Report of the Massachusetts Justice for All Project Housing Working Group

ACCESS TO JUSTICE IN HOUSING: A HOUSING STABILIZATION VISION
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Research has shown that eviction and homelessness are devastating and costly for both the people involved and the public at large. But achieving fair and equal access to justice in housing, particularly in the context of eviction, is difficult given the current design of the system. The law is complicated and the timelines tight and strict. The courts run at times and in ways that may make sense in other civil litigation contexts but are impractical for litigants with tenuous employment, limited access to childcare, and disabilities. Many if not most tenants facing eviction are low-income people of color with little to no court experience, and many face additional barriers like mental disabilities or limited English proficiency. And most are *pro se* – fewer than 7% had representation in the Housing Court in 2017. Yet while almost all tenants navigate the complex, unfamiliar, and rigid eviction system alone, the majority of landlords are both experienced in the system and represented by lawyers – many of whom are themselves regulars in the housing courts with instant credibility and insider knowledge. There is a persistent power imbalance that makes the system fundamentally unfair.

There is a strong community of lawyers and social service providers who attempt to close the resource gap, but many resources become available only once a case is in court, and this can be too late. Fee-shifting statutes, which in theory should enable private lawyers to take strong tenant cases and be paid by their landlords, are seemingly underutilized. It can also be difficult for service providers to allocate resources efficiently because housing cases are spread across the Housing Court and the various local District Courts based on the landlord's choice of forum.

When Massachusetts undertook its Justice for All project with a grant from the Public Welfare Foundation, it settled on housing as a core area in which important changes were necessary to promote increased and meaningful access to justice. A housing working group was convened, and with assistance from the JFA management team, through a series of regional meetings, two day-long conferences, and a variety of group and individual meetings with people familiar with the system, the working group sought to develop a vision for a fairer system in housing, focused on "housing stability."[1] This document outlines both the critical barriers to housing stability in the current system and potential solutions. It includes both short-term fixes that can be implemented immediately with little or no additional resources as well as more visionary solutions that would flow from a re-imagined eviction process that might truly promote housing stability, particularly for the most vulnerable residents of the Commonwealth.

Many of the proposed fixes are consistent with the points identified in the Court's Strategic Plan 2.0 with respect to Access to Justice & User Experience (see pp. 27-29), with the Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, and with the

[1] Promoting housing stability does not dictate the preservation of every tenancy but rather the restoration of balance to an unbalanced system and the creation of real opportunities for people to explore housing (or subsidy) preservation options and pursue safer and healthier transitions when a tenancy is not sustainable.

recommendations issued by the Housing Court Practice Working Group of the Access to Justice Commission.

A NOTE ON LAWYERS AND ACCESS TO JUSTICE IN HOUSING

Given that housing law and procedure are complex, and that landlords are most often represented or experienced in the system, most tenants cannot truly have equal access to justice in the current system without a lawyer. Fee-shifting is available in many no-fault and nonpayment eviction cases and in most cases that a tenant might bring against a landlord. But both anecdotal and empirical evidence suggest that fee-shifting is underutilized. The Access to Attorneys Committee of the Access to Justice Commission is currently conducting research on the reasons for this and engaging in a range of projects testing solutions. The committee is also looking at ways to expand the use of limited assistance representation (LAR) to provide more *pro se* housing litigants with access to counsel at crucial junctures. But a significant gap will remain, and *pro se* resources are unlikely to fill it. New York City has recently recognized this and instituted a right to counsel in most eviction cases. Massachusetts should follow suit, for reasons that cannot be explored at length here.

I. BEFORE SERVICE OF SUMMONS AND COMPLAINT

A. Upstream Barriers

Landlord-tenant disputes may be easier to resolve before a court case is filed and the parties have begun to see each other as legal adversaries. Pre-court, or "upstream," the landlord has not yet incurred a filing fee, constable fee, or much in the way of attorneys' fees, and the tenant does not yet have a record of a publicly viewable eviction in court files or on the masscourts.org website, which can serve as a long-term impediment to future housing regardless of the legal outcome. Yet currently, court-based resources like the Tenancy Preservation Project (TPP), the Court Service Centers, and Housing Specialist Department (HSD) mediation, as well as legal aid and state and nonprofit financial assistance, often don't become available, or readily accessible, until after the commencement of a court action. (They are also often concentrated only in the Housing Courts, while many eviction cases are filed and resolved in the District Courts.) Delayed intervention then often involves a greater expenditure of resources, and greater risk to housing stability as parties are invested in or resigned to the tenant's having to move.

