

capital fund program,³⁴ excess operating fund reserves³⁵ and voluntary conversion under Section 22 of the United States Housing Act.³⁶

The notice states that if there are tenants residing in units that are being renovated by another entity, this entity must provide the tenants with a public housing lease or a lease with similar protections.³⁷

Section 3

NHLP and HJN requested that HUD specifically mention and cross-reference Section 3 in the context of applications for demolition and disposition and that HUD review any application to determine how the PHA plans to maximize employment opportunities for Section 3 individuals. For example, the application could set forth qualifications for anticipated jobs, as well as the dollar amounts that will be set aside for contracting opportunities for Section 3 businesses. Notice PIH 2012-7 addresses only the first request and cross-references the Section 3 obligation.

Use Restrictions

The notice states that when a PHA proposes to dispose of public housing below the fair market value, HUD most likely will require the PHA to execute a use restriction, which generally will be not less than 30 years.³⁸ The perspective of most housing advocates is that a 30-year period is too short. The period should be substantially longer, and the use agreement should provide for additional protections to ensure to the maximum extent feasible that the property remains in the public domain and continues to serve the lowest-income families.

Conclusion

Notice PIH 2012-7 is a substantial improvement over prior HUD policies and addresses many of the problems identified by advocates. The benefits (and perhaps unintended weaknesses) of the new policies will be tested in the coming months as applications are processed according to the new procedures. The next major issue for advocates is the anticipated publication of proposed rules to amend the demolition and disposition regulations. These proposed rules likely will be published for comment later this year. ■

³⁴Congress appropriated \$1.875 billion for fiscal year 2012 for the capital fund, which is not enough to address the annual increase in capital fund needs.

³⁵The operating fund for fiscal year 2012 anticipated that up to \$750 million of operating reserves would be available to fund operating subsidies overall. There may some PHAs with significant reserves that could be tapped, but most do not have significant operating subsidy reserves.

³⁶The rules regarding voluntary conversions provide that in order to convert, the development must demonstrate that the conversion will not be more expensive than continuing to operate the development as public housing. 24 C.F.R. § 972.224 (2011).

³⁷HUD Training, *supra* note 15, at 13.

³⁸PIH 2012-7, *supra* note 1, ¶ 12.

Recent Studies Compare Full Representation to Limited Assistance in Eviction Cases*

The National Coalition for a Civil Right to Counsel (NCCRC)¹ encourages and supports research to explore the results of providing counsel in civil cases involving basic human needs such as housing. Such research can measure improved outcomes, cost savings, improved efficiency and the clients' perceptions of improved access to justice. Research that ultimately demonstrates such benefits is critically important not only to persuade policy-makers, but also because it factors into two prongs of the standard procedural due process test for appointment of counsel: the risk of erroneous deprivation if counsel is absent, and the cost to the state of providing counsel. In this vein, numerous studies in the past have shown that providing counsel makes a difference in civil cases in terms of improving outcomes and saving money.² A number of these have studies have focused specifically on housing.³

Most prior studies have compared those who receive counsel to those who do not. However, few studies have compared full representation to limited (unbundled) assistance or limited assistance to no assistance. Precise definitions are key here: as noted by Jessica Steinberg, the author of one of the studies discussed in this article, "In the literature, there is a tendency to conflate the unbundled assistance provided by legal aid lawyers with the 'self-help' assistance provided by court-based centers and to lump them both under the broad definitional umbrella of 'unbundled legal services.'"⁴ For purposes of this discussion, "limited assistance" refers to aid provided by an attorney in some form, be it advice/guidance in a clinic or some scaled-back form of direct representation.⁵

*The author of this article is John Pollock, who is the Coordinator of the National Coalition for a Civil Right to Counsel.

¹For more about the Coalition, visit www.civilrighttocounsel.org.

²For an overview of some of these studies, see Laura Abel and Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139 (Fall/Winter 2010), available at <http://www.law.seattleu.edu/x9204.xml>.

³For just a few examples, see Lawyers' Committee for Better Housing, *No Time for Justice: A Study of Chicago's Eviction Court* (Dec. 2003), available at <http://lcbh.org/images/2008/10/chicago-eviction-court-study.pdf>; Community Training and Resource Center and City-Wide Task Force on Housing Court, Inc., *Housing Court, Evictions, and Homelessness: The Costs and Benefits of Establishing a Right to Counsel* (June 1993), available for purchase at http://www.prrac.org/grants_reports_hg.php; Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & Soc'Y REV. 419 (2001), available for purchase at <http://www.jstor.org/pss/3185408>.

