourteenth year of the initial 15-year compliance period. If no purchaser is found, the owner may exit the LIHTC program. If a purchaser is found, or if the owner will not sell the property, the use restrictions extend to the full 30 years.

3. Authorizing statute.
   a) 26 U.S.C. § 42.

4. Implementing regulations.
   a) 26 C.F.R. § 1.42.

5. Rent limits.
   a) The tenant’s monthly housing costs, including a utility allowance, may not exceed the applicable LIHTC rent limit.
   b) These limits are based on a percentage of area median income, as adjusted by unit size.

6. Good cause required to terminate the lease.
   a) In Virgin Islands Comm. Housing v. Rivera, 2008 WL 5411985, ** 4-5 (Dec. 24, 2008 V.I. Super), the court relied on Congressional commentary on the 1989 amendments to the LIHTC statute (see below) to find that good cause is required to terminate the lease when the tenancy is subsidized under the LIHTC Program.
(1) “The bill denies the credit to otherwise qualified property unless the owner of that building is subject to an enforceable agreement with the housing credit agency which prohibits (1) eviction of low-income tenants for other than good cause and (2) any increases in the gross rent for low-income units in excess of allowable rents under the rules applicable during the 15–year compliance credit period.” H.R. Rep. No. 101-247, pt. 2 at 1195 (1989), reprinted in 1989 U.S.C.C.A.N.1906, 2665.

b) “It is clear . . . that, both during the initial compliance period and during the extended use period, a landlord participating in the § 42 tax credit program may not terminate the tenancy of a low-income tenant other than for good cause.” Carter v. Maryland Mgmt. Co., 835 A.2d 158, 165 (Md. 2003).

I. HOME Investment Partnership Program.

1. Overview.

a) The HOME Program provides formula grants to states and localities, and these grants are used to finance the construction, purchase, and/or rehabilitation of affordable housing for rent or homeownership, or to provide direct rental assistance to low-income people.

b) The HOME program is the largest Federal block grant to state and local governments designed exclusively to create affordable housing for low-income households.

2. Authorizing statute.

a) Title II of the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. § 12701 et seq.

3. Implementing regulations.

a) 24 C.F.R. Part 92.


a) There must be a written lease with an initial term of at least one year.

5. Terminating or refusing to renew the lease—24 C.F.R. § 92.253(c).

a) An owner may not terminate the tenancy or refuse to renew the lease of a tenant of rental housing assisted with HOME funds, except for:

(1) Serious or repeated violation of the terms and conditions of the lease; for violation of applicable Federal, State, or local law;
Completion of the tenancy period for transitional housing or failure to follow any required transitional housing supportive services plan; or

Other good cause.

b) Good cause does not include an increase in the tenant's income or refusal of the tenant to purchase the housing.

c) To terminate or refuse to renew tenancy, the owner must serve written notice upon the tenant specifying the grounds for the action at least 30 days before the termination of tenancy.


(2) In assessing this challenge, the court applied a “harm analysis.”

(3) Because the tenant did not contend that the landlord’s failure precluded her in any way from preparing an adequate defense, the court rejected her challenge.
XXXIII. STATE AND LOCAL HOUSING PROGRAMS.

A. Illinois Affordable Housing Program.

1. Overview.
   
a) In response to the acute shortage of affordable housing in Illinois – a crisis exacerbated by a sharp reduction in federal funding for affordable housing, by the potential prepayment of subsidized federal mortgages, and by an inability on the part of local government to meet this need – the Illinois legislature passed the Illinois Affordable Housing Act, 310 ILCS 65/1 et seq.

b) This Act created the Illinois Affordable Housing Program, which uses public and private resources to meet the affordable housing needs of low-income and very low-income households.

c) The Program is administered by the Illinois Housing Development Authority (IHDA), which receives advice and input from the Affordable Housing Advisory Commission.

d) The Program is funded in part through the Illinois Affordable Housing Trust Fund.

2. Termination of tenancy.
   
a) “Trust Fund assisted multi-family housing is prohibited from evicting tenants without good cause.” 310 ILCS 65/10(i).

B. Rental Housing Support Program.

1. Overview.
   
a) In response to multiple problems associated with the lack of affordable housing – including high tenant turnover, poorly maintained properties, vacant and abandoned properties, and overcrowded housing – the Illinois legislature passed the Rental Housing Support Program Act, 310 ILCS 105/1 et seq.

b) This Act created the Rental Housing Support Program to “help localities address the need for decent, affordable, permanent rental housing.”

c) IHDA administers the program and adopts rules for its implementation.

d) These rules are set forth at 47 Ill. Admin. Code Ch. II, Pt. 380.

(1) Subpart A – General Rules.

(a) Definitions – Section 380.103.
(i) “Authority”: The Illinois Housing Development Authority.

(ii) “Household”: A single person, family or unrelated persons living together.

(iii) “Housing Quality Standards”: Inspection standards for units, which shall be set forth in the Program Guide or the Municipality Program Guide, as applicable.

(iv) “LAA”: A local administering agency that receives an Allocation to provide Rental Assistance.

(v) “Tenant Bill of Rights”: Information LAAs and Developers are required to provide to Tenants concerning how to contact the LAA; local Landlord-Tenant laws and procedures; the housing rights of persons with disabilities; how to contact the local agency or agencies administering local Landlord-Tenant laws and procedures or protecting or promoting such housing rights of persons with disabilities; eligibility requirements for participating in the RHS Program; and the rights and responsibilities of prospective Tenants prior to occupancy of a Unit.

(vi) “Tenant Contribution”: The portion of the monthly rent for a Unit to be paid by the Tenant, which shall be approximately one twelfth of 30% of the Median Income for the Income Range in which the Tenant’s Annual Income falls, adjusted for Unit size.

(2) Subpart B—Distribution of Funds.

(3) Subpart C—General Requirements.

(a) “Each Tenant’s Tenant Contribution shall be a fixed amount and must be based on the size of the Unit and the Tenant’s Income Range. The Authority shall determine Income Ranges and Tenant Contribution schedules annually.” Section 380.305.

(4) Subpart D—Allocations to Local Administering Agencies.

(5) Subpart E—Landlord Responsibilities.

(a) “Landlords must maintain each Unit in compliance with the Housing Quality Standards.” Section 380.504.

(b) “Landlords shall have the right to evict Tenants from Units for good cause, as permitted under State and local law.” Section 380.506 (emphasis added).
C. Bridge Subsidy Program.

1. Overview.

   a) Tenant-based rental assistance program for people with mental illnesses.

   b) Modeled on the HCV Program and administered by the Illinois Department of Human Services, Division of Mental Health (DMH).

   c) The rental assistance payments are issued by a DMH-selected Bridge Subsidy Administrator (BSA).

   d) The program is part of DMH’s effort to expand Permanent Supportive Housing (PSH), which provides tenants with both rental assistance and community based mental health services. Such services, however, are not mandated as a condition of receiving the rental assistance.

   e) Available only to DMH “consumers” (i.e., persons who are enrolled or engaged with one of DMH's contracted vendors).

   f) Although there is no set limit on the time during which a consumer can receive assistance, the Bridge Subsidy Program is (as the title implies) a bridge to permanent housing programs, and should therefore be considered a vehicle for providing only temporary assistance.

   g) As consumers transition to permanent rental assistance programs, Bridge funding can be recycled and used to help other individuals.

2. Applying for assistance.

   a) Only a DMH contracted community mental health center can submit an application for assistance on behalf of a consumer.

   b) The web-based application is accessible only to DMH contracted vendors.

3. Eligibility.

   a) Consumer must have an Axis I diagnosis of serious mental illness or co-occurring mental illness and substance abuse diagnoses, and also be:

      (1) A resident of a Long Term Care Facility, or

      (2) At risk of placement in a nursing facility, or

      (3) An extended long term patient in a State Hospital, or
An aging-out adolescent or young adult from an Individual Care Grant program, or

A Department of Child and Family Services ward aging-out of guardianship, or

A resident of a DMH-funded supported or supervised residential setting, or

Homeless (as determined by DMH); and

b) **Current household income year must be at or below 30% of the area median income; and**

c) **Consumer must be on waiting list for rental assistance from a PHA or agree to register/apply for this rental assistance when it is possible to do so.**

d) **Undocumented individuals who are otherwise eligible may receive assistance.**

Because undocumented persons are ineligible to apply for the HCV Program, DMH helps undocumented consumers file an application for assistance under the Illinois Rental Housing Support program.

DMH provides this same service to consumers whose criminal records render them ineligible for assistance under the HCV Program.

e) **Consumer must be at least 18 (or an emancipated minor) because he or she will be required to sign a lease agreement with the owner of the assisted unit.**

4. Selecting a unit.

a) **The consumer has 90 days to locate a suitable rental unit in the private market**

(1) This period may be extended if the consumer actively sought housing during the 90-day period and can reasonably be expected to find housing within the extended period.

b) **The total rent for the unit may not exceed the FMR for the area, and the BSA must confirm that the rent is “reasonable.”**

c) **The BSA must also inspect the unit to ensure it complies with Housing Quality Standards.**

d) A consumer may move with his or her children into the assisted unit. The BSA will determine the appropriate number of bedrooms for the size of the consumer’s immediate family.
5. Bridge transition funds.
   a) Each consumer receives $2,000 to help pay security and utility deposits or to purchase basic household needs such as furniture.
   b) The consumer’s “care manager” manages these funds with input from the consumer. No cash is given directly to the consumer.

6. Leasing a unit.
   a) The consumer executes a lease with the dwelling unit’s owner.
   b) The owner executes a HAP Contract – similar to the one used in the HCV Program – with the BSA.

7. Rent.
   a) The consumer pays a reduced rent equal to no more than 30% of the consumer’s adjusted income.
   b) The consumer must recertify annually.
   c) Consumers are entitled to no less than 30 days’ advance written notice of a rent adjustment.

8. Temporary absence from unit.
   a) Subsidies will continue for up to 60 days (though DMH may extend this period) when the consumer is hospitalized or temporarily absent from the assisted unit for some other authorized reason.
   b) Subsidies will be issued for up to 30 days when the consumer is incarcerated.

9. Termination policies.
   a) The BSA initiates the termination procedure, but it must be approved by DMH and the Regional Housing Support Facilitator.
   b) The consumer is entitled to advance written notice that clearly sets forth one of the following grounds for termination:
      (1) Nonpayment of rent;
      (2) Serious and repeated lease violations that pose a threat or serious hazard to other residents;
      (3) Conviction for serious or violent crime;
Failure to accept offer to enter the HCV Program or a comparable rental assistance program;

(5) Failure to recertify annually; or

(6) Fraud in connection with the program.

c) Consumers should be terminated only for “the most serious rule violations.”

d) Subsidy administrators should consider extenuating circumstances.

e) DMH must provide the consumer with an opportunity to challenge a termination decision by presenting written or oral objections to someone other than the person who made the initial decision to terminate.

f) DMH must provide the consumer with prompt written notice of its final decision.

g) DMH reserves the right to permit the BSA to resume assistance to an individual whose assistance was previously and properly terminated.

D. Chicago Low Income Housing Trust Fund.

1. The Trust Fund’s “Rental Subsidy Program” provides annual subsidies to owners of qualified buildings in Chicago.

2. Landlords accepted into the program receive a one-year, renewable grant.

3. Generally, no more than 1/3 of the units in a building will be subsidized by the Trust Fund.

4. The subsidy runs with the approved building.

a) A tenant who vacates a Trust Fund subsidized unit loses the subsidy.

b) The landlord must then rent the vacated unit to another qualified tenant in order to continue receiving the subsidy allocated to that unit.

5. Tenant eligibility.

a) A qualified tenant’s household income may not exceed 30% of the area median income.

6. Rent.

a) The tenant pays an affordable flat rent that is based on one of the following two income levels:

(1) 0-15% of area median income; or
(2) 16-30% of area median income.

b) The total rent (subsidy plus tenant’s contribution) rent must include the cost of heating the apartment.
XXXIV. TENANTS WITH DISABILITIES.

A. The Problem.

1. Tenants with disabilities often face eviction or the termination of their assistance under the HCV Program because of violations directly related to their disabilities.

   a) Tenant faced eviction for nonpayment of $300 in rent that accrued after she fell into a debilitating depression triggered by her son’s murder.

   b) Tenant faced eviction for repeatedly informing property manager that voices in her head were telling her to sleep with property manager.

   c) Incontinent tenant faced eviction for unpleasant odors emanating from her apartment.

   d) Public housing resident faced eviction for past use of crack cocaine that numbed constant emotional distress caused by infant child’s murder.

   e) Tenant with bi-polar disorder faced eviction for lying naked in doorway and inviting passersby to have sex with her.

   f) Public housing resident faced eviction for hoarding and creating “pathway apartment” that could be negotiated only by following a single narrow path through canyons of newspapers.

   g) Public housing resident faced eviction for fire that started after resident, who was cooking pork chops on stove, fell asleep because of medication he was taking.

   h) Bone-cancer survivor faced eviction from public housing for past use of marijuana that eased physical pain caused by lifetime of reconstructive surgeries.

2. Even when not facing eviction, a tenant with disabilities may need certain accommodations that will afford the tenant the opportunity to use and enjoy a dwelling.

B. The Solutions—Laws that Prohibit Disability Discrimination.


   a) Title VIII of the Civil Rights Act of 1968.

   b) Implementing regulations – 24 C.F.R. Part 100 et seq.

   c) Covers all dwelling units except those in owner-occupied buildings with four or fewer units.
d) Fair Housing Amendments Act of 1988 (FHAA) extended protections to persons with disabilities. FHAA set forth special provisions regarding:

(1) Modifications;
(2) Design and construction; and
(3) Accommodations.

e) FHAA uses the word “handicap” instead of “disability,” but both terms have the same legal meaning.

(1) Section 3602(h) of the FHAA defines “handicap” to mean:

(a) a physical or mental impairment which substantially limits one or more of such person’s major life activities;
(b) a record of having such an impairment; or
(c) being regarded as having such an impairment.

f) The term “handicap” does not include current, illegal use of or addiction to a controlled substance (as defined in 21 U.S.C. § 802).

2. Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq.

a) Covers “public entities” – state and local governmental departments, agencies, and other instrumentalities.

b) The ADA’s definition of “disability” is similar to the FHAA’s definition of “handicap,” but it more clearly defines major life activities. 42 U.S.C. § 12102.

(1) In general.

(a) “[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, communicating, and working.”

(2) Major bodily functions.

(a) “[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” (Emphasis added.)
c) "The term ‘individual with a disability’ does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.” 42 U.S.C. § 12210(a).

   b) Covers all housing providers that receive federal financial assistance.
   c) Prohibits disability discrimination, which includes a failure to provide reasonable accommodations.
   d) Definition of “disability” is identical to the definition set forth in the ADA. 29 U.S.C. § 705(9)(B).
   e) Imposes greater obligations than the FHA to the extent that it requires landlords to pay for structural modifications to apartments and common areas.

C. Modifications.
1. The FHA defines discrimination to include “a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises.” 42 U.S.C. § 3604(f)(3)(A) (emphasis added).
   a) NOTE: If the dwelling unit is covered by Section 504, the landlord must bear the cost of the modification.

2. “[W]here it is reasonable to do so,” the landlord may “condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.” Id.

D. Reasonable Accommodations.
1. The FHA defines discrimination to include “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B). (The Rehabilitation Act and the ADA contain similar reasonable accommodation requirements.)

2. A tenant with a disability who is facing eviction for a violation related to her disability may be able to use a reasonable accommodation defense to preserve her tenancy.
3. Reasonable accommodation defenses under the FHAA, Section 504, and the ADA are all subject to the same analysis. *Churney v. Chicago Housing Auth.*, 2013 WL 589599, *3* (N.D. Ill. 2013) (“The FHAA, ADA, and Rehabilitation Act each contain a requirement of reasonable accommodation, and courts interpret the requirements similarly). For purposes of simplicity, this outline section focuses on the FHAA.

4. In *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109, 1129 (D.C. 2005), the court set forth the standard for establishing a reasonable accommodation defense. The tenant must demonstrate that:

   a) *She suffers from a “handicap” or “disability;”*

   b) *The landlord knew or should have known of this disability;*

   c) *An accommodation of the disability may be necessary to afford the tenant an equal opportunity to use and enjoy her apartment;*

   d) *The tenant requested a reasonable accommodation;*

   (1) In *Roseborough v. Cottonwood Apts.*, 1996 WL 490717, at *2* (N.D. Ill. 1997), the court omitted a reference to this fourth element, but it is generally still required and a failure to establish the element could prove fatal.

   e) *The landlord refused to grant this request.*
XXXV. REASONABLE ACCOMMODATION DEFENSE.

A. Establish that Tenant Suffers From a “Handicap”—Three Methods.

1. Establish that the tenant suffers from an impairment that substantially limits a major life activity.

   a) **First, the court must determine whether the individual has a physical or mental impairment, which the implementing regulations—24 C.F.R. § 100.201—define to include:**

   (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

   (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

   (3) The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

   (4) Evidence of a mental impairment.

      (a) “Mental impairment’ is a generic term that . . . on occasion, is susceptible to identification by lay individuals . . . . Indeed, persuasive case law firmly establishes that lay persons—while not competent to offer specific diagnoses—can render opinions as to a person's mental condition based on their own personal observations. No more than that—no specific diagnosis—is required for a finding of mental impairment under the Fair Housing Act.”

      Douglas, 884 A.2d at 1131 (holding that “requirement of expert testimony to establish the tenant’s ‘mental impairment’ under the Fair Housing Act—and especially the further requirement that experts opine with a ‘specific diagnosis’—sets the bar too high”).

   b) **Second, the court must identify the life activity that the impairment limits and determine whether it constitutes a “major life activity.”**
The plain meaning of the word “major” denotes comparative importance and suggests that the touchstone for determining an activity’s inclusion under the statutory rubric is its significance. Bragdon v. Abbott, 524 U.S. 624, 638 (1998).

“Major life activities include ‘functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.’” Valley Housing v. City of Derby, 802 F. Supp. 2d 359, 385 (D. Conn. 2011) (citing implementing regulations for the FHA, Section 504, and the ADA).

The above is not an exhaustive list. See Bragdon, 524 U.S. at 638 (finding that “reproduction is a major life activity”); McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999) (finding that sexual relations, sleeping, and interacting with others all qualify as “major life activities” within the meaning of the FHA).

c) Third, the court must determine whether the impairment “substantially limits” the major life activity.

(1) “When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable.” Bragdon, 524 U.S. at 641.

2. Establish a record of impairment.

a) “[T]he federal government has stressed that persons . . . who receive Supplemental Security Income (SSI) benefits ‘in most cases meet the definition of disability under the Fair Housing Act.’” Douglas, 884 A.2d at 1130; Sinisgallo v. Town of Islip Housing Auth., 865 F. Supp. 2d 307, 338 (E.D.N.Y. 2012) (“As a general matter, in most cases, individuals who meet the definition of disability for purposes of receiving SSI or SSDI benefits also qualify as disabled under the federal disability statutes.”).


(2) Although this Joint Statement did not result from a notice-and-comment rulemaking, the Douglas Court stated that it is entitled to substantial deference. 884 A.2d at 1120 n. 10.

b) “[A]n individual can sometimes establish that he or she is ‘handicapped’ within the meaning of the FHA simply by demonstrating that he or she resides in a facility that only admits ‘handicapped’ individuals.” McKivitz v. Township of Stowe, 769 F. Supp. 2d 803, 822 (W.D. Penn. 2010).
3. Establish that the tenant is regarded as having an impairment.

   a) The implementing regulations—24 C.F.R. § 100.201—define the phrase “is regarded as having an impairment” to mean:

      (1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;

      (2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or

      (3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.

   b) In Matarese v. Archstone Communities, 468 Fed. Appx. 283, 284 (4th Cir. 2012), the court found that a building owner and property managers violated the FHA by discriminating against a resident they “regarded as” suffering from a physical or mental impairment substantially limiting one or more of her major life activities, even though the resident did not actually suffer from such an impairment.

B. Establish that Landlord Knew or Should Have Known of Disability.

1. Landlord received letter setting forth evidence of tenant’s disability.

   a) The easiest way to establish the landlord’s knowledge is by writing a letter to either the landlord or the landlord’s attorney and setting forth the nature of your client’s impairment. See Douglas, 884 A.2d at 1133 (tenant’s attorney sent landlord’s counsel a letter stating that tenant suffered from a mood disorder, received SSI, and was an outpatient at a city operated mental health/substance abuse clinic, and this evidence “tended to show that the landlord knew or had reason to know that the tenant suffered from a mental impairment”).

   b) Send the letter by facsimile or by certified mail, return receipt requested, so you have proof that the landlord or its attorney received the letter.

2. Landlord demonstrated its knowledge of the tenant’s handicap.

   a) In Douglas, the landlord’s agent inspected the tenant’s apartment several times and urged her to seek help at a hospital. The tenant followed this advice and saw a psychiatrist who diagnosed her as suffering from a mood disorder. The court held that this evidence, like the letter from the tenant’s attorney, established the landlord’s knowledge of the disability. 884 A.2d at 1133.
3. Landlord was aware that the tenant received disability benefits.

   a) “[B]ecause a housing authority is aware of the source of a public housing tenant’s income, a housing authority is on notice of a tenant’s disability when they are recipients of SSI or SSDI.” Sinisgallo, 865 F. Supp. 2d at 339.

C. Establish that Accommodation is Necessary.

1. The tenant must show that:

   a) The disability has caused the need for accommodation; and

   b) The accommodation requested would eliminate the problem.

   Douglas, 884 A.2d at 1133.

2. To establish the first element, the tenant must show that there was a causal connection or “nexus” between her disability and the violation.

   a) It is not enough for the tenant to show that she is disabled.

   b) She must be able to demonstrate that she committed the violation at issue because of her disability.

   c) “To determine whether a plaintiff has shown that a reasonable accommodation ‘may be necessary’ to afford a plaintiff an equal opportunity to use and enjoy a dwelling under the FHA, courts look to whether ‘there is a causal link between the disability for which the accommodation is requested and the misconduct that is the subject of the eviction . . . .’” Sinisgallo, 865 F. Supp. 2d at 339-40 (citation omitted).

3. To establish the second element, the tenant must show that she will be able to satisfy her obligations as a tenant and refrain from repeating the violation at issue if the landlord provides the requested accommodation.

   a) A tenant may request a reasonable accommodation by challenging an eviction and asking for a second chance – provided she seeks help for her disability. Super, 2010 WL 3926887, at *6 (rejecting “contention that so-called ‘second chances’ cannot be accommodations under the FHA”); Boston Housing Auth. v. Bridgewaters, 898 N.E.2d 848, 859 (Mass. 2008).
b) In *Churney*, the plaintiff alleged that CHA violated the FHAA, the Rehabilitation Act, and the ADA by terminating her rental assistance under the HCV program after she was convicted of aggravated sexual assault. 2013 WL 589599, *3. The plaintiff alleged that the incident that led to her arrest and conviction was caused by her bipolar disorder, and that she was therefore entitled to a reasonable accommodation. *Id.* The United States District Court for the Northern District of Illinois, however, dismissed her complaint because she did not allege that her requested accommodation—that she be granted an exception to the CHA’s prohibition on sex offenders so long as she submits written confirmation of ongoing monitoring and counseling for her bipolar disorder—would effectively ameliorate the risk that she will suffer another psychotic episode and threaten the safety of residents living near her. *Id.*

D. Establish that Tenant Requested the Accommodation.

1. Necessity of request.
   a) Under the FHA, a landlord is not obligated to provide a reasonable accommodation to a tenant unless the tenant requests such an accommodation. *Douglas*, 884 A.2d at 1123, citing Joint Statement, at 11.

2. Timing.
   a) “[A] ‘reasonable accommodation’ defense is available at any time before a judgment of possession has been entered, if the other requirements of the defense are met.” *Douglas*, 884 A.2d at 1121

   b) The tenant may even be able to make the request any time before the judgment is enforced. See *Radecki v. Joura*, 114 F.3d 115, 116 (8th Cir. 1997) (“In assessing whether and when defendants knew of [the tenant’s] handicap, the court should have considered the date [the tenant] was actually evicted, as the FHA provides that unlawful discrimination occurs when a dwelling is ‘den[ied]’ to a renter because of that renter’s handicap.”)

3. How to make the request.
   a) “[T]he Fair Housing Act ‘does not require that a request be made in a particular manner.’” *Douglas*, 884 A.2d at 1123, citing Joint Statement, at 10.

   b) Nevertheless, submitting a written request is clearly the best practice, in part because it helps establish the landlord’s knowledge of both the tenant’s handicap and the accommodation request.

   c) Submitting a written request.
(1) Do not refer to the letter as a settlement offer. Clearly state that you are submitting a request for a reasonable accommodation under the FHA.

(2) Establish that your client suffers from a “handicap” as that term is defined in the FHA.

(3) Highlight the nexus between the alleged violation and your client’s handicap.

(4) Request a specific accommodation. See Douglas, 884 A.2d at 1123 (the tenant should clearly state that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of her disability, and she should explain what type of accommodation she is requesting.)

(5) Explain how this accommodation will address the problem and ensure that the problem does not reoccur.

(6) Ask the landlord to respond to your request by a specific deadline (at least ten days after the date of the letter).

(7) State that a failure to respond by the deadline will be deemed a rejection of the request. See Joint Statement, at 11 (“An undue delay in responding to a reasonable accommodation request may be deemed to be a failure to provide a reasonable accommodation.”).

E. Establish that Landlord Denied the Requested Accommodation.

1. A delayed response may constitute a denial.

   a) “[O]nce the tenant requests a ‘reasonable accommodation’ (or, without using those exact words, requests an accommodation for a disability) the landlord is obliged under the Fair Housing Act to respond promptly.” Douglas, 884 A.2d at 1123; see also Joint Statement, at 11 (landlord “has an obligation to provide prompt responses to reasonable accommodation requests”).

2. Landlord has duty to open dialogue before denying request.

   a) If the tenant’s request for an accommodation is not sufficiently detailed, the FHA – as properly interpreted – requires the landlord to “open a dialogue” with the tenant and request whatever information is needed to determine what specific accommodation the tenant is requesting and whether this accommodation would, in fact, be reasonable under the circumstances. Douglas, 884 A.2d at 1123.
b) “If a landlord is skeptical of a tenant’s alleged disability or the landlord’s ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.” Jankowski Lee & Assoc. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996) (after tenant with multiple sclerosis requested assigned parking space close to his building as a reasonable accommodation, landlord violated FHA by denying request without first asking for more information regarding the extent to which tenant’s impairment limited his activities.).
XXXVI. GROUNDS FOR DENYING ACCOMMODATION.

A. Requested Accommodation is Not Reasonable.

1. “An accommodation is unreasonable if it imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program.” Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002).

B. Tenant Poses a Direct Threat.

1. The FHA 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).

2. 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, 865 F. Supp. 2d at 336.

   a) “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 Joint Statement, at 4.

3. 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, 884 A.2d at 1125.

C. Tenant is a Current Drug-User.

1. Current drug users are not entitled to protection under the FHA. 42 U.S.C. § 3602(h) (the term “handicap” does not include “current, illegal use of or addiction to a controlled substance.”).

2. What is the “relevant time” to assess a tenant’s status as a current drug user?
a) In Kehoe v. Housing Auth. of South Bend, 2012 WL 1877740, *5 (N.D. Ind. May 18, 2012), aff’d, 498 Fed. Appx. 620 (7th Cir. December 20, 2012), the court defined the relevant time as the date on which the landlord issues written notice of its intent to terminate the tenancy on the grounds that the tenant used illegal drugs.

(1) Under this analysis, the time that elapses between the tenant’s last drug use and the date on which the notice is issued is used to determine whether the tenant should be classified as a current drug user who is excluded from the FHA’s protections.

(2) In Kehoe, the time that elapsed was just three weeks, so the court held that the tenant was precluded from claiming that she had a “handicap” as that term is defined in the FHA. “[W]here the line is exactly, may be hard to say. But where ever that line is drawn . . . it seems clear that if someone is caught using or possessing drugs . . . and a little more than three weeks later the housing authority seeks their eviction, they are properly deemed a current drug user.” Id. at *6.

b) In determining that the relevant time for assessing a tenant’s status as a current drug user is the date on which the termination notice is issued, the court relied exclusively on an employment discrimination case: Zenor v. El Paso Healthcare System, 176 F.3d 847 (5th Cir. 1999). Id. at *5.

