

## MEMORANDUM

### Background

In your e-mail following our national coalition conference call of May 20, 2009, you asked a number of questions related to the details of the pilot project. I attempt to respond to the questions below, repackaging the 13 questions into the areas of 1) Project Description, 2) Delivery Mechanism, 3) Funding, Duration & Costs and 4) Evaluation. Please note that these are my explanations, and are not official responses on behalf of the Boston Bar Association's Task Force on Expanding the Civil Right to Counsel, under whose auspices the pilot projects are being launched. Please let me know if you have more questions, or if you want to discuss any aspect of the pilot project.

### Project Description

Advocates in Massachusetts have launched two pilot projects exploring the impact of full representation in eviction cases. The projects grow out of the work of the Boston Bar Associate Task Force on Expanding the Civil Right to Counsel [see 9/08 Report, available at: [http://www.bostonbar.org/prs/nr\\_0809/GideonsNewTrumpet.pdf](http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf)]. The pilot project tests the theory that an expanded civil right to counsel should target the cases in which counsel is most likely to impact the outcome. Representation will focus on scenarios identified through a survey of housing experts in the state: 1) where the eviction was tied to a mental disability; 2) where it involves criminal conduct, and 3) where listed factors reveal a power imbalance likely to deprive a tenant of an affordable apartment where a viable defense exists. Available defenses and counterclaims in MA include breach of warranty of habitability, breach of quiet enjoyment, consumer protection, security deposit, retaliation. A small number of landlords may be eligible for representation as well. The details of the representation criteria appear as Appendix 5C to the September, 2008 Report, and are reprinted at the end of this memorandum.

One pilot project is situated in a specialized housing court and another in a generalized district court, since evictions occur in both types of courts in Massachusetts. The funding supports representation through two legal services offices. Evaluative tools, including a randomized analysis or study, will attempt to measure the efficacy of the program, testing the theory that representation in fact leads to a preservation of shelter. The projects also hope to obtain estimates as to the numbers statewide of these types of eviction cases, should the program become the basis for a statewide proposal

### Delivery Mechanism

Eviction cases in Massachusetts are handled by Housing Courts and by District Courts. The five specialized Housing Courts handle roughly two-thirds of the eviction cases each year, but do not have jurisdiction covering all parts of the state. The 62

District Courts cover the entire state, and handle eviction cases as only one type of the many cases they handle. Landlords may choose between District Court or Housing Court where both types of courts cover the geographic area; tenants have the right to remove cases filed in District Court to Housing Court, where there is overlapping jurisdiction.

The Housing Courts not only feature judges who specialize in housing, but they have additional resources available to litigants, including clerks with specialized housing knowledge, Housing Specialists who mediate cases and are specially trained to handle housing cases, various lawyer-of-the-day or equivalent assistance programs and Tenancy Preservation Projects; in addition, legal services offices tend to have a greater presence in the Housing Courts. In contrast to the Housing Courts, where two-thirds of the cases statewide are concentrated in five Housing Courts, the remaining one-third of the eviction cases are scattered among the District Courts. As a result, the courts lack Housing Specialists and Tenancy Preservation Projects, typically lack lawyer-of-the-day programs, and are less likely to feature a legal services presence.

For all these reasons, the Task Force sought to establish one pilot project in a Housing Court, and one in a District Court. In selecting the particular Housing and District Courts, we looked for 1) a willing court 2) an appropriately-sized docket 3) a willing legal services office and 4) other features that might enhance the success of the effort. For example, since the project targets representation of particularly vulnerable categories of tenants, we wanted to have the vast majority of the money directed to full-representation, while at the same time allowing for the possibility of counsel, advice and pro se assistance for cases not accepted.

Those factors led us to select the Northeast Housing Court and Quincy District Court. The Northeast Housing Court features not only an eager and supportive court, but an established assistance program staffed by Neighborhood Legal Services in three of the court's four sessions. The money in this site of the pilot project therefore can go directly to full representation, as the existing project can serve as a screen to identify eligible cases. Clients not accepted are offered counsel, advice and limited assistance. Clients might not be accepted because they or their cases do not fit the criteria, or because the randomization aspect of the selection process, for evaluation purposes (see below) rejects the case for full representation.