⁴Jessica Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 462 n.34 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960765.

⁵Even within this definition of "limited assistance," there is still a fairly broad range of services that could meet the definition, some of which

The question of what role (if any) limited assistance should play in a potential civil right to counsel model is subject to much debate.⁶ The inclusion of a limited assistance component in the American Bar Association's 2010 Model Access Act⁷ (which provided one possible framework for implementing a civil right to counsel) was one of the more contentious pieces of that document. For some, including limited assistance in a right to counsel model is desirable because they believe: (1) it allows service providers to calibrate the level of services provided to the actual need while still providing sufficient justice; (2) it makes the right to counsel model more feasible from a resources standpoint; and (3) if we give some assistance to a greater number of a people, it provides for better justice than giving full representation to a smaller group while the rest receive nothing. For others, the inclusion of limited assistance is unwise because they believe: (1) limited assistance provides justice that is significantly inferior to full representation; (2) it is difficult to determine prior to the start of a case whether a lesser level of assistance will provide justice; (3) states will be inclined to rely on limited assistance heavily (due to its cheaper cost), even in situations where it will not be effective; (4) there are some needs too important to risk providing only limited assistance; and (5) if the opposing party knows the attorney will not litigate the entire case, the opposing party is more inclined to "play hardball."

In thinking about this issue, it is undeniably important to know whether limited assistance is even capable of providing an acceptable level of justice, and if so, in which situations. Three recent studies conducted in the eviction context begin to scratch the surface of this question: one in Quincy District Court in Massachusetts ("MA District Court study"),⁸ one in the Northeast Housing Court in Massachusetts ("MA Housing Court study"),⁹ and one in the San Mateo County Court in California ("CA County Court study").¹⁰ This article will discuss the structure of those studies, the results, and some critical "between the lines" details.

(as will be seen later) can come fairly close to full representation.

⁶NCCRC will host a panel on the subject at this year's Equal Justice Conference, which takes place May 17-19 in Jacksonville, Florida.

⁷American Bar Association, *Resolution 104* (Model Access Act) (Aug. 2010), available at <http://www.abanow.org/2010/07/am-2010-104/>.

⁸James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future* (Oct. 23, 2011) (draft), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948286.

⁹James Greiner et al., *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* (Oct. 24, 2011) (draft), available at <http://ssrn.com/abstract=1880078>.

¹⁰Jessica Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY LAW & POL'Y 453 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960765.

Basic Study Design and Key Components

In the MA District Court study, Greater Boston Legal Services (GBLS) used eviction court records to identify potential study participants and mailed individualized form letters inviting the tenants to participate in a two- to three-hour clinic for filling out court forms and learning court procedure. The letter also explained that the tenants would be screened at the clinics for participation in a study in which they might receive full representation. After attending eviction calendar proceedings to identify additional cases, GBLS screened all the tenants who agreed to participate in the study and selected 129 cases where it felt its assistance could make the most difference. Of these 129 cases, 76 were randomized¹¹ into a "treatment group" and were offered full representation that included help in pursuing rental assistance, reasonable accommodations and other relief outside of the direct eviction process. The remaining 53 were control group cases that were not offered any additional assistance (but the majority had already received the clinic assistance).¹²

In the MA Housing Court study, Neighborhood Legal Services (NLS) did no individualized outreach, but rather located its study participants from the 60- to 90-minute clinics it was already running or from calls to its telephone intake system. Of the 184 cases accepted into the study, more than half (100) were at the notice to quit (NTQ) stage, while for the rest an eviction complaint had been filed with the court. The 184 cases were randomized into 85 cases receiving an offer of full representation (which included only advocacy in court, not extrajudicial assistance like in the MA District Court study) and 99 control cases receiving an offer of limited assistance in the form of lawyer for the day (LFTD) assistance in addition to the clinic assistance previously received. The LFTD assistance involved help with negotiations and mediation, but not the filing of motions.

The CA County Court study compared 96 eviction complaint cases that had received one or more types of limited assistance from the Legal Aid Society of San Mateo County (all 96 received clinic assistance, while 29 also received assistance negotiating with landlords) to 20 cases receiving full representation from the Stanford Law Clinic

¹¹In such an approach, study participants are placed either in a treatment or control group. In these studies, the treatment group received full representation, while the control group received the limited assistance.