(1) In Zenor the Fifth Circuit held that the proper time at which to evaluate whether an employee was “currently engaging in the illegal use of drugs” – and thus was not a “qualified individual with a disability” within meaning of the ADA – was the date on which he was notified that he would be terminated, and not the actual termination date. 176 F.3d at 853-54; but see Teahan v. Metro-North Commuter R. Co., 951 F.2d 511, 518 (2d Cir. 1991) (the relevant time for assessing an employee’s current status is the time of his actual firing because “[i]t would defeat the goal of § 504 to allow an employer to justify discharging an employee based on past substance abuse problems that an employee has presently overcome.”).

3. A tenant’s current drug use should not preclude her from requesting a reasonable accommodation if:

a) The tenant suffers from a second disability; and

b) There is a causal connection between that second disability and the violation for which the tenant is facing eviction.
(1) “The Fair Housing Act excludes from the definition of “handicap” the current, illegal use of drugs, but it does not exclude necessarily from its protection a current user of illegal drugs who has some other handicap.” Peabody Properties, Inc. v. Sherman, 638 N.E.2d 906, 911 (Mass. 1994) (Liacos, C.J., dissenting) (tenant could not argue that his current drug use constituted a handicap under the FHA, but he could still argue that he was entitled to a reasonable accommodation because he was a quadriplegic).

4. Medical marijuana.

a) As set forth below in more detail in the section on “Criminal Law and Housing,” many states (including Illinois) have passed laws that authorize the use of medical marijuana.

b) HUD, however, has taken the position that a tenant with a disability may not request, as a reasonable accommodation, the right to use medical marijuana. Memorandum from Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing—February 10, 2011.

c) According to Assistant Secretary Henriquez, PHAs and owners may not permit the use of medical marijuana as a reasonable accommodation because:

   (1) Federal law—the Controlled Substances Act, 21 U.S.C. § 801 et seq.—defines marijuana as a Schedule I substance that may not be legally prescribed by a physician,

   (2) The federal law preempts any conflicting state law in this area;

   (3) Current illegal drug use does not qualify as a handicap or disability under any of the governing federal statutes; and

   (4) Allowing a tenant to use an illegal drug as an accommodation is not reasonable because it requires a fundamental alteration in the nature of a PHA’s or an owner’s operations.
XXXVII. CRIMINAL LAW AND HOUSING.

A. Overview.

1. The connection between criminal law and housing law is extensive and important.

2. Many families face eviction from subsidized housing or the termination of their assistance under the HCV Program because a household member or guest engaged in certain criminal activities.

3. A criminal record can also serve as grounds for denying an application for subsidized housing.

B. Applicable Federal Regulations.

1. Public Housing.
   a) 24 C.F.R. § 960.204—Denial of admission for criminal activity or drug abuse by household members.
   b) 24 C.F.R. § 996.4(l)(5)—Termination of tenancy for criminal activity or alcohol abuse.

2. HCV Program.
   a) 24 C.F.R. § 982.553 – Denial of admission and termination of assistance for criminals and alcohol abusers.

3. Section 8 Project-Based Programs.
   a) 24 C.F.R. Part 5, Suppart I—Preventing Crime in Federally Assisted Housing—Denying Admission and Terminating Tenancy for Criminal Activity or Alcohol Abuse


1. Issued November 2, 2015.

2. Guidance for PHAs and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions.
   a) Arrest records may not be used to deny admission, terminate assistance, or evict.
   b) PHAs and owners are not required to adopt “one strike” policies.
   c) PHAs and owners must protect their residents’ right to due process.
D. Denying Admission, Terminating Assistance, and Evicting for Criminal Activities.

1. Public Housing.

a) The PHA must establish standards that prohibit admission of a household to the PHA’s public housing program if:

   (1) The PHA determines that any household member is currently engaging in illegal use of a drug. (For purposes of this section, a household member is “currently engaged in” the criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current); or

   (2) The PHA determines that it has reasonable cause to believe that a household member’s illegal use or pattern of illegal use of a drug may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

b) “The PHA may evict the tenant by judicial action for criminal activity in accordance with this section if the PHA determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.” 24 C.F.R. § 966.4(l)(5)(iii)(A).

2. HCV Program.

a) The PHA may prohibit admission to the program when it “determines” that a member of the applicant’s household has engaged in certain criminal activities. 24 C.F.R. § 982.553(a).

b) “The PHA may terminate assistance for criminal activity by a household member as authorized in this section if the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the activity, regardless of whether the household member has been arrested or convicted for such activity.” 24 C.F.R. § 982.553(c).

3. Section 8 Project-Based Programs.

a) Owners may deny admission if they “determine” that a member of the applicant’s household has engaged in prohibited criminal activity. 24 C.F.R. §§ 5.854, 5.855 and 5.857.
b) The owner may terminate the resident’s lease agreement if the owner “determine[s] that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying a criminal conviction standard of proof of the activity.” 24 C.F.R. § 5.861.

E. Police Reports as Evidence of Crime.

1. In eviction actions.

a) Illinois Rule of Evidence 803(8) allows, as an exception to the hearsay rule, the introduction of reports and statements from public officials and agencies setting forth “matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . . unless the sources of information or other circumstances indicate lack of trustworthiness.”

b) The Committee Commentary to the IRE, however, states that “the Committee incorporated into the Illinois Rules of Evidence the current law of evidence in Illinois wherever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years.”

c) “Illinois courts have generally held that a police report is inadmissible, and that the mere attempt to introduce such an exhibit may be considered reversible error.” Camco v. Lowery, 362 Ill. App. 3d 421, 434 (1st Dist. 2005).

(1) Police reports are essentially a collection of hearsay statements. Kociscak v. Kelly, 962 N.E.2d 1062, 1068 (1st Dist. 2011) (“Generally, written police reports are not admissible in Illinois because they contain conclusions or are hearsay.”); People v. Garrett, 216 Ill. App. 3d 348, 357 (1st Dist. 1991) (“Generally, a police report summarizes information obtained from various sources during the course of an investigation [so it is] the product of secondhand knowledge as to the reporting officer and hence, hearsay.”).

(2) Even when the police report summarizes “matters observed pursuant to duty imposed by law as to which matters there was a duty to report,” the report is still hearsay because it was created in anticipation of litigation. In re Joseph S., 339 Ill. App. 3d 599, 608 (1st Dist. 2003) (“Records made with a view towards possible litigation do not qualify as business records since they are not made in the ordinary course of business . . . ”).

d) “Police reports have been admitted into evidence, provided a proper foundation has been laid, as evidence of a past recollection recorded or for use in impeachment.” Kociscak, 962 N.E.2d at 1068 (emphasis added).
(1) Evidence admitted as a past recollection recorded must satisfy the following prerequisites:

(a) The witness had firsthand knowledge of the recorded event;

(b) The written statement was made at or near the time of the event and while the witness had a clear and accurate memory of it;

(c) The witness lacks present recollection of the event; and

(d) The witness can vouch for the accuracy of the written statement. \textit{Id.}

2. In administrative proceedings.

a) As stated above, the rules of evidence are not strictly applied in administrative hearings, so a police report may be admitted into evidence if it has indicia of reliability.

F. Arrests as Evidence of Crime.

a) An arrest record, by itself, is not a sufficient basis for denying admission or terminating assistance. See \textit{Landers v. Chicago Housing Authority}, 404 Ill. App. 3d 568, 576-77 (1st Dist. 2010) (sheer number of arrests, without evidence that any arrests led to convictions, does not establish a history of criminal activity.); see also \textit{Miles}, (without any live testimony to shed light on the incident, evidence showing that criminal charges were still pending was insufficient to establish by a preponderance of the evidence that alleged household member engaged in the violent criminal activity for which he was arrested).

b) PIH Notice 2015-19.

(1) Arrest records may not be used to deny admission, terminate assistance, or evict.

(a) “[T]he fact that an individual was arrested is not evidence that he or she has engaged in criminal activity.”

(b) “[A] PHA or owner may not base a determination that an applicant or household engaged in criminal activity warranting denial of admission, termination of assistance, or eviction on a record of arrest(s).”

(c) “An arrest record can trigger an inquiry into whether there is sufficient evidence for a PHA or owner to determine that a person engaged in disqualifying criminal activity, but is not itself evidence on which to base such a determination.”

G. Evictions for Crimes That Threaten People in the “Immediate Vicinity.”
1. The regulations governing the subsidized housing program do not define “immediate vicinity,” but the following three cases have addressed the term.

   a) In *Carroll v. Chicago Housing Authority*, 2015 IL App (1st) 133544, ¶ 28 (2015), a recipient of assistance under the HCV program challenged the hearing officer’s decision to terminate her assistance on the grounds that she was arrested for DUI. The appellate court held that the site of recipient’s arrest for DUI, which was located 15 minutes away from the assisted unit, was not “in the immediate vicinity of or on her premises . . . .” (emphasis in original).

   b) In *Bailey v. United States*, 133 S. Ct. 1031, 1042 (2013), the United States Supreme Court held that the suspect who was arrested about a mile away from the premises to be searched “was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question.”

   (1) The Court declined to further define the meaning of immediate vicinity, but did set forth the following non-exclusive list of factors to be considered in closer cases:

      (a) The lawful limits of the premises;

      (b) Whether the occupant was within the line of sight of his dwelling; and

      (c) The ease of reentry from the occupant’s location.

   c) In *Powell v. Housing Authority of the City of Pittsburgh*, 760 A.2d 473, 482-83 (Pa. Commw. Ct. 2002), rev’d on other grounds, 812 A.2d 1201 (Pa. 2002), the court construed “immediate vicinity” to mean “on the premises or next door,” and found that a carjacking that occurred close to a mile from the premises did not pose a threat to individuals residing in the immediate vicinity.

H. Strict Liability for Certain Crimes.

1. Public housing.

   a) The *Anti-Drug Abuse Act* provides that “[e]ach public housing agency 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.” 42 U.S.C. § 1437d(f)(6).
(1) In HUD v. Rucker v. HUD, 535 U.S. 125 (2002), the United States Supreme Court unanimously held that this statutory provision requires lease terms that vest PHAs with the discretion to evict tenants for the drug-related activity of household members and guests regardless of whether the tenant knew, or should have known, about the crime.

(2) The Court also recognized, however, that “[t]he statute does not require the eviction of any tenant who violated the lease provision.” Rucker, 535 U.S. at 133-34 (emphasis in original). Accordingly, PHA’s may consider mitigating circumstances. See also Letter dated June 6, 2002, from Assistant HUD Secretary Michael Liu to all public housing directors: http://www.ezrc.hud.gov/offices/pih/regs/rucker6jun2002.pdf

(3) Less than two months after the Court issued its opinion in Rucker, an unexpected source criticized the decision. In his April 12, 2002, review of the movie Human Nature, legendary Chicago film critic Jonathan Rosenbaum wrote,

I don’t mean to suggest that Europeans are any more “civilized” than Americans — only that some sense of relativity is necessary to understand the ideas this movie pretends to be dealing with. It seems to assume, for instance, that having an education guarantees civilized behavior. But when the Supreme Court recently voted unanimously that public-housing tenants could be legally evicted if any household member or guest took illegal drugs—even outside the premises and without the tenant’s knowledge—I’m sure that some educated people, possibly including the justices themselves, considered this an act on behalf of “civilized” folk such as themselves rather than a gift to the sleaziest and cruelest slumlords. I consider it barbaric.

2. Public housing in Chicago.

   a) Paragraph 16(f) of the lease that the Chicago Housing Authority uses for its traditional housing units authorizes a tenant who is facing eviction for a household member’s or guest’s crime to assert as an affirmative defense that he or she did not know, or have any reason to know, the crime would occur.

3. Section 8 project-based developments.

   a) The Illinois Appellate Court has extended the holding in Rucker to Section 8 project based developments. Camco, 362 Ill. App. 3d 421 at 439 (“Rucker clearly applies in this case because Van Buren is a federally assisted low-income housing complex with tenants in the Section 8 program.”)
I. Collateral Civil Consequences of Guilty Pleas.

1. The problem.

   a) In many criminal cases—especially when the defendant has no prior record and/or has been arrested for a relatively insignificant crime—the State offers a sentence that involves no incarceration in exchange for a guilty plea.

   b) In these situations the public defender—and almost any individual who is financially eligible for legal services will not have a private criminal defense attorney—may encourage the defendant to take the offer.

   c) The guilty plea constitutes both an admission and a conviction that can jeopardize the defendant’s eligibility for, or right to remain in, subsidized housing.

   d) Reasons why public defenders may encourage a subsidized housing resident to plead out.

      (1) Public defenders are primarily focused on protecting a client’s liberty interests.

      (2) Public defenders are often unaware of the collateral civil consequences of a guilty plea.

      (3) The public defender may not know that the defendant has a subsidized tenancy.

2. How landlords learn about arrests.

   a) In the public housing, HCV, and Section 8 project-based programs, PHAs and property managers conduct criminal background checks on all adult household members during annual reexaminations.

   b) In the HCV Program, the PHA conducts criminal background checks on all adult household members when the family requests moving papers.

   c) The Chicago Police Department notifies CHA whenever a person is arrested for drug-related activity at a CHA development, or when the offender identifies a CHA unit as his or her residence. See U.S. Residential v. Head, 397 Ill. App. 3d 156, 158 (CPD and CHA “shared information through established procedures about public housing residents who were arrested for committing drug-related crimes. Generally, CPD provided case reports to CHA regarding arrests on CHA properties. CHA would then complete a notice of arrest and send it to the property manager.”).

J. Maintaining Innocence after Guilty Plea.
1. May a tenant who has pled guilty in a criminal proceeding maintain his or her innocence in a subsequent eviction action or administrative hearing? Maybe.