A related set of access to justice issues arises from the fact that once a summary process case has been commenced, the case moves extremely quickly, leaving tenants -- many of whom face multiple barriers to understanding and fully engaging in the eviction process under the best of circumstances -- little time to educate themselves about their rights and obligations, or to secure the assistance they need (charitable funds, legal aid, mental health support, childcare for court dates, etc.) to defend themselves or resolve their cases. This problem is exacerbated by the scarcity of and associated long wait times for many necessary resources, like legal aid and affordable mental health care.

Many of the following suggestions attempt to bring resources that now exist, or are primarily accessed, at the court stage further upstream in the hope of expanding meaningful access to justice and facilitating the fair and efficient resolution of cases.

B. Upstream interventions:

1. **Informing tenants about rights and resources**

    a. At the commencement of each tenancy, the tenant should be provided with a short packet of information, written at a third-grade reading level and available online in common non-English languages, summarizing landlords' and tenants' rights and responsibilities; suggesting documents that the tenant should keep in the event of future questions or disputes (know-your-rights (KYR) packet, rental agreement, communications with landlord); and containing a description of the court processes (and other mechanisms) landlords and tenants can use to enforce their rights (e.g., summary process, G.L. c. 139, § 19, injunctions to secure repairs, Board of Health action). [Washington D.C. has implemented a version of this idea for housing code violations and in Massachusetts, every tenant must already be provided with a lead law notification.]

    b. Along with each notice to quit, the landlord should serve a pre-determined packet containing: (1) the KYR packet provided at the commencement of the tenancy; (2) a list of housing stabilization resources (mediation, lawyers (including fee-shifting and limited assistance representation (LAR) attorneys), community organizations that provide information on tenants' rights or assistance in landlord-tenant cases, financial assistance programs like RAFT, etc.); and (3) information about any upstream programs available through the courts (e.g., TPP or HSD mediation). [In other contexts, like DUA and immigration appeals, similar resource lists are provided.]

2. **Improvements and Updates to Notice to Quit Substance and Process**

    a. Notices to quit should be renamed, and rephrased (fillable forms available on court websites), to suggest their actual function and avoid misleading tenants to believe that they are legally obligated to leave their apartments on the expiration date.

    b. To ensure that tenants understand this very important document, each notice to quit should:
        - Be written at a 3rd grade reading level (fillable forms available on court websites)
        - Be provided in the preferred language of a tenant with limited English proficiency (LEP) if the landlord is or should be aware of the LEP need and can feasibly provide the notice in the language required (fillable forms in multiple languages to be made available on court websites), or at a minimum contain a standard bolded warning in multiple languages (available on court websites) informing the tenant that the notice is important and should be translated immediately (see, e.g., BHA notices)
        - Be provided in accessible format to tenants for whom landlord is on notice of, or is made aware of, a disability requiring such accommodation (e.g., blindness or cognitive disabilities). If the tenant informs the landlord of the need for an accessible document, the deadline for termination of tenancy should run from the date the accessible document is provided, assuming the request qualifies as a reasonable accommodation.

- Contain a disability rights advisory informing tenants in simple language that they can request reasonable accommodations, including provision of the notice in accessible format

c. Notices to quit should be sent simultaneously to the city/town and/or to a social service agency designated by the city or town, which can then engage in outreach to the parties (e.g., offering mediation or KYR services) or analyze the data to assess and address local eviction trends. Boston, for example, has an Office of Housing Stability that offers an array of assistance programs to prevent unnecessary evictions. Measures will need to be in place to protect tenant privacy.[2]

d. In non-summary process civil injunction actions brought by landlords seeking to "lock out" tenants for troubling behavior (often related to mental illness) or criminal conduct, intervention should be required to explore solutions that would avoid homelessness, including TPP outreach and mediation. A form must be completed and given to the judge reporting the intervention method(s) attempted and the outcome.

e. At any time prior to the issuance of a notice to quit, a tenant should be permitted to contact his landlord and designate a friend, family member, social worker, or health care provider (e.g., therapist) to receive copies of all correspondence, or at least of any notices to quit. This will help LEP tenants and tenants with mental health disabilities like depression and anxiety (common in low-income communities) in particular.