¹²The study notes that some in the control group may have received some unofficial additional help. According to the study, "GBLS's staff attorneys provided quick advice on several occasions to defendants, including possibly some in our control group. This quick advice was nothing close to the magnitude of the assistance provided in the Lawyer for the Day program in the Housing Court Study...Nevertheless, unless one believes that this advice could have made defendants worse off (by, for example, raising defendants' expectations and inducing them to refuse settlement offers they should have accepted), the fact that some defendants received even more legal assistance than that described above makes our results all the more startling." Greiner, *supra* note 8, at 25 n.112.

and 305 cases receiving no assistance at all. As with the MA Housing Court study, there was no targeted outreach.

A Caution on Interpreting and Relying Upon These Studies

On the surface, these three studies look somewhat similar: all three generally attempt to compare “full representation” in eviction cases to something less than full representation, and featured a legal clinic available to all litigants to receive assistance in filling out court forms and learning about court procedures. But after that, the resemblance diminishes, even to a significant degree between the two studies in Massachusetts. As described above, these three studies compared different types of full representation provided by different legal services providers to several different types of limited assistance. And as will be shown later, the three studies were conducted in three different types of courts that had varying procedures (in some instances, the variations were quite significant), examined cases that were not always at the same procedural stage, and contained groups of tenants and landlords that had some collective differences in terms of goals and resources.

Additionally, two very important caveats about the CA County Court study require viewing that study’s results with a critical eye. The first is that due to its very small sample size of full representation cases (20), the study is on safer ground where it compares limited assistance (96 studied cases) to no aid at all (305 cases). The second is that in the two Massachusetts studies, all litigants in the study pool sought full representation before being randomized into either the “full representation” or “limited assistance” groups. In other words, the level of assistance they received was not determined by their particular efforts, but rather by the study itself. Such an approach reduces the risk that any study results are due not to the assistance provided or not provided, but rather due to different personal characteristics of the litigants (such as a different level of motivation), a problem known as selection bias. Conversely, the CA County Court study used a non-randomized, “observational in nature” approach, and thus, in that study author’s own words, “the study contains a significant methodological limitation in that it was unable to measure the impact of unbundled legal services independent of the merit of the cases or the personal attributes of the clients who sought assistance.”¹³ While these caveats make it unwise to accord the same weight to this study as the Massachusetts studies, the CA County Court study author correctly notes that the results still “provide[] a valuable jumping off point for promoting further public discussion of the unbundled model and future study of its impact.”¹⁴

In short, while the studies contain a number of intriguing results, and while they undeniably justify further

study of the possible role of limited assistance, it would be unwise for legal services providers to draw any broad conclusions or alter their practices based on these results alone. In fact, given the large number of variables that could have affected the study results (discussed later), it becomes clear it will take a large body of research to be able to draw conclusions even within a single state or for a particular subject area as to what role limited assistance can or should play in thinking about a right to counsel.

Results of Studies

In two of the studies (MA District Court and CA County Court), those with full representation did substantially better than those receiving limited assistance in terms of retaining possession, saving more months of rent and paying less to the landlord. Meanwhile, in the MA Housing Court study, the fully represented and limited assistance groups achieved roughly the same results.¹⁵ While the MA Housing Court study results might seem to indicate the effectiveness of that study’s limited assistance program, it is possible that actually neither the limited assistance nor the full representation was actually effective, since their success rate was far lower than the full representation group in the MA District Court study.

The CA County Court study conducted additional measurements. First, it found that the limited assistance group failed to outperform even the no aid group in all substantive results (possession, saving rent, not paying money to the landlord).¹⁶ It also found that while both the full representation and limited assistance groups had better *procedural* success (avoiding default, raising cognizable defenses) than the no aid group,¹⁷ only the fully represented group had better *substantive* results (possession, rent savings, money judgments).

The table below provides a comparison of the results in the three studies. The following results in the table were *not* statistically significant: the differences between the fully represented and limited assistance groups in the MA Housing Court study, and the differences between

¹⁵As explained later, the MA Housing Court study did not examine the results for just those who obtained the lawyer for the day assistance as compared to the full representation group, but rather looked at the entire limited assistance group as a whole.