2. In *Talarico v. Dunlap*, 177 Ill. 2d 185 (1997), the Illinois Supreme Court held that a medical student who pled guilty to criminal battery in exchange for a sentence that involved no incarceration, and who therefore had no incentive to litigate his defense in the criminal proceeding, was not collaterally estopped from raising this defense as a claim in a subsequent civil case.

   a) Ernie Talarico, a second-year medical student at the Chicago College of Osteopathic Medicine, suffered from severe acne so his doctor prescribed Accutane, a medication with known side effects. *Talarico*, 177 Ill. 2d at 187.

   b) After taking the medication, Talarico went to a forest preserve, grabbed a 15-year-old boy, pushed him to the ground, and shocked him with a stun gun. Less than a week later, Talarico visited another forest preserve where he stunned a 25-year-old man with a stun gun. Talarico and the man fell to the ground, and Talarico grabbed the man’s genitals and kissed him several times. *Id.* at 188.

   c) Talarico was arrested and charged with aggravated battery, aggravated unlawful restraint, armed violence and aggravated criminal sexual abuse. He pleaded guilty to two counts of misdemeanor battery in exchange for one-year's probation. *Id.*

   d) Talarico subsequently filed a civil suit alleging that his doctor subjected him to unnecessary risks by prescribing Accutane. *Id.* at 188-89.

   e) The trial court found that Talarico’s guilty plea in the criminal proceeding collaterally estopped him from claiming that Accutane proximately caused his criminal behavior. As part of the plea agreement, the court noted, Talarico admitted that he committed the crimes “intentionally and knowingly, without legal justification” and therefore waived his right to argue that Accutane was to blame. Accordingly, the trial court granted the doctor’s motion for summary judgment. *Id.*

   f) The appellate court reversed, and the Illinois Supreme Court affirmed the appellate court, finding that Talarico had no incentive to litigate his defense in the criminal proceeding because the State offered a sentence that involved no incarceration. *Id.* at 197. Furthermore, it appeared that, at the time of the criminal proceedings, the civil suit against the doctor was not foreseeable. *Id.* Taken together, these facts “rebut[ted] the inference that Talarico’s admission on the issues of intent and knowledge was treated by him with entire seriousness.” *Id.* at 198.
3. **Costa v. Fall River Housing Auth.**, 881 N.E.2d 800, 811 (Mass. App. Ct. 2008) (“A finding of guilt by trial is conclusive of the same factual issues in any later civil litigation. In contrast, a plea of guilty without trial has only evidentiary effect upon the same issues in any subsequent civil litigation.”), aff’d, 903 N.E.2d 1098, 1114 (Mass. 2009) (“guilty pleas are not conclusive of the underlying facts, but evidence of them.”).

K. **Suppressing Illegally-Seized Evidence.**

1. In **U.S. Residential v. Head**, 397 Ill. App. 3d 161 (1st Dist. 2009), the Illinois Appellate Court reversed the trial court’s decision to suppress illegally-seized evidence in a forcible action. The court held that suppressing such evidence in a civil proceeding does not serve what the court claimed is the sole purpose of the exclusionary rule: to deter police misconduct.

   a) “While the circuit court focused on the deterrent value of suppressing the illegally seized evidence, the costs of excluding relevant and probative evidence outweigh any additional marginal deterrence provided by extending the exclusionary rule. [P]olicemen are sufficiently punished by the exclusion of evidence in criminal prosecutions.” 397 Ill. App. 3d at 163.

   b) “While CPD and CHA are parties to an agreement that requires CPD to provide CHA with policing services, the record does not indicate CPD is, or has been, improperly motivated to illegally seize evidence to benefit civil proceedings.” Id.

   c) “Defendant suggests that if illegally seized evidence may be introduced in eviction proceedings, ‘nothing will discourage the police from conducting unlawful searches.’ We are not persuaded by this type of speculative argument. In the event that such improper behavior or police harassment is shown, ‘the judiciary may impose appropriate sanctions to deter misconduct.’” Id.

L. **Crimes That Do Not Warrant Eviction or Deprivation of Assistance.**

1. Crimes that are mischaracterized as “violent criminal activities.”

   a) Tenants may be evicted from or denied admission to subsidized housing for, among other things, “violent criminal activity.” That term, however, has a very specific definition in the governing regulations and may not apply to the crime at issue in your case.

   b) “Violent criminal activity means any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage.” 24 C.F.R. § 5.100 (emphasis added).

2. Possession of Drug Paraphernalia.
a) In Degelman v. Housing Auth. of Pittsburgh, 67 A.2d 1287, 1289-90 (Pa. Commw. Ct. 2013), the court found that a tenant's disorderly conduct conviction relating to drug paraphernalia that was found at her apartment provided insufficient cause to terminate her assistance under the HCV Program on the grounds that she engaged in drug-related activity; under the applicable federal regulations, “drug-related criminal activity” required the actual use or possession of a drug, not drug paraphernalia.

3. Crimes (other than drug-related crimes) that do not pose a threat to other residents.

a) DUI.

(1) Carroll v. Chicago Housing Authority, 2015 Ill. App (1st) 133544, ¶ 25 (2015) (“Termination for ‘violent criminal activity’ is authorized (24 C.F.R. § 982.553(b)(2)(iii)); however, we find no support for the conclusion that a singular traffic offense qualifies as ‘violent’ criminal activity under the Code where there is no evidence indicating the underlying facts that formed the basis of the conviction were ‘violent.’”).

b) Theft.

(1) Guste Homes Resident Mgmt. Corp. v. Thomas, 116 So.3d 987, 990-92 (La. App. 2013) (public housing resident’s off-site criminal activity—misdemeanor theft—did not threaten other residents’ health, safety, or right to peaceful enjoyment of the premises, and thus did not constitute lease violation).

M. Juvenile Records.

1. When a tenant is facing eviction on the grounds that a household member or guest who is under the age of 18 committed a crime, the police may not disclose to the landlord any information about the crime unless the judge presiding over the juvenile case issues an order authorizing the release of such information, or the minor is being charged as an adult.

a) “The records of law enforcement officers . . . concerning all minors under 18 years of age must be maintained separate from the records of arrests and may not be open to public inspection or their contents disclosed to the public” except by order of the presiding juvenile court or where the minor is being charged as an adult. 105 ILCS 405/1-7(C)

b) “Law enforcement officers . . . may not disclose the identity of any minor in releasing information to the general public as to the arrest, investigation or disposition of any case involving a minor.” 105 ILCS 405/1-7(E).
2. These statutory provisions do not preclude an eye-witness to the crime from testifying against the tenant in the eviction action.

N. Decriminalization of Cannabis Possession.

1. As noted above, entire families may be evicted from subsidized housing, or lose their assistance under the HCV Program, if a household member or guest engages in drug-related criminal activity. In many of these cases the offense involves possession of a very small amount of cannabis, often no more than one joint.

2. These cases begin with an arrest that the PHA or owner learns about when conducting a criminal background check during annual reexaminations and, in the HCV Program, when the family requests moving papers.

3. On June 27, 2012, the Chicago City Council passed by a vote of 44-3 an ordinance provision – Chicago Municipal Code, § 7-24-099 – that provides, in pertinent part, that:

   a) *It is a violation of this section for any person to possess up to 15 grams of any substance containing cannabis.*

   b) *Citations shall not be issued under this section for violations ... occurring on the grounds of a school or public park.*

   c) *Any person who violates this section shall be subject to a fine of not less than $250.00 nor more than $500.00 for the first offense, and $500.00 for the second and each subsequent violation occurring within a period of 30 days.*

4. CPD Special Order 4-26-12 sets forth the policies that the police should follow with respect to Section 7-24-099 of the Chicago Municipal Code.

5. Section 7-24-090 should reduce (at least in Chicago) the number of forcible actions based on possession of a small amount of cannabis.

   a) *By decriminalizing possession of up to 15 grams of marijuana, the ordinance provision reduces the number of arrests for cannabis possession.*

   b) *Accordingly, when PHAs and property managers conduct criminal background checks, they will not discover that a family’s household member or guest possessed a small amount of cannabis.*

O. Medical Marijuana.

1. States that have passed medical marijuana laws.

2. The law in Illinois.

a) On April 17, 2013, the Illinois House passed a medical marijuana bill. The Senate voted 35-21 to pass the bill on May 17, 2013, and Governor Pat Quinn signed the bill into law on August 1, 2013. The law became effective on January 1, 2014.

b) The Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILCS 130/1 et seq., establishes a patient registry program, protects registered qualifying patients and registered designated caregivers from “arrest, prosecution, or denial of any right or privilege,” and allows for the registration of cultivation centers and dispensing organizations.

c) Approved Conditions:

(1) Cancer,
(2) Glaucoma,
(3) Positive status for HIV,
(4) AIDS,
(5) Hepatitis C,
(6) ALS,
(7) Muscular dystrophy,
(8) Crohn's disease,
(9) Agitation of Alzheimer's disease,
(10) Multiple sclerosis,
(11) Chronic pancreatitis,
(12) Spinal cord injury or disease,
(13) Traumatic brain injury; or
One or more injuries that significantly interferes with daily activities as documented by the patient’s provider; and a severely debilitating or terminal medical condition or its treatment that has produced at least one of the following:

(a) Elevated intraocular pressure,
(b) Cachexia,
(c) Chemotherapy induced anorexia,
(d) Wasting syndrome,
(e) Severe pain that has not responded to previously prescribed medication or surgical measures or for which other treatment options produced serious side effects,
(f) Constant or severe nausea,
(g) Moderate to severe vomiting, seizures, or severe, persistent muscle spasms.

**d) Possession/Cultivation:** “Adequate supply” is defined as “2.5 ounces of usable cannabis during a period of 14 days and that is derived solely from an intrastate source.” The law does not allow patients or caregivers to cultivate cannabis.

3. **HUD position on use of medical marijuana in subsidized housing.**

**a) Memorandum from Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing—February 10, 2011.**

(1) Subject: Medical use of marijuana and reasonable accommodation in federal public and assisted housing.

(2) PHAs and owners may not permit the use of medical marijuana as a reasonable accommodation because:

(a) **Federal law**—the Controlled Substances Act, 21 U.S.C. § 801 et seq.—defines marijuana as a Schedule I substance that may not be legally prescribed by a physician,

(b) The federal law preempts any conflicting state law in this area;

(c) Current illegal drug use does not qualify as a handicap or disability under any of the governing federal statutes; and

(d) Allowing a tenant to use an illegal drug as an accommodation is not reasonable because it requires a fundamental alteration in the nature of a PHA’s or an owner’s operations.
(3) PHAs and owners must deny admission to households with a member who is currently using an illegal drug.

(4) PHAs and owners, however, are not required to evict a household for such illegal drug use. They must have the right to evict, but they do not have to exercise this right.


(1) Subject: Medical marijuana use in public housing and housing choice voucher programs.

(2) PHAs must deny assistance to individuals who currently use medical marijuana.

(3) PHAs have the right to terminate assistance under the public housing and HCV programs to individuals who currently sue medical marijuana, but they are not required to exercise this right.

(4) Certain prescription drugs like Marinol and Cesamet contain marijuana synthetics, but they are not medical marijuana and they are not illegal. Their use, therefore, is not proscribed in the public housing and HCV programs.

c) Memorandum from General Counsel Gail Laster—September 24, 1999.

(1) Subject: Medical use of marijuana in public housing.

(2) Any state law purporting to legalize the use of medical marijuana in public or other assisted housing would conflict with the admission and termination standards found in QHWRA and be subject to preemption.

P. Staying Eviction Proceedings Pending Resolution of Criminal Case.

1. Overview.

   a) When a tenant is facing eviction for criminal activity and the criminal case is still pending, the tenant must decide whether to claim the Fifth Amendment privilege against self-incrimination or to testify at the trial in the eviction action. See Chagolla v. City of Chicago, 529 F. Supp. 941, 945 (N.D. Ill. 2008).

   (1) If the tenant chooses to invoke the privilege, she runs the risk that this will be used as the basis for an adverse inference against her in the civil case, a practice the Fifth Amendment does not prohibit.

   (2) Conversely, if the tenant chooses to testify, she runs the risk that her responses will be used by the prosecutor in the pending criminal case.
b) If forced to choose between claiming the privilege and testifying, the tenant will likely claim the privilege, thereby creating the risk that the claim will be used to help prove the plaintiff’s case against her. See Chagolla, 529 F. Supp. 2d at 945.

c) In these circumstances, the judge presiding over the eviction proceeding court may stay the civil litigation. Id.

2. Establishing the need for a stay.

a) The factors considered include the following non-exclusive list:

(1) Whether the civil and criminal matters involve the same subject;

(2) Whether the governmental entity that has initiated the criminal case or investigation is also a party in the civil case;

(3) The posture of the criminal proceeding; the effect of granting or denying a stay on the public interest;

(4) The interest of the civil-case plaintiff in proceeding expeditiously, and the potential prejudice the plaintiff may suffer from a delay; and

(5) The burden that any particular aspect of the civil case may impose on defendants if a stay is denied. Id.

Q. Crime-Free Ordinances.

1. Many municipalities in Cook County now have crime-free rental housing ordinances and/or nuisance property ordinances that penalize both landlords and tenants for:

a) Suspected criminal activity; and/or

b) Excessive calls for police assistance.

2. Common provisions.

a) Landlords must get a license to rent residential property. This license may be revoked for failing to comply with other ordinance provisions.

b) Landlord must evict entire household when criminal activity, or even non-criminal activity that is prohibited by a local ordinance, allegedly occurs at the rental property.

c) Landlord must evict entire family that makes excessive or unreasonable number of calls to police within a specified period of time.

3. Challenging prohibition against making excessive calls to the police.
**The prohibition violates public policy.**


(2) “Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe crimes have been committed should not be deterred from reporting them . . . .” *Joiner v. Benton Community Bank*, 82 Ill. 2d 40, 44 (1980).


(4) “The Illinois Supreme Court in *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124 (1981) established a public policy favoring citizen crime-fighters, and courts have interpreted this to mean that public policy favors the reporting of potentially illegal or improper conduct.” *Mackie v. Vaughn Chapter-Paralyzed Veterans of America, Inc.*, 354 Ill. App. 3d 731, 742 (1st Dist. 2004).