3. Making Stabilization Resources Readily Accessible Earlier

a. Each Housing Court should maintain on its website (and either updates annually or permits organizations, with password-protected access, to self-update) a list of resources, with weblinks, for landlords and tenants seeking to resolve housing disputes. Such resources could include not only court-based programs like TPP, HSD, Lawyer for the Day (LFD), and the Court Services Center (CSC) but also community resources like:
   - Elder/Protective Services
   - Community Health Clinics
   - Subsidized Housing Providers/Housing Authorities
   - Housing search workers (this is a HUGE unmet need/hole in the safety net)
   - Legal Aid
   - "CAP" agencies (Community Action Programs)
   - Community/Tenant non-profit organizations
   - Disability Rights organizations
   - Cities/Towns (Boards of Health)
   - Congressional/State representatives
   - Police Departments

[2] For a discussion of a similar law in Virginia, see Emily Nugent and Peyton Whiteley, "Third Party Notice of Eviction Actions: An Opportunity for Advocates to Help End Homelessness," 40 Clearinghouse Review 431 (2006).

b. Stabilization programs like RAFT, HomeStart, legal aid, TPP, and mediation (including HSD mediation) should alter eligibility criteria to permit upstream resolution of disputes. [The Boston Housing Authority and TPP are reportedly piloting such an approach (or will soon do so).]

c. Housing courts should host one-stop Housing Stabilization Centers, available to landlords and tenants pre-court, where much of the above can be offered in person.

d. Paraprofessionals, trained lay advocates, and first-year law students – who are ineligible to appear in court under Rule 3:03 – should be recruited to assist tenants in administrative hearings like public housing grievance hearings and Section 8 voucher terminations. [Harvard Law School's Tenant Advocacy Project has a successful model.]

II. PLEADINGS

A. Barriers at the Pleadings Stage (Summary Process[3])

A summary process case starts with service of a "Summons and Complaint," a dense one-page document that is filed between 7 and 30 days later. The Summons and Complaint is presumably intended to notify the tenant of the nature of the case against her and of important information, like the date the tenant must appear in court, the purpose of the court date, and the answer deadline. But the document is confusingly named (even some lawyers call it "the summary process"), uses formalistic language not accessible to many tenants, and is formatted poorly, burying important information about the steps the tenant must take to assert her rights in a box of small, cramped text at the bottom or even on the back of the form.

Ideally, tenants would respond to the Summons and Complaint by 1) filing answers asserting their defenses and counterclaims by the deadline; and 2) showing up on the first court date prepared for trial. Yet it is very uncommon for unrepresented tenants to file answers; in most cases, this is almost certainly attributable to the fact that the tenants do not know what to file or when to file it, or both. In some areas of the state, clerk's offices "ride circuit" and accept answers only on certain days of the week in certain locations, creating a moving target for tenants seeking to file answers. Other tenants are limited in their ability to get to a courthouse to file a document in person – because they are bedridden or hospitalized, cannot take time off work without losing their jobs, or live far from the filing location and do not have cars.

There is also a high rate of default on the trial date. Tenants who do show up on the court date listed in the Summons and Complaint are often surprised to learn that their cases are scheduled for trial that day: the Summons and Complaint references a "hearing," not a trial. Volunteers at Lawyer for the Day tables have fielded innumerable confused and frustrated questions from tenants who have proof of defenses and counterclaims but have not brought supporting witnesses

[3] For simplicity's sake, we have primarily focused on summary process cases. Any broader review of access to justice in housing or housing stabilization should encompass other forms of eviction, like civil injunction actions brought under G. L. c. 139, § 19, and affirmative claims by tenants, most of which are directly connected to housing stability.

and documents to court because they did not realize they would be expected to prove their cases on the first court date, let alone grasp evidentiary rules.

In addition, the reason for the eviction is often not stated on the Summons and Complaint; instead, most landlords simply state that the tenant failed to vacate after service of a notice to quit. The basis for the eviction – what the landlord will need to prove and the tenant will need to defend against – is listed in the notice to quit, but while the notice to quit is *filed* with the Summons and Complaint, it is generally not *served* with it. Tenants who have not seen the notice to quit (often because of lost or undelivered mail) therefore often come to court without information about the nature of the case against them.

Access to Housing Court through the right to "transfer" a case from District Court has recently been expanded as of July 1, 2017. Such expansion has the potential for increasing tenants' access to Lawyer for the Day programs and the Tenancy Preservation Program, which are not available at all in the District Court. Tenants need to be informed of the right to transfer, however, and given accurate guidance about what will happen once their transfer requests are filed. This often requires frequent and accurate cross-court communication, and then clear transmission of information to the litigants by busy clerks. Even once a case lands in Housing Court, LFD Programs are under-staffed and not available in all Housing Courts. TPP also needs additional funding just to meet existing need, let alone to match expansion.