¹⁶In fact, those receiving enhanced limited assistance (negotiation help in addition to the clinic) fared slightly worse than those who only received clinic assistance, although the difference was not statistically significant. The CA County Court study author posits this could have happened because the attorneys assisting with negotiations either did not accurately estimate the value of the case or expected a worse outcome than they should have, or knew the value of obtaining a sealed eviction record, and negotiated for this in exchange for other types of relief (such as money or days to stay). Steinberg, *supra* note 10, at 489, 490 n.14.

¹⁷The “no aid” group defaulted 51% of the time, compared to 3% for the limited assistance group and 0% for the fully represented group. In terms of cognizable defenses, only 59% of the “no aid” group raised cognizable defenses, compared to 100% of the fully represented group and 97% of the limited assistance group.

¹³Steinberg, *supra* note 10, at 458.

¹⁴*Id.* at 474-75.

the limited assistance and no aid groups in the CA County Court study.

Here are some specific details in terms of comparing full representation and limited assistance:

- *Possession*: MA District Court study tenants retained possession twice as often with full representation, whereas in the CA County Court study it was three times as often (a figure the CA County Court study notes is “highly statistically significant” despite the small sample size).¹⁸ In the MA Housing Court study, both the full representation and limited assistance groups retained possession about one-third of the time, which was only as good as the *limited* assistance group in District Court.
- *Rent Saved by Tenants*:¹⁹ Fully represented MA District Court study tenants saved four times as much rent as those receiving limited assistance. In the CA County Court study, fully represented tenants received financial benefits more than half the time, while virtually none of the limited or no-assistance tenants received such a benefit. In contrast, in the MA Housing Court study, the fully represented and limited assistance groups saved about the same amount of money, which was only as much as that saved by the limited assistance group in the MA District Court study.

¹⁸Steinberg, *supra* note 10, at 484.

¹⁹Note that “rent saved” is not exactly what was measured by the Massachusetts studies, since “rent saved” assumes an equivalency between a court judgment and actual payments/nonpayments, and vice versa. To understand the distinction better, see Greiner, *supra* note 8, at 35 n.136.

- *Money Paid by Tenants to Landlords*:²⁰ In the MA District Court study, the fully represented tenants paid \$0 on average to landlords, while the limited assistance tenants paid over \$600 on average. In the CA County Court study, the fully represented tenants paid landlords 0% of the time, while the limited assistance group not only paid the landlords more than 70% of the time, but 50% of the time they paid *more* than the total amount of rent owed (often as part of a settlement).²¹ In contrast, in the MA Housing Court study, the full representation group fared no better than the *limited* assistance groups in both Massachusetts studies (and actually fared slightly worse, although the difference was not statistically significant).
- *Time to Move Out*: The MA District Court study could not draw a conclusion on this, while the MA Housing Court study found a difference that was not statistically significant.²² The CA County Court study found

²⁰Note that “money paid” is not quite what was measured, since it assumes an equivalency between a court judgment and actual payments, and vice versa. To understand the distinction better, see Greiner, *supra* note 8, at 35 n.136, 39.

²¹In fact, the limited assistance group in the CA County Court study actually did worse in this respect (albeit not to a degree of statistical significance) than the group that received no aid whatsoever and the tenants that defaulted. Of this, the study author notes, “This is not to say that default is preferable—or even equivalent—to fully and robustly litigating claims in court. But it does raise the question of whether it’s worthwhile for tenants to launch a defense in court without full representation by an attorney.” Steinberg, *supra* note 10, at 493.

²²One scenario is that tenants fare worse on measurements like possession and cash payments if their attorneys trade these things

Comparison of Limited-Assistance Studies

	MA District Court	MA Housing Court	CA County Court
Retaining Possession of Unit	66% of full rep group, compared to 33% of limited assistance group	33% of the full rep group, compared to 36% of the limited assistance group	55% of full rep group, compared to 18% of limited assistance group and 14% of no aid group
Amount of Rent Tenants Saved	Full rep group saved average of 9.4 months of rent, compared to 1.9 months for limited assistance group	Full rep group saved average of 1.8 months of rent, compared to 1.6 months for limited assistance group	In full rep group, LL paid T 55% of time, compared to 0% for limited assistance group and 2% for no aid group
Amount Tenants Ordered to Paid to LLs	Full rep group paid \$0 to LLs on average, compared to \$617 for limited assistance group	Full rep group paid \$903 to LLs on average, compared to \$486 for limited assistance group	Full rep group paid LLs 0% of time, compared to 71% for limited assistance group (where 51% paid more than max liability) and 61% of time for no aid group (where 55% paid more than max liability)
Where Possession Lost, Days to Move	Studied, but study authors could not come to a conclusion*	Full rep group given 113 days on average, compared to 82 days for limited assistance group	Full rep group given 97 days on average, compared to 54 days for limited assistance group and 47 days for no aid group