4. **Recent litigation.**

   **a)** *On October 2, 2014, HUD announced that it reached a Conciliation Agreement with Norristown, Pennsylvania, settling allegations that the municipality violated the FHA when it enacted ordinances that held landlords responsible for evicting tenants cited for "disorderly behavior," including domestic violence incidents, or risk being fined or losing their rental license. Norristown’s City Council subsequently repealed the original law but passed a similar ordinance that same day which called for charging landlords mounting fines for tenants that display disruptive behavior.*


5. **Recommended reading:**

XXXVIII. DOMESTIC VIOLENCE, SEXUAL ASSAULT & STALKING.

A. The Problem—Blaming the Victim.


2. PHAs and owners sometimes rely on this rule to evict a tenant – or to terminate her assistance – for a violent crime committed by her spouse, partner, or visitor, even if she is the victim of the crime.

3. Examples.

   a) 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].”

   b) 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.

   c) 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.

B. The Solution—Housing Laws That Protect Victims/Survivors.

1. Federal.


2. State.

a) Safe Homes Act—765 ILCS 750.

b) Section 106.2 of the Forcible Entry and Detainer Act, 735 ILCS 5/9-101 et seq.

C. VAWA 2013.

1. Overview.

a) On March 17, 2013, President Obama signed into law VAWA 2013.

b) The statute extends protections to victims on tribal lands as well as LGBT and immigrant survivors of sexual assault and domestic violence.

c) It also continues many of the housing protections afforded by VAWA 2005, and expands these protections by:

   (1) Extending coverage to an additional nine federal housing programs;

   (2) Extending protections to victims of sexual assault;

   (3) Allowing survivors, when a lease is bifurcated so the landlord can evict the abuser, to either establish eligibility for the unit or find new assisted housing;

   (4) Providing survivors with emergency transfers; and

   (5) Ensuring that applicants for covered programs and tenants receiving assistance under these programs receive notice of VAWA rights at three critical junctures.

d) It makes the housing protections for all covered programs more consistent by repealing many of the prior provisions that were found in different statutes and consolidating them into a new section within VAWA 2013, which will be codified at 42 U.S.C. § 41411 (2013).

2. Authority and Guidance.

a) The implementing regulations are expected in early 2015, but for now HUD’s final regulations implementing VAWA 2005, 75 Fed. Reg. 66,246 (Oct. 27, 2010), continue to apply.

b) These regulations may be found at 24 C.F.R. Part 5, Subpart L.

4. VAWA covers individuals who have been subject to:

a) Domestic violence.

(1) Defined as any felony or misdemeanor crimes of violence committed by:

(a) a current or former spouse, intimate partner;

(b) a person with whom the victim shares a child;

(c) a person who is cohabiting or was cohabitating with the victim;

(d) a person similarly situated to a spouse of the victim under the domestic or family laws of the jurisdiction receiving grant monies; or

(e) any other person who committed a crime against an individual protected under the domestic or family laws of the jurisdiction. VAWA 2013, § 3(a) (amending definition of “domestic violence” and relocating it to 42 U.S.C. § 1437f(f)(11)).

(2)

b) Dating violence.
(1) Defined as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. VAWA 2013, § 3(a) (relocating definition of “dating violence” to 42 U.S.C. § 13925(a)(10)).

(2) The existence of such a relationship shall be determined based on a consideration of the following three factors:

(a) The length of the relationship.

(b) The type of relationship.

(c) The frequency of interaction between the persons involved in the relationship. Id.

c) Sexual assault.

(1) Defined as any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent. VAWA 2013, § 3(a) (adding 42 U.S.C. § 13925(a)(29)).

d) Stalking.

(1) Defined as a course of conduct directed at a specific individual that would cause a reasonable person to fear for his or her safety or suffer substantial emotional distress. VAWA 2013, § 3(a) (relocating definition of “stalking” to 42 U.S.C. § 13925(a)(30)).

5. VAWA also covers “affiliated individuals” of the survivor.

a) “Affiliated individual” is defined as:

(1) the spouse, parent, sibling, or child of the victim, or

(2) an individual to whom the victim stands in loco parentis, or

(3) an individual, tenant, or a lawful occupant living in the victim’s household. (VAWA 2013 eliminated the requirement under VAWA 2005 that the household member be related by blood or by marriage to the survivor.) VAWA 2013 § 601 (to be codified at 42 U.S.C. § 41411 (2013)).

b)

6. Denials of admission, and termination of tenancies or assistance.

a) A tenant may not be denied admission to, denied assistance under, terminated from participation in, or evicted from housing subsidized under a covered program on the grounds that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking. VAWA 2013 § 601 (adding §§ 41411(b)(1) and (b)(2)).
7. **Criminal activity directly related to abuse.**

   a) *Crimes that are directly related to the abuse endured by a survivor do not constitute grounds for denying assistance to the survivor, terminating the survivor’s assistance, or evicting the survivor.* VAWA 2013 § 601 (adding §§ 41411(b)(3)(a)).

8. **Limitations on VAWA protections.**

   a) *Survivors are held to same standard as other tenants for violations unrelated to domestic violence, dating violence, or stalking.* VAWA 2013, § 601 (adding § 14043e-11(b)(3)(C)(iii); 24 C.F.R. § 5.2005(d)(I).

   b) **Actual or imminent threat.**

      (1) A PHA, owner, or manager may evict or terminate assistance to a survivor if the PHA, owner, or manager can demonstrate that the survivor poses an “actual and imminent threat” to other tenants or employees at the property if she is not evicted or subject to the termination of assistance. VAWA 2013, § 601 (adding § 41411(b)(3)(C)(ii); see also 24 C.F.R. § 5.2005(d)(2).

      (2) The statute does not define the term “actual and imminent threat,” but the implementing regulations state that it “consists of a physical danger that is real, would occur within an immediate time frame, and could result in death or serious bodily harm.” 24 C.F.R. § 5.2005(e).

      (3) In determining whether an individual would pose an actual and imminent threat, the factors to be considered include:

         (a) *The duration of the risk,*

         (b) *The nature and severity of the potential harm,*

         (c) *The likelihood that the potential harm will occur,* and

         (d) *The length of time before the potential harm would occur.* 24 C.F.R. § 5.2005(d)(3) provides that a PHA, owner, or management agent should not evict a covered person or terminate her assistance unless there are no other actions that could be taken to reduce or eliminate the threat, including, but not limited to:

         (a) *Transferring the victim to a different unit,*

         (b) *Barring the perpetrator from the property,*

         (c) *Contacting law enforcement to increase police presence or develop other plans to keep the property safe,* or
(d) Seeking other legal remedies to prevent the perpetrator from acting on a threat.

9. Lease Bifurcation.

   a) PHAs, owners, or managers may “bifurcate” the lease in order to evict or terminate assistance to the abuser without penalizing the survivor. VAWA 2013, § 601 (adding § 41411(b)(3)(B)).

      (1) “Bifurcate means, with respect to a public housing or a Section 8 lease, to divide a lease as a matter of law such that certain tenants can be evicted or removed while the remaining family members’ lease and occupancy rights are allowed to remain intact.” 24 C.F.R. § 5.2003.

      (2) “Such eviction, removal, termination of occupancy rights, or termination of assistance shall be effected in accordance with the procedures prescribed by Federal, State, or local law for termination of assistance or leases under the relevant public housing, Section 8 Housing Choice Voucher, and Section 8 project-based programs.” 24 C.F.R. § 5.2009(a).

      (3) Congress and HUD have provided no guidance on how VAWA’s bifurcation rules work with state and local laws.

   b) If the abuser was the sole tenant eligible to receive assistance, the landlord must provide the remaining tenant with either an opportunity to establish eligibility or a reasonable time to move or establish eligibility for another covered housing program.” VAWA 2013, § 601 (adding § 41411(b)(3)(B)(ii)).

10. Special provisions regarding the HCV Program.

   a) “The PHA has discretion to determine which members of an assisted family continue to receive assistance in the program if the family breaks up.” 24 C.F.R. § 982.315(a)(1).

   b) “If the family break-up results from an occurrence of domestic violence, dating violence, or stalking . . . the PHA must ensure that the victim retains assistance.” 24 C.F.R. § 982.315(a)(2) (emphasis added).

   c) “If a court determines the disposition of property between members of the assisted family in a divorce or separation under a settlement or judicial decree, the PHA is bound by the court’s determination of which family members continue to receive assistance in the program.” 24 C.F.R. § 982.315(c) (emphasis added).

11. Portability in the HCV Program.
a) Even if moving would otherwise violate the lease, a family may move to another jurisdiction if it has complied with all program obligations and is moving to protect a family member who is the victim of domestic violence, dating violence, or stalking. 42 U.S.C. § 1437f(r)(5); see also 24 C.F.R. §§ 982.314(b) and 982.353(b).

b) VAWA 2013 does not extend this protection to victims of sexual assault, but this oversight, which undermines an important purpose of the statute’s housing provisions, should be corrected when the implementing regulations are issued.

12. Court orders.

a) Nothing in the statute may be construed “to limit the authority of a public housing agency or owner or manager of housing assisted under a covered housing program, when notified of a court order, to comply with a court order with respect to (i) the rights of access to or control of property, including civil protection orders issued to protect a victim of domestic violence, dating violence, sexual assault, or stalking; or (ii) the distribution or possession of property among members of a household in a case.” VAWA 2013, § 601 (adding § 41411(b)(3)(C)(i)).

“Nothing in [the implementing regulations] may be construed to limit the authority of a PHA, owner, or management agent, when notified, to honor court orders addressing rights of access to or control of the property, including civil protection orders issued to protect the victim and to address the distribution of property among household members in a case where a family breaks up.” 24 C.F.R. § 5.2009(b).

13. Emergency transfers—VAWA 2013, § 601 (adding § 41411(e) and (f)).

a) HUD must adopt a model emergency transfer plan for use by public housing agencies and owners or managers of housing assisted under covered housing programs that allows tenants who are victims of domestic violence, dating violence, sexual assault, or stalking to transfer to another available and safe dwelling unit assisted under a covered housing program if:

(1) the tenant expressly requests the transfer; and

(2) the tenant reasonably believes that the tenant is threatened with imminent harm from further violence if the tenant remains within the same dwelling unit assisted under a covered housing program; or

(3) in the case of a tenant who is a victim of sexual assault, the sexual assault occurred on the premises during the 90 day period preceding the request for transfer.

14. Establishing status as survivor.
a) PHAs, owners, and property managers are permitted but not required to demand official documentation of a tenant’s status as a victim. They have discretion to rely on nothing more than the tenant’s assertion that she is a victim of domestic violence, dating violence, or stalking. VAWA 2013, § 601 (adding §§ 41411(c)(3)(D) and (c)(5); see also 24 C.F.R. § 5.2007(d).

b) If the PHA, owner, or property manager demands official documentation, the demand must be made in writing. The tenant must then provide one of the following:

(1) A HUD-approved form, either HUD-50066 or HUD-91066. The form must:

(a) State that the tenant is a victim of domestic violence, dating violence, sexual assault, or stalking;

(b) State that the incident at issue meets the requirements under VAWA; and

(c) Identify the perpetrator by name, provided the name is known and safe to provide. VAWA 2013, § 601 (adding § 41411(c)(3)(A)); see also 24 C.F.R. § 5.2007(b)(1).

(2) A statement signed by the victim and a victim service provider, attorney, or medical professional. VAWA, § 41411(c)(3)(B); see also 24 C.F.R. § 5.2007(b)(2).

(3) A police or court record. VAWA 2013, § 601 (adding § 41411(c)(3)(C); see also 24 C.F.R. § 5.2007(b)(3).

c) Confidentiality requirement.

(1) The PHA, owner, or property manager must (subject to the following exceptions) keep this information confidential. VAWA, § 41411(c)(4); see also 24 C.F.R. § 5.2007(b)(4).

(2) Exceptions:

(a) The disclosure is requested or consented to by the tenant in writing;

(b) The disclosure is required for use in an eviction proceeding; or

(c) The disclosure is otherwise required by law.

d) Timeline.
(1) If the tenant does not provide the requested documentation within 14 days after receiving a written request, the PHA, owner, or property manager may deny admission or assistance, terminate assistance, or bring eviction proceedings for good cause. The PHA or landlord may extend the 14-day deadline at its discretion. VAWA 2013, § 601 (adding 41411(c)(2)); see also 24 C.F.R. § 5.2007(a) and (c).

15. Notification of rights--VAWA, § 41411(d); see also 24 C.F.R. § 5.2005(a).

a) HUD must develop a notice of VAWA housing rights for applicants and tenants.

b) PHAs, owners, and property managers must provide this notice to each applicant and tenant.

c) The notice must be provided:

(1) When an applicant is denied admission to a covered program;

(2) When an applicant is admitted to a covered program; and

(3) With any notice of termination of tenancy or notice of intent to terminate assistance under a covered program.


a) VAWA does not preempt any federal, state, or local law that provides greater protections for victims of domestic violence, dating violence, or stalking. VAWA, §§ 41411(b)(3)(C)(iv) and (c)(8); see also 24 C.F.R. § 5.2011. Accordingly, VAWA 2013 can only augment existing protections.

17. Unresolved issues under VAWA.

a) What happens when there is only an indirect link between the violation and the abuse (e.g., when the abuser refuses to pay rent)?

b) Where can a tenant or her advocate file a complaint against a PHA or owner who refuses to comply with its obligations under VAWA?

c) What happens when the survivor violates an agreement to bar the abuser from the premises and/or repeatedly reconciles with the abuser?

(1) This question was addressed in Metro North Owners v. Thorpe, 870 N.Y.S.2d 768 (N.Y. 2008). Sonya Thorpe, the resident of a Section 8 project-based development, was facing eviction for stabbing her boyfriend, John Capers. 870 N.Y.S.2d at 769.
Thorpe argued that she was actually the victim of Capers’ domestic violence, and moved for summary judgment on the grounds that VAWA prohibited the plaintiff from evicting her. Id. In support of this motion she asked the court to consider police reports and an order of protection, which the court found relevant as “necessary background information in establishing a pattern of domestic violence in which [Thorpe] is a victim.” Id. at 771.

The court rejected the plaintiff’s attempt to oppose the motion by showing that Thorpe allowed Capers into the building several times before the most recent incident and after obtaining an order of protection against him. The court held that the plaintiff’s evidence constituted hearsay, but also explained that it would have rejected the plaintiff’s argument even if this argument were based on admissible evidence. Id. at 772-73.