Finally, assuming a tenant knows that an answer is due and knows how to obtain a form[4] and where and when to file it, it is still difficult for most tenants facing eviction to sort through the defenses and counterclaims available and then to assert them in a proper pleading without assistance. Tenants with disabilities or language barriers have even more difficulty and may find the task of filing an answer without assistance impossible. While some judges allow late answers upon motion, tenants who do not file pleadings by the answer deadline almost inevitably lose their right to claim a trial by jury and in some courts are not permitted to seek discovery on the claims against them.

B. Interventions at the Pleadings Stage

1. To be understandable to tenants and serve its notice pleading function, the Summons and Complaint form should be made uniform and amended to:

   a. Be written at a 3rd grade reading level
   b. Highlight in bold and large letters in a prominent location critical information like the court date and the answer deadline
   c. Include the actual grounds for the eviction, as opposed to "tenant failed to vacate after termination of tenancy," or include a copy of the notice to quit in the served copy
   d. Clearly state that the tenant should be ready for trial on the first court date and should bring all witnesses and documents to court that day; alternatively, make the first court

[4] Currently, legal aid offices, a free website found at www.masslegalhelp, and some law libraries and Court Service Centers have user-friendly checkbox answer and discovery forms. Most clerks' offices make available to tenants only the form answer appended to the Uniform Summary Process Rules, which fails to elicit the necessary information on certain claims and defenses from an inexperienced tenant, and no discovery form.

date a mediation/pre-trial conference date, as recommended below, and identify and explain both court dates

e. Inform tenants that all people named on the summons must appear, and that tenants cannot represent or appear for their family members in court (unless this rule is changed as suggested below)
f. Contain a disability rights advisory informing tenants in simple language that they can request reasonable accommodations, including a Summons and Complaint provided in accessible format
g. Contain a standard bolded warning in multiple languages informing the tenant that the document is important and should be translated immediately (see, e.g., BHA notices), at a minimum; ideally, translated versions of the form would be available in multiple languages on the court's website (to which the warning could direct tenants)
h. Direct tenants to the Court Service Center and to the court website (and/or a phone app and/or masslegalhelp.org) for a fillable .pdf answer and discovery form, ideally based on a guided interview platform that elicits information about possible defenses and counterclaims the way the Summons and Complaint elicits the landlord's prima facie case, which answer/discovery can be completed and e-filed from there
i. Elicit a landlord's or attorney's email address where the tenant can serve documents electronically
j. Identify any subsidies associated with the tenancy and the administering agency and certify compliance with the subsidized lease or program rules regarding pre-termination procedures like grievance hearings, reasonable accommodation, and communication with LEP tenants

2. Alternatively, the Summons and Complaint could be very simple and state just three things clearly: that an eviction case has been commenced against the person; that the tenant has a right to file a response by a certain deadline, and the date and nature of the hearing. It could be accompanied by a fact sheet with additional information, including:

a. what will happen (opportunity for mediation or hallway negotiation and the differences between them, then trial if no deal reached, either that day or on a later date)
b. resources that will be available at the courthouse (e.g., TPP, LFD, mediators, funding agencies)
c. how long it will actually take (likely until noon but possibly all day)
d. what to bring (documents in admissible format and witnesses)
e. how to prepare (including filing an answer and discovery and demanding a jury trial if the tenant wants one)
f. ways to request interpreters, reasonable accommodations, and night court or phone/video appearances, if available

In addition to the fact sheet, the summons would be served with a packet of information including:

a. Answer and discovery forms with a cover sheet explaining how to file and serve them
b. Transfer form with explanatory cover sheet for all cases filed in District Court
c. The KYR packet provided at the commencement of the tenancy

d. The list of housing stabilization resources offered with the notice to quit
e. A list of lawyers or nonlawyer advocates, including the Court Service Center, where the tenant can find assistance with pleadings, get legal information or advice, and perhaps find limited assistance or full representation

3. Tenants cannot be expected to know how to use a blank sheet of paper to assert their claims and defenses, demand a jury, or request discovery they need to defend themselves (like the names of witnesses in fault evictions, or copies of Board of Health notices the landlord has received about conditions of disrepair). The answer and discovery forms offered at courthouses and on court websites should thus use guided interviews or detailed checkbox forms to elicit all relevant information. The forms created by the Massachusetts Law Reform Institute achieve this purpose and are already in use at some Court Service Centers and on the masslegalhelp.org website, among other places. Technological advances will soon make it possible instead for landlords and tenants to simply answer a set of plain-language questions that generate pleadings that can be e-filed. These should be available on court websites and at terminals in courthouses.