*The MA District Court study authors suggest the one-third of cases receiving full representation that had to vacate might be weaker cases on the whole (by virtue of losing despite having full representation) than the two-thirds of the limited assistance group that had to vacate, making the comparison difficult. They add, “We attempted to address this problem via statistical modeling, but we did not succeed.” Greiner, *supra* note 8, at 44.

that represented tenants got almost twice as long to move out as those receiving limited assistance or no aid whatsoever, but does not comment on the statistical significance of that difference.

Factors That Likely Contributed to Results

Two of the three studies appear to show situations in which full representation dramatically outperformed limited assistance, while the third seemed to find that full representation and limited assistance provided the same level of benefit (although that level was well below that of the full representation group in the other studies). Below are some factors that could explain why only the MA Housing Court study results showed a statistically insignificant impact of representation, or in particular why the MA Housing Court study results might have differed from those of the MA District Court study. Notably, some of these factors (such as the nature of full representation provided and the intake screening process) have particular relevance to thinking about designing a civil right to counsel model.

- *Scope of the Full Representation and Limited Assistance Provided:* The full representation in the MA District Court study was significantly “fuller” than that of the MA Housing Court study, since it involved efforts by the attorneys to secure rental assistance, reasonable accommodations and other relief outside of the direct eviction process. Conversely, the limited assistance in the MA Housing Court study was more extensive than that of the MA District Court, since the former involved use of the Lawyer for the Day Program. The net result of these differences is that the full representation and limited assistance in the MA Housing Court wound up being fairly similar to each other. Insufficient information is available regarding the extra-judicial efforts made by the full representation attorneys in the CA County Court study.
- *Rate of Requesting Jury Trials:* In the MA District Court study, the full representation group requested jury trials 81% of the time, compared to just 18% for the full representation group in the MA Housing Court study. Because requesting a jury trial in Massachusetts often delays the trial date for several weeks (due to the difficulty in obtaining juries), it provides attorneys with more time to prepare and negotiate, and therefore could have played a critical role in attorney effectiveness. Although the MA District Court study’s limited

in exchange for a longer time to move out. As previously described, the fully represented tenants in the MA Housing Court study did not perform better on the “possession” and “cash exchange” metrics. But the fact that the fully represented group also did not receive additional time to move (at least, not enough additional days to be statistically significant) suggests the attorneys were not engaged in these tradeoffs, or if they were, that it was not effective.

assistance group also requested a high rate of jury trials, the fact that that that group did not do as well as the full representation group seems to suggest that this procedural maneuver is only effective when combined with attorney representation. In the CA County Court study, although the rate of jury trial requests was low (around 25%), requesting a jury trial in California does not typically delay the trial date. It only adds a mandatory settlement conference before trial.

- *Rate of Filing Motions:* In the MA District Court study, the full representation attorneys filed prejudgment motions at more than 10 times the rate used by the full representation attorneys in the MA Housing Court study. In terms of total motions, it was four times as much. In the MA Housing Court study, the rate of filing motions for the full representation group was almost the same as the limited assistance group, even though those in the limited assistance program did not receive help with filing motions. As with jury trials, while the limited assistance group in the MA District Court study filed a fairly high rate of total motions, the fact that that group fared less well than the full representation group again suggests that these motions were not effective without an attorney to backstop them. Data is not available regarding the motion filing rate in the CA County Court study.
- *Effect of the Court’s Mediation Program:* The MA Housing Court’s mediation program was “worlds apart”²³ from the mediation programs in the other courts studied. The MA Housing Court mediators had the power to inspect housing units, call non-present witnesses for clarification, predict judicial outcomes, suggest settlement terms to the parties, and answer procedural/substantive questions of the litigants.²⁴ The study authors suggest this type of mediation placed significant pressure on the parties to settle, even when represented by an attorney, and might have “left little room for attorneys to be effective.”²⁵
- *Rate of Landlord Representation:* Some might guess that the higher the rate of landlord representation in a group, the more difficult it will be for unrepresented

²³Greiner, *supra* note 8, at 22.