(a) “Although [the plaintiff] alleges that [Thorpe] allowed Capers access to the subject premises shortly after obtaining a protection order, her behavior, even if true, does not determine that respondent was not a victim of domestic abuse. The battered-woman syndrome, a well-established concept in law and science, explains the concept of anticipatory self-defense and seemingly inconsistent victim behavior.” Id. at 773 (citation omitted).

(b) “The battered-woman syndrome explains the behavioral pattern of abused women and how the abuse affects their conduct. The syndrome is ‘a series of common characteristics found in women who are abused both physically and emotionally by the dominant male figures in their lives over a prolonged length of time.’ One ‘characteristic is that [i]f charges are filed, the battered woman may change her mind about prosecuting the batterer and withdraw her complaint, refuse to testify as a witness, or recant.’” Id. (citations omitted).

(c) “[Thorpe] might have changed her mind after she obtained the [order of protection] and allowed Capers access to the subject premises. Unrepresentative and inconsistent victim behavior toward an alleged aggressor fits into the cycle of domestic violence. Domestic violence is cyclical in nature. The battered woman’s inconsistent behavior allows the victim to anticipate oncoming violence and entices her to remain with her abuser after the violence ends. Respondent’s seemingly inconsistent behavior toward Capers, even if true, characterizes a battered woman.” Id. (citations omitted).

D. The Fair Housing Act


   a) The FHA does not apply to:

   (1) Single-family homes; or
(2) Dwelling units in owner-occupied buildings containing four or fewer apartments.

b) Other, less common exemptions (regarding religious organizations and private clubs) are set forth in 42 U.S.C. § 3607.

3. In relevant part, the FHA makes it unlawful:

a) To refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling because of race, color, religion, sex, familial status, or national origin;

b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

4. “There are two theories of discrimination by which plaintiffs may proceed under the FHA: (1) disparate treatment; and (2) disparate impact.” Cavalieri-Conway v. Butterman & Assoc., 992 F. Supp. 995, 1002 (N.D. Ill. 1998).

a) Disparate treatment involves intentional discrimination. It occurs when a housing provider treats some people less favorably than others because of their membership in a protected class.

b) Disparate impact involves policies that are neutral on their face have a more negative effect on members of classes protected under the FHA. It is not necessary to prove discriminatory intent to prevail in a disparate impact case.


6. Accordingly, women who are denied housing, evicted, or deprived of assistance because of an incident of domestic violence may have a cause of action for discrimination under the Fair Housing Act.

a) While it is true that men are sometimes the victims of domestic violence, the vast majority of victims are women and FHA claims are based on the disparate treatment of women who are domestic violence victims, or on the disparate impact of domestic violence on women.

7. Cases:

a) Evictions and termination of assistance.
(1) *Dickinson v. Zanesville Metro. Housing Auth.*, 975 F. Supp. 2d 863, 872 (S.D. Ohio 2013) (denying motion to dismiss complaint alleging PHA's violation of FHA, and finding that PHA's “dereliction of its duties under VAWA and apportionment of blame for results of domestic violence could give rise to an inference that [PHA] acted with intent to discriminate on the basis of gender.”).

(2) *Creason v. Singh*, 2013 WL 6185596, *4 (N.D. Cal. 2013) (“There is persuasive authority that, at least in some cases, evicting a tenant with a valid domestic violence defense could constitute discrimination on the basis of sex in violation of Section 3604.”).

(a) *Creason* is an unusual case. The plaintiff was an attorney who worked for a firm that represented landlords. Id. at *1. While representing one of the firm’s clients in a forcible action, she realized that the tenant had “a ‘complete and valid domestic violence’ defense to eviction.” Id. (It appears, based on what later transpired, that the attorney was thinking of a discrimination defense under the FHA and that the housing at issue was not covered by VAWA.) The attorney therefore negotiated a settlement that allowed the tenant to preserve her tenancy. Id. The firm accused the attorney of mishandling the case and firing her, and she sued the firm for, among other things, interfering with her attempt to help another individual enforce her rights under the FHA. Id. at *2.

(b) In the course of ruling on the firm’s motion to dismiss the four-count complaint, the court noted that the firm argued that “Section 3604 prohibits gender discrimination, not evicting domestic violence victims.” Id. at *4. Even though the court did not need to resolve that question to rule on the motion to dismiss, the court addressed it “for the benefit of the parties.” Id.

(c) The court rejected the firm’s argument and, relying on *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. V’t. 2005) – see below – said that “the eviction of a tenant because she is a victim of domestic violence might constitute unlawful discrimination under the Fair Housing Act.” Id.

(3) *Bouley v. Young-Sabourin*, 394 F. Supp. 2d at 678 (attempt by landlord to evict plaintiff 72 hours after domestic dispute could give rise to inference of discrimination on the basis of gender).

(4) *Meister v. Kansas City*, 2011 WL 765887, *6 (D. Kan. 2011) (“evidence that defendant knew that domestic violence caused damage to plaintiff's housing unit would help support a claim that she was evicted under circumstances giving rise to an inference of sex discrimination.”)

b) Transfers.
E. The Safe Homes Act.

1. Overview.

   a) The Safe Homes Act gives a tenant who is a victim of domestic or sexual violence the right to break the lease and vacate the premises without incurring any responsibility for the rent that accrues during the rest of the lease term.

   b) In emergency situations, the law gives such a tenant the right to change the locks to keep the abuser out of the premises.

2. Purpose.

   a) “[T]o promote the State’s interest in reducing domestic violence, dating violence, sexual assault, and stalking by enabling victims of domestic or sexual violence and their families to flee existing dangerous housing in order to leave violent or abusive situations, achieve safety, and minimize the physical and emotional injuries from domestic or sexual violence, and to reduce the devastating economic consequences thereof.” 765 ILCS 750/5.

3. Application.

   a) The Safe Homes Act covers:

      (1) Unassisted rental housing.

      (2) Housing assisted under the HCV Program.

      (3) Section 8 project-based developments.

   b) Exclusion:

      (1) Public housing is not covered by the Safe Homes Act. 765 ILCS 750/35.


b) “Sexual violence” means any act of sexual assault, sexual abuse, or stalking of an adult or minor child, including but not limited to non-consensual sexual conduct or non-consensual sexual penetration as defined in the Civil No Contact Order Act and the offenses of stalking, aggravated stalking, criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, criminal sexual abuse, and aggravated criminal sexual abuse as those offenses are described in the Criminal Code of 2012.

5. Breaking the lease—765 ILCS 750/15.

a) When there is a “credible imminent threat” of domestic or sexual violence against the tenant or a member of the household, the tenant may break the lease if she gives written notice to the landlord prior to or within 3 days of vacating the premises that the reason for vacating the premises was because of this threat.

b) When the tenant or a member of the household was a victim of sexual violence on the premises, the tenant may break the lease if:

(1) The tenant gives written notice to the landlord prior to or within 3 days of vacating the premises that the reason for vacating the premises was because of this threat.

   (a) The sexual violence must have occurred within the past 60 days and the tenant must identify this date in her notice to the landlord; and

   (b) The tenant must give the landlord at least one form of the following types of evidence supporting the claim of the sexual violence:

      (i) Medical, court or police evidence of sexual violence; or

      (ii) A statement from an employee of a victim services or rape crisis organization from which the tenant or a member of the tenant’s household sought services.

(2) If the tenant cannot reasonably give notice because of reasons related to the sexual violence, such as hospitalization or seeking assistance for shelter or counseling, then the tenant must provide the notice as soon thereafter as practicable.

c) If the tenant follows these procedures, she is not responsible for rent that accrues during the remainder of the lease term.

a) When there is a written lease.

(1) Upon written notice from all tenants who have signed as lessees under a written lease, the tenants may request that a landlord change the locks of the dwelling unit in which they live if one or more of the tenants reasonably believes that one of the tenants or a member of tenant’s household is under a credible imminent threat of domestic or sexual violence at the premises.

(2) When the perpetrator is on the lease, the written request must be accompanied by:

   (a) a plenary order of protection; or

   (b) a plenary civil no contact order.

(3) When the perpetrator is not on the lease, the written request must be accompanied by at least one form of the following types of evidence:

   (a) Medical, court or police evidence of domestic or sexual violence; or

   (b) A statement from an employee of a victim services, domestic violence, or rape crisis organization from which the tenant or a member of the tenant’s household sought services.

b) When there is an oral lease.

(1) Notice to the landlord requesting a change of locks shall be accompanied by:

   (a) A plenary order of protection; or

   (b) A plenary civil no contact order.

c) Landlord’s responsibilities.

(1) Once the landlord receives a proper request, the landlord has 48 hours to either change the locks or give the tenant permission to change the locks.

(2) If the landlord changes the locks, the landlord shall make a good faith effort to give the tenant a key to the new locks as soon as possible, and not more than 48 hours of the locks being changed.

(3) The landlord may charge a reasonable fee for changing the locks.
If a landlord fails to change the locks within 48 hours, the tenant may change the locks without the landlord’s permission. The tenant must then make a good faith effort to give the landlord a key to the new locks within the next 48 hours.

F. The Forcible Act – Section 9-106.2.

1. Governs all dwelling units, including those not covered by VAWA.

2. The defendant in a forcible action may assert as an affirmative defense that the plaintiff’s demand for possession is:
   a) **Based solely on the defendant’s status as a victim of domestic violence or sexual violence, stalking, or dating violence;**
   b) **Based solely upon an incident of actual or threatened domestic violence, dating violence, stalking, or sexual violence against the defendant;**
   c) **Based solely upon criminal activity directly relating to domestic violence, dating violence, stalking, or sexual violence engaged in by a member of a defendant’s household or any guest or other person under the defendant’s control, and against the defendant.**

3. When asserting such an affirmative defense, the defendant must provide at least one form of the following types of evidence:
   a) **Medical, court, or police records documenting the violence; or**
   b) **A statement from an employee of a victim service organization or from a medical professional from whom the defendant has sought services.**

4. The landlord may evict a tenant whose continued tenancy would pose an actual and imminent threat to other tenants or to the landlord’s agents at the property.

5. The landlord may evict a tenant who committed the criminal activity on which the demand for possession is based.

6. A landlord may bar from the premises a person who is not a tenant or a member of the tenant’s household.
   a) **The landlord must first provide written notice to the tenant that the person is no longer allowed on the premises.**
   b) **The notice shall state that if the tenant invites the barred person onto any portion of the premises, then the landlord may treat this as a breach of the lease.**
c) *If the landlord tries to evict the tenant for allowing the barred person onto the premises, the tenant may assert as an affirmative defense that:*

(1) She did not knowingly allow the barred person into the premises; or

(2) A valid court order permitted the barred person’s entry onto the premises.
XXXIX. BANKRUPTCY AND HOUSING.

A. Overview.

1. The Bankruptcy Code may be used to help tenants who are facing eviction for:
   
   a) Nonpayment of rent; or
   
   b) Failing to maintain utility services.

2. It may also be used to help tenants who are not facing eviction but need to maintain or restore their utility services.

3. Filing for bankruptcy protection harms a tenant’s credit rating, but just about any tenant who is financially eligible for LAF’s services is going to be more concerned about preserving her subsidized tenancy or utility service than maintaining good credit.

4. Once the debtor files for bankruptcy protection, an automatic stay bars the commencement or continuation of any action that was or could have been filed pre-petition. The landlord may, however, move the bankruptcy court to modify this stay and allow the landlord to file or proceed with a forcible action against the debtor.

5. A bankruptcy trustee is assigned to every bankruptcy case to manage the property of the debtor’s estate.

B. Governing Statute.

1. 11 U.S.C. § 101 et seq.
   
   a) Section 362—Automatic stay.
   
   b) Section 366—Utility service.
   
   c) Section 525—Protection against discriminatory treatment.
   
   d) Chapter 7—Liquidation.
   
   e) Chapter 13—Adjustment of debts of an individual with regular income.

C. Using the Bankruptcy Code in “Nonpayment” Eviction Cases.

1. File under Chapter 13 of the Code.

   a) A debtor who is facing eviction for nonpayment of rent should file a Chapter 13 petition that allows her to reorganize and satisfy her debt instead of discharging the debt through Chapter 7 of the Code.
The risks of using Chapter 7 to eliminate the rental debt are discussed below.

Eliminating the rental debt through Chapter 7 may still be a viable option for a voucher-holder who is trying to preserve not her lease agreement with the owner but her assistance under the HCV Program. See below.

b) In her Chapter 13 reorganization plan, the debtor may assume her lease agreement provided it is “unexpired.” 11 U.S.C. §§ 1303 and 1322(b)(7).


(2) The Seventh Circuit has held that a lease “expires” when it ends under state law. Matter of Williams, 144 F.3d 544, 546 (7th Cir. 1998); Robinson v. Chicago Housing Auth., 54 F.3d 316, 319 (7th Cir. 1995).

c) The debtor must also propose satisfying the entire rental debt over a period of 3-5 years.

(1) The debtor must pay the landlord everything she owes. Otherwise, the landlord can move to modify the automatic stay (see below) on the grounds that the debtor’s plan does not protect the landlord’s economic interest in the lease.

(2) The debtor may propose paying other creditors just a percentage of the amount owed (sometimes as little as 10%).

(3) Creditors are often willing to accept such a proposal because they realize that:

(a) If the debtor is evicted from subsidized housing she will have no way to pay them anything because she’ll be spending her entire income on market rent; and

(b) If the debtor is financially eligible for subsidized housing, she is most likely judgment-proof.

d) The debtor must have a steady source of income to file for protection under Chapter 13 because, pursuant to the terms of her reorganization plan, she will be required to send monthly payments to the trustee.

D. Automatic Stay.


2. Once a debtor files the bankruptcy petition, an automatic stay bars the commencement or continuation of:
a) Any action that was or could have been filed pre-petition, and

b) Any action that seeks to recover a pre-petition debt.

3. The automatic stay, therefore, prevents the landlord from filing a forcible action against the debtor, or from proceeding with a pending action.

   a) If a forcible action is already pending when the tenant files her bankruptcy petition, the forcible judge will continue the case for about two months for a status report on the bankruptcy proceedings.

4. Unless otherwise ordered by the bankruptcy court, the automatic stay continues until the property in question is no longer property of the estate, the case is closed or dismissed, or a discharge is granted or denied. 11 U.S.C. § 362(c).