With the District Court, we met with Court officials, who proposed Quincy District Court as a site, in part due to the interest of the presiding judge. This site had additional advantages, because the docket was neither too large nor too small, and because Greater Boston Legal Services, which serves the area, was interested in participating. Unlike with the Northeast Housing Court, however, no legal services presence existed at the time in the court. As a result, the money here provides both for full representation by a lawyer, and also for screening and assistance.

In terms of eligibility and percentage of the docket, the cap on financial eligibility coincides with the Supreme Judicial Court's Indigency Rules for Assignment of Counsel generally, although as a practical matter, the offices may be using 150% of poverty level

for simplicity and to reduce the amount of resources dedicated to the financial eligibility screening. The percentage of the docket to be served is an open-ended question, and part of what we hope to learn. Our best guess put the size of the docket that fit the criteria at between 10 and 20% of the docket. If the project helps produce a more concrete figure, that knowledge will help us to develop an estimate of the number of cases, and eventually, costs for a state-wide program. Whether all eligible cases are actually taken, however, will depend on the capacity of the staff attorneys hired for the project. As with other legal services offices, they will shut down intake when and if they reach the point of being unable to handle more cases in an ethically proper manner.

As noted below, since one form of evaluation is a randomized study, the ability to randomize depends on excess capacity in the first place. If every eligible case is accepted, then evaluation will be impeded. If excess capacity exists, then evaluation can include a randomized study, but the pilot project will not represent every eligible client.

Finally, with respect to landlords, the project will provide representation where the landlord resides in the building that is the subject of the eviction and the landlord owns no other interest in real property and the tenant is represented by counsel and the landlord's shelter is at stake in the proceeding. We anticipate this will be a small number of cases. Representation will be provided by pro bono attorneys not affiliated with the legal services offices.

#### Funding, Duration & Cost Estimates

Three private sources are providing the funding: The Boston Bar Foundation, the Massachusetts Bar Foundation and The Boston Foundation. The first two Foundations are the charitable arms, respectively, of the Boston Bar Association and Massachusetts Bar Association, both of which are heavily involved in the Task Force [The Task Force is a Task Force of the Boston Bar Association, but has been expanded to include statewide stakeholders, including the Massachusetts Bar Association]. There is no public funding involved. While the three grants are on slightly different timetables, most funding is for one year. We have envisioned a multi-year pilot project to insure that we have meaningful data that will support the findings and conclusions, and we plan to seek additional funding.

In terms of numbers of cases to be served and cost estimates per case, as explained above, we approached this differently once we settled on the use of staff-based legal services models for the delivery system. We started by taking the number of cases on the dockets of the courts we were targeting, used a rough estimate as to the percentage of the docket that might fit our criteria, used an average figure as to the caseload for an experienced legal services lawyer, and then based our funding request on those figures. The number of cases and cost estimates per case, therefore, become outcomes we hope to measure. By launching the project, we will obtain more specific data on the number of eligible cases. By having the staff attorneys keep careful records, we will obtain an estimate as to the average number of hours per case. Should we choose to do so, we could use the hourly rates for appointed counsel that exist in the state to calculate the

costs of an equivalent statewide program, if we decide the model is sound. The math will change if we conclude that a different subsection of the docket should in fact be targeted for representation, if the number of cases is higher or lower, if we should be using a different figure for hourly compensation, or if compensation should be calculated on a per case basis.

### Evaluation

We are exploring a variety of options for evaluation. Our core evaluative tool is a randomized study designed, and being conducted, by Professor Jim Greiner of Harvard Law School. This ambitious project depends on an excess capacity of eligible cases to allow for randomization. For example, since the project is being staffed by finite legal services resources, the staff would normally accept eligible cases until capacity is reached, and then go off intake until the caseload drops. Until we know more about the numbers, we will not know whether capacity might be reached after one, two, four or even ten months. With randomization, the same number of clients will be represented, but at a different rate. The computer will randomly determine which of the eligible clients will be accepted for full representation, and which instead will be offered counsel, advice and other forms of assistance. The project simply remains open for intake twice as long, allowing for a comparison between the case outcomes achieved with full representation and those achieved with lesser forms of assistance.

Professor Greiner also plans to conduct follow-up interviews with both accepted and rejected clients, to help determine which remain in their housing and where displaced tenants go. We aspire to identify cost savings as well, although our ability to do so will depend in part Professor Greiner's ability to track successfully the tenants and former tenants at various time periods after the court disposition.