²⁴The study authors noted, “Given this description of the broad powers exercised by the Housing Specialist, it is perhaps unsurprising that their ‘mediation’ style was evaluative and sometimes forceful. Because they felt free to predict the judge’s ruling in any matter, and because their day-to-day interactions with the judge and with Housing Court gave them at least the appearance of considerable knowledge about the judge’s likely course of action, and because they could threaten to investigate the parties’ factual representations, the Housing Specialists wielded considerable persuasive power. Unless parties stood extremely firm in the ‘mediation’ sessions, the Housing Specialists came close to serving as adjudicators with inquisitorial powers.” Greiner, *supra* note 9, at 14.

²⁵Greiner, *supra* note 9, at 58.

litigants and therefore the more difference full-time attorneys could make. The MA Housing Court study, which saw the least benefit of full-time representation, featured the lowest rate of landlord representation (57%-63%). Although the landlords in the MA District Court study were represented more frequently in the limited assistance group than in the full representation group (which could have meant the limited assistance group would be expected to do worse than the full representation group), the difference was only of “borderline statistical significance.”

Factors That Had An Unknown Effect

The factors below are ones where there is insufficient information to judge their impact on the comparative results of the three studies. In some cases, this is due to a lack of data for one of the studies in particular, while in others it is due to conflicting data or data that is susceptible to multiple interpretations. It is possible that some of these factors could be analyzed using data collected from client/judge interviews or prior court reports, and for the two Massachusetts studies, such data and analysis may yet appear in a report issued by the task force responsible for the pilots.

- *Background of Attorneys:* Full representation in the MA District Court study was provided by two attorneys with a specialty in low-income housing matters, including disability issues.²⁶ In the MA Housing Court study, the two attorneys providing full representation had two or fewer years conducting housing cases, with one having only three years’ total legal experience. On the other hand, the full representation attorneys in the CA County Court study had no particularized housing experience, whereas the attorneys providing limited assistance had substantial housing experience. Additionally, at least one of the two attorneys in all three studies had substantial overall legal experience.
- *Background of Judges:* Both the MA District Court and MA Housing Court studies featured judges that previously worked for legal services programs (suggesting they would not be biased against tenants), and in both studies that judge heard nearly all cases in the study. But the CA County study had a number of different judges on the cases.
- *Number of Limited Assistance Study Participants Finding Full Representation Elsewhere:* These figures were nearly identical in the MA District Court and MA Housing Court studies, and were relatively low (11%

²⁶The study authors note, “From our concededly limited observation, both appeared to possess unusual dedication, skill, and zealotry.” Greiner, MA *supra* note 8, at 23.

and 8% respectively). This is in stark contrast to a prior unemployment study done by James Greiner, where anywhere from 40% to 49% of the control group obtained full representation elsewhere.²⁷ This factor is a non-issue for the CA County Court study, as that study only examined what level of assistance the litigants already had at the time of the study.

- *Intake Screening Process:* In the MA District Court study, GBLs screened all cases presented to determine whether GBLs could improve the outcome of the case, while in the CA County Court study, the cases were screened for “pedagogical appropriateness,” which in some but not all cases included the case having at least some merit. Conversely, in the MA Housing Court study, while “availability of defenses” was one of six factors considered in deciding whether to accept a case into the study, the study accepted a case if it met *any* of the six eligibility factors.²⁸ As a result, the intake process in the MA District Court study may have increased the effect of representation over a study lacking a similar screening process. The study authors contend that this is not likely a significant factor because it would not mean there were *no* cases where legal aid could improve the outcome, and therefore the full representation group in the MA Housing Court study should still have been able to do better (albeit to a lesser degree than if screening were used) than the limited assistance group. However, the study authors concede that due to the sample size of the study, they could only pick up large differences.
- *Outreach Conducted:* The authors of the Massachusetts studies have previously speculated,²⁹ and speculate again in these studies, that (1) those clients with the initiative/ability to locate and contact legal aid are more “capable” litigants that can do better even when not fully represented; and (2) if the legal aid program does not engage in aggressive outreach, the litigants that still manage to find the program will on average be more capable and therefore more successful even when receiving limited assistance. It is true that in the MA Housing Court study, which did not do any aggressive or individualized outreach, the full

²⁷James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: Report of a First Study, A Critical Review of the Literature, and Prospects for the Future*, 121 YALE L.J. (forthcoming 2012) at 8-9, draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708664.