5. Accordingly, a landlord may file a forcible action against the debtor, or proceed with a pending action, only if the landlord moves the bankruptcy court to modify the automatic stay and wins this motion. (See below.)

E. Modifying the Automatic Stay.

1. “On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . for cause, including the lack of adequate protection of an interest in property of such party in interest.” 11 U.S.C. § 362(d)(1).

2. Under this provision, a landlord may move the bankruptcy court to:

   a) Modify the automatic stay on the grounds that the lease expired pre-petition or that the debtor has not adequately protected the landlord’s interest in the property; and

   b) Allow the landlord to file a forcible action, or proceed with a pending action, against the debtor.

3. In Williams, the Seventh Circuit held that a bankruptcy court does not abuse its discretion by granting a landlord’s motion to modify when the debtor files her petition after the termination notice expired.

4. In reaching this conclusion, the Williams Court divided the eviction process into three stages. 144 F.3d at 548.

   a) The first stage ends with the expiration of the termination notice.

   b) The second stage extends from the expiration of the notice to the entry of a judgment for possession.

   c) The third stage is post-judgment.

5. During the first stage, the lease remains in effect and is therefore “unexpired” and may be assumed. Id.
6. During the third (post-judgment) stage, the lease has clearly been terminated under state law and has therefore “expired” and may not be assumed. \textit{Id.}

7. During the second stage—which is when the debtor in \textit{Williams} filed her petition—“whether the lease has ended is not clear.” \textit{Id.} The \textit{Williams} court held that state forcible courts are in a better position to resolve that question, and that the bankruptcy court therefore did not abuse its discretion by granting the landlord’s motion to modify the automatic stay. \textit{Id.} at 550.

F. When to File the Petition.

1. Given the Seventh Circuit’s decision in \textit{Williams}, the much preferred and safest course of action is to file the bankruptcy petition before the termination notice expires.

2. A public housing resident may postpone the “expiration” of her lease agreement by requesting a grievance hearing before the termination notice expires.

   a) A tenant who is facing eviction for nonpayment of rent is entitled to a grievance hearing. 24 C.F.R. § 966.53(a).

   b) “When the PHA is required to afford the tenant the opportunity for a hearing under the PHA grievance procedure for a grievance concerning the lease termination . . . the tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.” 24 C.F.R. § 966.4(l)(3)(iv).

3. Can the petition be filed after the termination notice expires?

   a) Yes. The bankruptcy court is not required to modify the automatic stay unless the petition is filed post-judgment (when the lease has definitely expired).

   b) Bankruptcy court judges have the discretion to deny a motion to modify even when the voluntary petition was filed during what the \textit{Williams} Court identified as the second stage of the eviction process.

G. Chapter 7—Risks And Benefits.

1. Provided the tenant is current in her rent and therefore does not have to identify the landlord as a creditor, Chapter 7 is an excellent option for maintaining or restoring utility services. (See below.)

2. A debtor may seek protection under Chapter 7 of the Bankruptcy Code only once every eight years.
3. Chapter 7 is not a good option when a tenant who is facing eviction for nonpayment of rent is trying to preserve her lease.

   a) A Chapter 7 debtor may not assume her lease.

      (1) “In a Chapter 7 case, the right to assume or reject an unexpired lease resides exclusively with the trustee; the debtor has no authority or standing to do so.” In re Scharp, 463 B.R. 123, 129 (Bankr. C.D. Ill. 2011).

      (2) The trustee will probably take no action, and after 60 days that failure results in an abandonment of the lease back to the debtor. 11 U.S.C. § 365(d)(1).

      (3) Despite rejection, however, “an unexpired lease continues and may be honored or repudiated by either party.” Id. (“Assumption and rejection are bankruptcy concepts that determine whether the estate will administer the lease; rejection merely removes it from property of the estate.”).

   b) The landlord may then repudiate the lease.

      (1) A landlord who is trying to evict a tenant for nonpayment of rent has every reason to repudiate the lease and will therefore likely file a motion to modify the automatic stay.

      (2) Because the lease is no longer property of the estate, the bankruptcy court will grant this motion.

      (3) The landlord can then move to evict the tenant for nonpayment of the discharged debt because “[d]ischarge of a debt in bankruptcy does not constitute payment of rental fees or the extinguishment or cancellation of a debt.” Stoltz v. Brattleboro Housing Auth., 259 B.R. 255, 259 (D. Vt. 2001).

H. The Bankruptcy Code’s Anti-Discrimination Provision.

1. Section 525(a) of the Code prohibits governmental units (such as PHAs) from discriminating against a debtor on the grounds that she has filed for bankruptcy protection or failed to pay a debt that was discharged through bankruptcy.

2. Does the Code’s anti-discrimination provision prevent a PHA from terminating the debtor’s lease when the debtor discharges her rental debt to the PHA?

   a) In Stoltz, the United States District Court in Vermont held that § 525(a) prohibits PHAs from repudiating the lease. 259 B.R. at 263-64.

   b) Can tenants in Illinois expect the Seventh Circuit to follow Stoltz?
Probably not. In justifying its decision to rule in the debtor’s favor, the Stoltz court specifically rejected a concern, expressed by the Robinson court here in Illinois, that “a broad reading of § 525(a) would enable public housing tenants to forego payment of rent without fear of eviction.” Stoltz, 259 B.R. at 263.

3. Does the Code’s anti-discrimination provision prevent a PHA from terminating a debtor’s assistance under the HCV Program when the debtor discharges her rental debt to the owner of an assisted unit?
   a) Probably so. In the HCV Program, the tenant’s lease agreement is with the owner, not with the PHA, so the PHA cannot repudiate and terminate the lease.
   b) If the PHA terminates a debtor assistance on the grounds that the debtor discharged her debt to the owner, that action would likely constitute a violation of the prohibition against discrimination set forth in § 525(a).

I. Using the Code to Maintain or Restore Utility Services.

1. A tenant who owes money to a utility company may file a petition under either Chapter 13 or Chapter 7 to maintain or restore her services. 11 U.S.C. § 366(a).
   a) The concern expressed above about using Chapter 7 to discharge a rental debt to a landlord does not apply, provided the tenant is current in her rent and does not have to identify the landlord as a creditor. Furthermore, even if the landlord knows about the bankruptcy filing, it will likely have no desire and, more important, no legal grounds for repudiating the lease and trying to evict the tenant.
   b) EXAMPLE: A public housing resident who was current in her rent received from her PHA a termination notice for failing to maintain her gas service. The notice gave her ten days to cure this violation. The tenant owed more than $10,000 that had accrued over a decade because her meter was in her closet and the gas company (which could not disconnect her service from the street), had to get a replevin order that authorized them to enter her apartment and remove her meter. Before the notice expired, the tenant filed a Chapter 7 petition that wiped out her debt and required the gas company to restore her meter and her service. Because the tenant cured her violation before the termination notice expired, the PHA did not move to evict her.

2. If the services have not yet been terminated, the utility company may demand a deposit within 20 days after the petition has been filed. 11 U.S.C. § 366(b).

3. If the services have already been terminated, the utility company may demand a deposit before restoring services. Id.
4. If the tenant cannot afford the amount demanded as a deposit, she may file a motion to modify this amount. 11 U.S.C. § 366(c)(3)(A).

5. A tenant may not discharge amounts owed for utility services that the tenant stole. 11 U.S.C. § 523(a)(2)(A).
XL. REMAINING HOUSEHOLD MEMBERS.

A. The Problem.

1. The federal statute and regulations governing the public housing, HCV, and Section 8 project-based assistance programs define “family” to include “the remaining member of a tenant family.” 42 U.S.C. § 1437a(b)(3)(a); 24 C.F.R. § 5.403.

2. After the head of household dies or vacates the premises, the remaining household member is eligible for the housing or rental assistance.

3. Unfortunately, the governing statute and regulations do not define the term “remaining member of a tenant family.”

4. This oversight causes problems when the PHA or owner challenges a person’s right to claim “remaining member” status.

B. Examples.

1. After head of household was murdered—her boyfriend’s ex-girlfriend ran her over several times with a car—her sister obtained legal guardianship of the remaining family members (all of whom were minors) and moved into the public housing unit to care for them. The PHA then moved to evict the entire family on the grounds that the minors were unable to contract, and that the sister was not on the lease at the time of the murder and was therefore not entitled to remaining member status.

2. Head of household lived in two-bedroom public housing unit with her two children. Her boyfriend joined them in 1996 and was added to the lease. The head of the household and her children subsequently moved away. Boyfriend immediately informed management of their departure and tried to enforce his rights as a remaining member of the household. Management told him to sit tight. Ten years later management moved to evict him, contending that he had forged the 1996 lease agreement and that the former head of household had signed recertification forms in 2001 stating that she was the sole occupant of the premises. Jury ultimately decided that the recertification forms had been forged and that the 1996 lease was authentic.

3. Elderly public housing resident asked PHA to add her adult son, who was disabled, to her lease. PHA sat on request for 17 months, and during this period the mother died. PHA then denied her request on the grounds that she had passed away, and coerced her son to sign an agreement to voluntarily vacate the premises. When he refused to honor this agreement, PHA served him with a demand for immediate possession.

C. The Solution.

1. Case law, almost all of which comes from New York and New Jersey for some reason.
2. Public Housing Occupancy Guidebook, § 12.3.

D. General Rule.

1. Members of the household who are either on the lease or otherwise recognized by the PHA or owner as household members are entitled to “remaining member” status.

   a) “The term ‘remaining member of a tenant family’ . . . should be defined according to the ordinary and natural meaning of its own words, as a person who had actually been in occupancy as a part of the family unit at the time of the named tenant’s death. Its use recognizes an underlying statutory assumption: all family members have occupancy rights which are not terminated by the death of any member. In contrast, one who assumed occupancy just before the tenant’s death, with no purpose other than that of succeeding to the tenancy, is not so protected. Such an interloper is not part of the class which the federal law sought to benefit.” Morrisania II Assoc. v. Harvey, 527 N.Y.S.2d 954, 957 (N.Y. Civ. Ct. 1988).

E. Factors to be Considered.

   a) In Gill v. Hernandez, 865 N.Y.S.2d 843, 851-52 (N.Y. Sup. Ct. 2008), the court noted that “[t]he general trend has been to analyze each remaining family member’s succession claims on a case-by-case factual basis.” In making this analysis, the court should consider:

   (1) Whether the person claiming “remaining member” status was living in the household as part of a family unit.

   (2) The length of time the person claiming “remaining member” status was living with the former head of household.

      (a) Federal law does not, however, “require a minimum period of co-occupancy with the tenant of record to establish a legitimate occupancy. . . . Thus while the length of [a person’s] co-occupancy with the tenant of record bears on the legitimacy of [that person’s] occupancy as a member of the family unit, it is not dispositive of that central issue.” Bronx 361 Realty v. Quinones, 2010 WL 761240, *3 (N.Y. Civ. Ct. 2010).

   (3) Whether the income of the person claiming “remaining member” status was used to calculate the household’s rent.

   (4) Whether the person claiming “remaining member” status was listed on the lease.
Nevertheless, “the touchstone of succession to a project-based Section 8 tenancy is the legitimacy of respondent’s occupancy as a member of the family unit at the time of the tenant of record’s death, and not the accuracy of one or more HUD forms.” Quinones, 2010 WL 761240 at *3.

F. When a Minor is the Only Remaining Household Member.

1. The remaining household member must be capable of executing a lease agreement with the PHA or owner. This rule can present a problem when the only remaining household members are minors.


   a) The minor can, if eligible, obtain a decree of emancipation.

      (1) In Carteret Housing Auth. v. Gilbert, 693 A.2d 955 (N.J. Super. Ct. Law Div. 2002), the minor daughter of an incarcerated public housing resident was entitled to stay in the apartment as a “remaining member of the tenant family” because she was eligible for an order of emancipation and had paid all the back rent.

   b) An adult can move into the household.

      (1) “A PHA may permit an adult not on the lease to be the new head of household after the death or departure of the original head of household. This would usually occur when the only family members remaining in the unit are children who otherwise would have to leave the unit.” Public Housing Occupancy Guidebook, § 12.3.

      (2) In Arsenault v. Chicopee Housing Auth., 444 N.E.2d 968 (Mass. App. Ct. 1983), a public housing resident who lived with her two-year-old son told the child’s father that she wanted nothing more to do with the child and left. When the father moved into the public housing unit to care for his son, the PHA threatened to prosecute him for criminal trespass. The father submitted a request for a grievance hearing, which the PHA denied. The Housing Court stated that the father was not entitled to the grievance hearing because he did not have legal custody of his son when he submitted the grievance request, but the reviewing court reversed and enjoined the PHA from commencing an eviction action until after the conclusion of the grievance process.

G. Responsibility for Debts Incurred by Former Head of Household.

1. When the new head of household is an adult.
a) “[T]he new head of household [may] be charged for any outstanding debt incurred by the former head or spouse. The PHA may establish a payment plan with the new head of household, especially in the case where there could be an eviction due to delinquent amounts incurred by the former head.” Public Housing Occupancy Guidebook, § 12.3.

2. When the new head of household is a minor.

   a) “A PHA shall not hold remaining family members under age 18 responsible for the rent arrearages incurred by the former head of household, nor for any amounts incurred before a new head of household attained age 18.” Id.

H. Live-In Aides.

1. The governing regulation—24 C.F.R. § 5.403—defines a live-in aide as a person who resides with one or more elderly persons, or near-elderly persons, or persons with disabilities, and who:

   a) Is determined to be essential to the care and well-being of the persons;

   b) Is not obligated for the support of the persons; and

   c) Would not be living in the unit except to provide the necessary supportive services.

2. A live-in aide’s income is not used to calculate the household’s share of the rent. 24 C.F.R. § 5.609(c)(5) ("Annual income does not include . . . [i]ncome of a live-in aide, as defined in § 5.403."").

3. A live-in aide’s right to remain in the household ends when the person who needs her services dies or vacates the premises.

4. Accordingly, a live-in aide is not entitled to “remaining member” status.

I. HUD Policy.

1. HUD’s policy on succession rights is set forth in Section 3-16 of Handbook 4350.3.

J. Challenging Policies.

1. If a PHA’s or owner’s policy on succession rights is contrary to federal policy, it may not be controlling. See Gill, 865 N.Y.S.2d at 852 (PHA occupancy policy, which extended succession rights to adult children of former head of household only if they joined the household as minors, was contrary to federal policy and therefore not controlling.).
XLI. GUEST POLICIES.