We are developing additional evaluative tools as well to supplement the randomized student. These are dependent initially on volunteer help, so it is an open question at the moment as to how many will occur. We plan to go back in time, a year ago, for example, to study the dockets of the same courts and compare results. We may also compare the results to the dockets of different courts; for example, we have existing data from Cambridge District Court from 2006. One session of the Northeast Housing Court (Lowell) is not included in the pilot project, and we might compare the results from that session with the results from the sessions covered.

Beyond file reviews, we hope to supplement the evaluation with court observations, litigant interviews (at intake, but also follow-up), other interviews (court personnel, including judges; advocates; agencies) and information from other sources/reports (shelters, housing mobility studies, etc.). Finally, we hope to interview personnel at the homeless shelters in the areas of Quincy District Court and Northeast Housing Court to obtain insight into the connection between displacement via eviction and presence at the homeless shelters, a connection complicated by stringent eligibility rules at the shelters.

We underscore the point that these are pilot projects, and we likely can only begin to identify the questions to which we might obtain full or partial answers. Beyond the questions of whether the program as envisioned will succeed in identifying the most important cases and provide a workable model for representation, the pilot program has other important goals reflected above. The first is to help provide estimates as to the numbers that would be involved statewide. We currently have only an array of educated guesses as to how many cases would fit within a proposal of this type. Second, we have included both a Housing Court and a District Court for comparative purposes. Since roughly one-third of the eviction cases statewide are in the District Court, we cannot simply focus on the Housing Courts, and need to be sure a program is workable and effective in both settings. Third, we need to measure the effectiveness of the program, testing the theory that representation in fact leads to a preservation of shelter. And, of course, the data regarding numbers of eligible cases and time involved in representation will shed light on the cost of a statewide program with this design.

We realize many components of the project are ambitious, and dependent entirely on volunteer help beyond the funding for legal services staff, so we may not achieve all that is set out here. We emphasize that many of the details discussed here are in flux. We built a three-month trial period into the project, so we could assess what is working and what is not, before finalizing the study design. And, we underscore the idea that the Task Force has focused on starting points for expanding a civil right to counsel, rather than endpoints. Nothing in the design of the pilot, including the sorting of cases, randomization, or delivery model, should be viewed as the features of any final proposal for a civil right to counsel in Massachusetts.

**Draft Proposal: Pilot Project for A Right to Counsel in Certain Eviction Cases**

I. Representation Proposal

A. Legal counsel shall be provided for indigent tenants in the following eviction cases:

- 1) *Cases involving household members with mental disabilities where the disability is directly related to the reason for eviction; or*
- 2) *Cases involving criminal conduct (including cases brought pursuant to M.G.L. c. 139, sec. 19 and those brought as summary process cases); or*
- 3) *Cases in which the absence of representation for the tenant will lead to a substantial denial of justice. In the exercise of judicial discretion, judges shall consider the following factors:*
  - a. Factors relating to a tenant's vulnerability, such as disability, domestic violence, education, language, culture or age;*
  - b. Factors relating to the landlord, such as whether the landlord controls a large or small number of units, whether the landlord is legally sophisticated, whether the landlord is represented by counsel, and whether the landlord lives in the building;*
  - c. The affordability of the unit for the tenant, including whether the unit is in public or subsidized housing;*
  - d. Whether there appear to be cognizable defenses or counterclaims in the proceeding;*
  - e. Whether the loss of shelter might jeopardize other basic needs of the tenant, such as safety, sustenance, health or child custody;*
  - f. Other indicia of power imbalances between the parties.*

B. Legal counsel shall be provided for indigent landlords where:

- 1) *The landlord resides in the building that is the subject of the eviction proceeding;*
- 2) *The landlord owns no other interest in real property;*
- 3) *The tenant is represented by counsel; and*
- 4) *The landlord's shelter is at stake in the proceeding.*

II. Proposals complementing the Representation Proposal

We will further recommend that the proposal above be supplemented with the expansion of assistance programs, such as lawyer of the day programs for both tenants and landlords in all Housing and District Courts, to reach all eligible litigants seeking assistance.

**Appendix 5C to Task Force Report**