²⁸See Greiner, *supra* note 9, at 18 n.15. The factors were the occupant’s potential vulnerability, the evictor’s level of sophistication, whether the unit appeared to be affordable given the occupant’s resources, the availability of defenses to an eviction action, the effect of an eviction on the occupant, and any power imbalance as between the evictor and the occupant (as might be induced, for example, if the evictor were represented).

²⁹Greiner & Pattanayak, *supra* note 27, at 47.

representation and limited assistance groups had roughly similar results, whereas in the MA District Court study, which did have a more robust outreach program, the full representation group significantly outperformed the limited assistance group. However, as described above, the intake screening process also was different for these programs, making it difficult to know how much of this difference was specifically attributable to outreach. Additionally, a high degree of personal motivation may have little correlation with rate of success in a judicial forum, since motivation and persistence only go so far given that the litigants lacked a legal background, and some litigants may pursue their claims even though they have little or no merit. While the CA County Court did no extensive outreach and still saw the full representation group significantly outperform the limited assistance group (a result that appears to defy the theory described above), the lack of randomization in this study makes it impossible to know how the motivation level of the litigants affected the level of service they ultimately received.

- *Percentage of Cases Involving Foreclosure:* Foreclosure cases can cut both ways. If the defendant is a former homeowner, she has fewer defenses available to her, and there is less for a full representation attorney to do. But if the defendant is a former tenant, she may have *more* defenses available thanks to the federal Protecting Tenants at Foreclosure Act. The MA District Court and MA Housing Court studies had very similar numbers of foreclosure cases overall (15% and 12%, respectively), but the MA District Court study's limited assistance group had a higher percentage of former homeowners as defendants than the full representation group, so it may be less surprising that that limited assistance group did not do as well. On the other hand, no data is available in either the MA District Court or MA Housing Court studies as to how many of the foreclosure evictions were of tenants and not homeowners. The CA County Court study had a higher figure than the other two studies for total number of foreclosure-related evictions (27%). However, there were more foreclosure evictions in the full representation group, and there is no data available as to whether the foreclosure evictions were of homeowners or tenants.
- *Portions of Groups Offered Full Representation that Refused It:* While nearly all those offered full representation in the MA District Court study (97%) accepted the offer, nearly one-fifth of those offered full representation in the MA Housing Court study turned it down, and it is unknown what effect this might have had on the study results. The CA County Court study did not use the "offer" approach, so this statistic cannot be used for that study.

- *Portions of Groups Offered Limited Assistance that Refused It:* While 100% of the limited assistance group in the CA County Court study utilized the clinics offered, roughly 30% of the MA District Court study's limited assistance group declined to participate in the clinics, and it is unknown what percentage of the MA Housing Court study's limited assistance group declined to attend the clinics.³⁰ Moreover, nearly half (43%) of the MA Housing Court study's limited assistance group declined to receive the lawyer for the day (LFTD) assistance, and the study does not examine the difference in results between those in the limited assistance group who used the LFTD program and those who did not.³¹ As described earlier, the CA County Court did study the difference between those accepting the enhanced legal assistance and those who did not.
- *Procedural Stage of Cases:* More than half of the MA Housing Court study's cases were at an earlier stage (notice to quit), whereas all of the cases in the MA District Court and CA County Court studies were at the complaint stage. This difference in the MA Housing Court study could have made the work of the full representation or limited assistance attorneys easier (since they had more time and were not at that stage subject to the high-intensity court mediation program), but there is no way to know for sure. Additionally, a larger percentage of the notice to quit cases in the control group reached litigation.
- *Prior Operation of Legal Services Provider in the Court:* One possible explanation for a study finding a small positive effect of full representation is that the regular provision of full representation by a legal services provider in a particular court improves that court by regularly educating the judge and controlling the landlord bar, and that tenants in such a court might therefore do better even when unrepresented. In the MA Housing Court study, NLS had been operating continuously for some time, while in the MA District Court and CA County Court studies, the legal service provider of full representation had not been appearing regularly.