A. Right to Have Guests.

1. Part of the covenant of quiet enjoyment.
   b) “An implied covenant of quiet enjoyment includes, ‘absent a lease clause to the contrary, the right to be free of the lessor’s intentional interference with full enjoyment and use of the leased premises.’” Infinity Broadcasting, 1987 WL 6624, at *5, citing American Dairy Queen v. Brown-Port Co., 621 F.2d 255, 258 (7th Cir. 1980).
   c) The covenant of quiet enjoyment includes the right to have guests. See State v. DeCostyer, 653 A.2d 891, 893 n.1 (Me. 1995) (“The right of a tenant to have visitors in their homes [sic] at reasonable times and for reasonable purposes . . . is so fundamental that it requires no statutory authority.”)

2. Reasonable accommodation of guests explicitly required in public housing.
   a) The regulations governing the public housing program provide that, “[t]he lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including reasonable accommodation of their guests.” 24 C.F.R. § 966.4(d)(1) (emphasis added).

B. Restrictions on Right to Have Guests.

1. Landlords sometimes adopt policies that impose unnecessary and unreasonable restrictions on a tenant’s right to have guests.

2. Sample policies:
   a) Tenant must obtain prior written approval for guest.
   b) Tenant may not have more than one overnight guest at a time.
   c) Tenant may not have overnight guest more than twice in one week, or more than fourteen times in one year.

C. Challenging Unreasonable Restrictions.

1. In public housing.
a) Restriction violates statute and implementing regulation regarding unreasonable lease terms.

(1) The governing statute provides that “[e]ach public housing agency shall utilize leases which . . . do not contain unreasonable terms and conditions.” 42 U.S.C. § 1437d(l)(2).

(2) The implementing regulation requires tenants “to abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of the housing project and the tenants . . . .” 24 C.F.R. § 966.4(f)(4).

(3) Lancor v. Lebanon Hous. Auth., 760 F.2d 361. 363 (1st Cir. 1985) (rule that required tenant to obtain prior written approval of every overnight guest and gave management unfettered discretion to deny tenant’s request was neither necessary nor reasonable when considered in light of federal regulation that required residents to abide only by rules that PHA promulgated for benefit and well-being of housing project.).

b) Restriction violates public housing regulation that requires reasonable accommodation of guests. See 24 C.F.R. § 966.4(d)(1).

(1) Regulation is not only a valid interpretation of the statutory prohibition against unreasonable terms and conditions, but is also implicit within this prohibition, “since it would be patently unreasonable to prohibit public housing tenants from entertaining guests.” Diggs v. Housing Auth. of City of Frederick, 67 F. Supp. 2d 522, 531 (D. Md. 1999).

c) Restriction violates tenant’s Constitutional right to freedom of association and to privacy.

(1) McKenna v. Peekskill Housing Auth., 647 F.2d 332, 335-36 (2d Cir. 1981) (house rule requiring public housing residents to register and obtain prior permission for overnight visitors was overbroad defense against remote dangers, which could have been addressed in more direct and less intrusive ways.).

2. In programs governed by HUD Handbook 4350.3.

a) Leases used in covered properties may “not contain unreasonable terms and conditions.” 12 U.S.C. § 1715z-1b(b)(3).

b) Lease provision that authorizes owner to unilaterally bar any visitor violates HUD Handbook, which states that, “House Rules must . . . [b]e reasonably related to the safety, care, and cleanliness of the building or the safety and comfort of the tenants.” HUD Handbook 4350.3, REV-I, ¶ 6-9 B 1.
c) “Reasonable house rules are within the bounds of common sense. They are not excessive or extreme, and most importantly, they are fair.”
HUD Handbook 4350.3, REV-1, ¶ 6-9 B I e (1).


a) Restriction interferes with tenant’s right to quiet enjoyment.

(1) Ashley Court Enters. v. Whitaker, 592 A.2d 1228, 1231 (N.J. Super. Ct. App. Div. 1991) (rule that prohibited tenant from having guest more than 7 days in a 30-day period was unreasonable and interfered with tenant’s right to quiet enjoyment).

b) Restriction is unenforceable because it is unreasonable provision in adhesion contract.


(2) “[L]eases can be adhesion contracts drafted by landlords. The disparity in bargaining power is probably at its height in the instance of low-income tenants . . . who are desperate to secure housing and cannot afford it on the private market.” Id.

(3) An unreasonable provision in an adhesion contract should not be enforced. See Williams v. Illinois State Scholarship Comm’n, 139 Ill. 2d 24, 72 (Ill. 1990) (refusing to enforce forum-selection clauses in loan agreements, in part because agreements were “adhesion contracts, in that the [students] were in a disparate bargaining position, and, if they wanted the loan, were forced to ‘take it or leave it.’”)
A. Overview.

1. Property managers often maintain lists of individuals who are barred from entering the property.

2. A barred individual receives a “barment notice.”

3. The next time the individual enters the property he may be arrested for criminal trespass, even if he has been invited onto the property by an authorized resident.

4. The tenant who invited/allowed the barred person onto the property may also face eviction.

B. Need for Barred Lists.

1. Unusually high crime rates at some subsidized developments.

2. Some residents do not feel safe.

3. Bar lists are effective.

C. Problems.

1. Management makes unilateral decision to place individuals on barred lists.

2. No standards, so property managers have far too much discretion. Some people are barred without good cause (e.g., for littering, parking in front of a dumpster, being unemployed, owing money to the PHA, curfew violations).

3. Some bar lists are incredibly long. One list identified more than 2,300 banned individuals.

4. Many barred individuals pose no threat.

5. No policy for challenging decisions to place individual on bar list.

6. Barred individuals may have constitutionally protected relationships with tenants.

D. Williams v. Nagel.


2. Relevant facts and legal analysis:
a) The Nagle Group, Inc. is a private corporation that owned and operated a Section 8 project-based development. 162 Ill. 2d at 545.

b) Each resident at this development signed a lease which provided, in pertinent part, that, “Management has the right to bar individuals from the property. You must inform your guest(s) of all rules and regulations. If rules and regulations are broken by your guests, they may be barred and/or arrested for criminal trespassing. If the rules and regulations are broken by a resident, it is grounds for termination of tenancy.” Id.

c) The police made recommendations to the property manager to place certain individuals on a “no trespass” list. Id.

d) Every individual whose name appeared on the “no trespass” list received a “barred notice” stating that he was prohibited from entering the development and would be subject to arrest if found on the property. Id. at 545-46.

e) Each of the three plaintiffs in Nagle received a “barred notice” and was subsequently arrested for and convicted of criminal trespass. Id. at 546.

f) The plaintiffs challenged their convictions on Constitutional grounds—they alleged that the barring policy violated their rights to freedom of movement, freedom of association, and due process—and on the ground that they had been invited to the development by one of the residents. Id.

g) The court rejected the plaintiffs’ Constitutional challenges, finding no state action.

(1) “[T]he plaintiffs have presented no facts to show a sufficiently ‘close nexus’ between the conduct of the Champaign police department and the Nagel Group to establish State action.” Id. at 552.

(2) “While the Nagel Group may have heard recommendations from the Champaign police department as to whom should be placed on the ‘no trespass’ list, such recommendations were purely advisory and the management of Parkside Apartments made all decisions concerning the ‘no trespass’ list of its own accord.” Id.

h) The court also rejected the plaintiffs’ argument that they could not be convicted of trespass because they had been invited onto the property. The court stated that, under the terms of the lease agreement, Nagel Group had broad authority to bar individuals, and no resident could extend a valid invitation to an individual who had been barred. Id. at 554-55.

E. Challenging Barred Lists in the Shadow of Nagel.
1. When the tenant resides in public housing.

a) Arguments under governing statute and regulations.

(1) Federal regulation governing the public housing program mandates that, “The lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including reasonable accommodation of their guests.” 24 C.F.R. § 966.4(d)(1) (emphasis added).

(2) Furthermore, “[e]ach public housing agency shall utilize leases which . . . do not contain unreasonable terms and conditions.” 42 U.S.C. § 1437d(l)(2).

(3) Lease provisions that give landlords broad authority to bar non-residents (like the one at issue in Nagel) violate the prohibition against unreasonable lease provisions.

b) Constitutional challenges.

(1) State action.

(a) PHAs are state actors.

(2) Claims under the due process clause of the 14th Amendment.

(a) Procedural component — notice and opportunity to be heard.

(b) Substantive component — policy infringes fundamental right.

(i) Standard of review.

(a) Rational basis if no fundamental right implicated.

(b) Strict scrutiny if fundamental right implicated

(c) Fundamental rights implicated.

(i) Right to intimate association.

(a) This is the second part of freedom of association—the first part being the right to “expressive association” protected by the First Amendment—and of the larger right to privacy.

(b) Protected relationships attend the creation and sustenance of a family.

(ii) Freedom of movement.
(a) Does it protect intra-state travel as well as inter-state travel?

(iii) Freedom of speech.

(a) In Virginia v. Hicks, 539 U.S. 113 (2003), the United States Supreme Court held that trespass polices are not overbroad infringements on protected First Amendment speech.

c) Suggested reading.


2. Outside the public housing context.

a) Consider arguments the Nagel court did not address.

(1) Barred list interferes with tenant’s right to quiet enjoyment.

(2) Lease is adhesion contract, and provision that authorizes owner to unilaterally bar any visitor was unreasonable term that cannot be enforced.

b) When the tenancy is covered by HUD Handbook 4350.3.

(1) Leases used in covered properties may “not contain unreasonable terms and conditions.” 12 U.S.C. § 1715z-1b(b)(3).

(2) Lease provision that authorizes owner to unilaterally bar any visitor violates HUD Handbook, which states that, “House Rules must . . . be reasonably related to the safety, care, and cleanliness of the building or the safety and comfort of the tenants.” HUD Handbook 4350.3, REV-1, ¶ 6-9 B 1.

(3) “Reasonable house rules are within the bounds of common sense. They are not excessive or extreme, and most importantly, they are fair.” HUD Handbook 4350.3, REV-1, ¶ 6-9 B 1 e (1).

c) Constitutional arguments.

(1) These arguments are harder to make outside the context of public housing, but one can argue that the Nagel court erred when it found no state action.
In *Anast v. Commonwealth Apts.*, 956 F. Supp. 792 (N.D. Ill. 1997), the court set forth a more sensible test for determining whether state action exists. *Id.* at 798-99 (Former tenant sufficiently described symbiotic relationship between federal government and apartment owner and manager to satisfy threshold requirement of state action for protections of due process clause; tenant alleged that defendants participated in Section 8 Substantial Rehabilitation Program, and that defendants were subject to regulatory framework established by government, and that defendants consulted HUD about what to do with tenant.)

**F. Evictions for Violating “Barred List” Policy.**

1. As even the dissent noted in *Nagel*, a tenant may face eviction for violating the landlord’s trespass policy. 162 Ill. 2d at 557-58 (Harrison, J., dissenting) (“If a tenant agrees to the landlord’s restrictions as a condition of the lease, the restrictions have the force of contract, and their violation may place the tenant in breach, subjecting him to eviction.”).

2. Defending against such evictions.
   
   a) *Did the tenant receive notice that the individual had been barred?*
   
   b) *Did the tenant actually allow the barred individual onto the property?*
   
   c) *Is there a basis for challenging the landlord’s decision to bar the individual?*
      
      (1) Was the decision unreasonable?
      
      (2) Can the landlord’s unilateral right to bar individuals be challenged as an unreasonable provision in an adhesion contract?

**G. Model “Barred List” Policy.**

1. Provides basic procedural protections, including notice and an opportunity to be heard. Barment notice should include reason for bar and procedures for appeal.

2. Demands sufficiently strong justification for bar. Doesn’t bar people for non-criminal activities like owing money to the PHA.

3. Identifies offenses that are sufficient to invoke the “no-trespass’ policy. Takes away excessive discretion from property managers.

**H. Does the Forcible Act Give Illinois Landlords An Unfettered Right to Bar Guests?**

1. No, but landlords argue it does.
Section 9-106.2(f) of the Forcible Act provides that, “[a] landlord shall have the power to bar the presence of a person from the premises owned by the landlord who is not a tenant or lessee or who is not a member of the tenant’s or lessee’s household. A landlord bars a person from the premises by providing written notice to the tenant or lessee that the person is no longer allowed on the premises. That notice shall state that if the tenant invites the barred person onto any portion of the premises, then the landlord may treat this as a breach of the lease, whether or not this provision is contained in the lease. Subject to paragraph (4) of subsection (a), the landlord may evict the tenant.” 735 ILCS § 5/9-106.2.

This statutory provision, however, is just a subpart of a section entitled, “Affirmative defense for violence; barring person from property.” 735 ILCS § 5/9-106.2. (This part of the Forcible Act is discussed above in the section on Domestic Violence, Sexual Assault, and Stalking.)

Subsection (f) must be read in the context of the entire statutory provision, and clearly applies only when the barred person is an individual who has committed domestic or sexual violence against a household member.

2. NOTE: There is an unpublished Rule 23 Order that misinterprets subsection (f) and lends support to the argument that a landlord may bar anyone who is not a household member.

“Generally, an owner of realty has the right to exclude all others from use of the property, a right that is one of the ‘most essential sticks in the bundle of rights that are commonly characterized as property.’ In line with the general rule, courts have uniformly upheld the rights of landlords—including public housing authorities—to ban nonresidents from their premises. See Williams v. Nagel; Thompson v. Ashe, 250 F.3d 399 (6th Cir. 2011) (holding that maintenance of “no-trespass” list by Knoxville public housing agency did not violate constitutional rights of those placed on the list). Illinois has now codified this rule. Section 9–106.2(f) of the Code of Civil Procedure provides that a ‘landlord shall have the power to bar the presence of a person from the premises owned by the landlord who is not a tenant or lessee or who is not a member of the tenant’s or lessee’s household.’” Anderson-Bey v. Martin, 2012 IL App (2d) 110311-U.

This order has no precedential value and may not be cited. S. Ct. Rule 23(e).