³⁰The MA Housing Court study authors have said that all the complaint cases participated in the clinic, but they do not have data on how many of the notice to quit cases did so, and more than half of the cases in the study were notice to quit cases.

³¹The MA Housing Court study authors explain, "NLS strongly believed that there would be a strong difference in the outcomes realized by occupants who took advantage of the lawyer for the day program and those who did not; it also felt similarly about those notice to quit occupants whose cases reached litigation and who took advantage of the NLS offer of an instructional clinic in its office. We did not conduct comparisons to test these assertions because we would not have been able to separate the causal effect of the lawyer for the day program (or an instructional clinic) from the selection effect based on the difference between the kind of occupant who would take advantage of such services and the kind of occupant who would not." Greiner, *supra* note 9, at 30.

- *Rate of Filing Answers, Counterclaims, or Discovery:* While the rate of filing these was high for both groups in both the MA District and MA Housing Court studies, data is not available on this point for the CA County Court study.
- *Portions of Study Participants Actually Wanting to Stay in Unit:* The rate of tenants wanting to stay in their units was higher in the MA District Court study (86% and 77% for the full representation and limited assistance groups) than in the MA Housing Court study (68% and 70%). This statistic was not tracked in the CA County Court study. Retaining possession is a marginal indicator of success if the tenants do not actually want to remain in their unit. It is unknown whether the differential between the MA District and Housing Court studies is significant, and some of those who said they did not want to retain possession could identify no alternative housing option, raising a question of the seriousness of their desire to live elsewhere.

Conclusion

As the lengthy list of variables above suggests, there is still much to learn regarding the impact of legal representation in housing cases. The studies highlight several issues that need to be addressed by anyone planning a pilot project on right to counsel, such as: (1) clearly defining both the intake/outreach program to be used and the assistance to be provided to the full representation and limited assistance groups; (2) knowing the background of the attorneys involved; and (3) understanding the nature and scope of services provided by the court. But most importantly, these studies demonstrate that if limited assistance is to be included in the right to counsel conversation, there are still many questions to be answered about how and whether it can effectively be used. ■

Court Reverses Voucher Termination That Was Based on Criminal Records Issue*

In most instances, it is a Section 8 tenant's responsibility to obtain and produce documents requested by the public housing agency (PHA) to ensure initial or continued eligibility. However, advocates must pay close attention when the documents requested by the PHA are related to criminal activity. As such, when faced with a termination for failing to provide necessary documents, if the document requested by the PHA is a criminal record relating to the Section 8 tenant, the duty and burden to obtain it lies with the PHA, not the Section 8 tenant. A California court applied this principle in finding that a Section 8 voucher tenant could not be terminated for failing to provide court documents related to an arrest.

Background

In early January 2008, a tenant was arrested on a shoplifting charge. The tenant was eligible for deferred entry of judgment pursuant to the California Penal Code.¹ Accordingly, although the tenant pleaded guilty, she was not convicted of this charge. The tenant successfully completed her deferred entry of judgment program, her plea was set aside, the case was dismissed and the proceedings were terminated.²

The tenant obtained a voucher from the City of Los Angeles Housing Authority. More than one year later, the tenant ported her Section 8 voucher to the Los Angeles County Housing Authority. To determine the tenant's continued eligibility, the county PHA conducted a criminal background check. The tenant signed a form consenting to the background check.³ On that form, the tenant accurately answered "no" to the questions "Have you ever been convicted of a crime?" and "Are you currently on parole or

*The author of this article is Holly N. Turney, Staff Attorney, Legal Aid Society of Orange County/Community Legal Services, Norwalk, California.

¹California Penal Code § 1000.1(d) states in relevant part, "a defendant's plea of guilty shall not constitute a conviction for any purpose unless a judgment of guilty is entered." Moreover, "upon successful completion of a deferred entry of judgment program, the arrest upon which the judgment was deferred shall be deemed to have never occurred. The defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or granted deferred entry of judgment for the offense. A record pertaining to an arrest resulting in successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate." Cal. Penal Code § 1000.4(a).

²[Redacted] v. Hous. Auth. of the County of Los Angeles, slip op. (Cal. Super. Ct. Oct. 22, 2011).

³See 24 C.F.R. § 5.903 regarding the obligation to obtain a signed consent form and the limitations on the use of any record obtained.