4. Tenants should be able to file answers and discovery requests electronically or in person at any courthouse, regardless of the court in which the case is being heard. [Note: This and/or other measures are especially critical in rural areas, where low income tenants may lack transportation, and in the Northeast Housing Court, where the satellite sessions in Lynn and Lowell have no clerk's office – thus the only filing option is when the court is in session on Monday mornings in Lowell or Tuesday mornings in Lynn.]

5. Service of answers and discovery requests should be simple and flexible. Tenants should be able to serve documents by fax or electronically, to the email address the landlord's attorney has listed with the BBO or an email address customarily used for landlord-tenant communications. Where a landlord or attorney lists only a P.O. Box on the Summons and Complaint, the answer/discovery should be considered served on the date mailed, to avoid imposing extra costs on tenants who must otherwise serve by Express Mail in order to have proof of receipt.

6. If one member of a household files an answer or discovery requests, other members of the household should be formally invited and given time to sign onto them rather than being treated as if they have not answered the complaint.

7. *Pro se* landlords (and tenants, when served) need assistance in responding to discovery requests with user-friendly forms.

III. COURT APPEARANCES, HEARINGS, AND TRIALS

A. Barriers at the Courthouse/In Court

The experience a litigant will have in court varies widely across the state and across the court system. Some courts, like the Boston/Eastern Housing Court, have extremely high volume (routinely 150-200 eviction cases are scheduled to be heard each Thursday, divided between only two judges) but also a variety of potential stabilization resources, including HSD mediation, a

Lawyer for the Day Program, and HomeStart advocates and a TPP office on site. In other Housing Courts, the volume is lower, but there may also be fewer stabilization resources available at the courthouse. In the district courts, while volunteer mediations are sometimes available, the judges are often not housing law experts—a burden that falls disproportionately on unrepresented litigants, who are typically also unfamiliar with the law—and stabilization resources like LFD programs and TPP are largely nonexistent.

Certain barriers to unrepresented litigants' access to justice are common across the court system:

1. Navigating an Unfamiliar System

Tenants and small landlords may have no experience in *any* court system, much less the housing courts. They do not know what will happen during the day, in what order it will happen, the roles that the various people they encounter (mediators, volunteer lawyers, opposing counsel, paralegals working for opposing counsel, clerks, TPP) play in the system and in their cases, and how to speak persuasively to any of them. They don't know how long they will likely be in court. They are generally unable to predict what will happen in court and often unsure what will happen if they lose, or even if they win. They may not know how to conduct an effective negotiation, especially against an experienced lawyer who is a regular in the court. They rarely know how to conduct mediation, a hearing, or a trial. They don't know how to bring their evidence in admissible form, sometimes because of arcane rules (under G.L. c. 239, sec. 8A, a Board of Health report is inadmissible as prima facie evidence of conditions of disrepair unless the inspector who performed the inspection has signed the *tenant's copy* of the inspection report sent to the landlord, and Boards of Health rarely make acquiring such signatures feasible), or because their evidence is stored on their phones and they lack the knowledge or technology to transform it into the admissible document format demanded by the particular court. And because their housing is urgently on the line, they are often experiencing high levels of stress, which make figuring all this out even harder.

It can be hard for insiders familiar with the system to recognize, and empathize with, this confusion and stress and the impact is has on how people act in court and present their cases.

2. Language and Culture

Language and culture differences exacerbate any confusion and make communication between litigants and lawyers or court personnel, including judges, more challenging. LEP litigants can be unable to access resources aimed at helping *pro se* litigants. They may not know how to timely request an interpreter, and interpreters can be difficult to schedule for less-common languages. In a trial or hearing, the effectiveness (even likeability) of the interpreter can have a significant impact on the outcome.

3. Transportation/Childcare

In Boston, low-income litigants are reliant on public transportation, which is rigidly scheduled and not always reliable, particularly from low-income neighborhoods where multiple bus transfers are required. In much of the Commonwealth, litigants without cars have a difficult time reaching courthouses in person. Figuring out how to get to court on time, and get out of court in time, is particularly difficult for litigants with school-age children. Some do not have social

support systems to fall back on in such circumstances, leading to increased defaults or the removal of children from school.

4. Work

Low-income litigants who miss work often lose significant income or risk job security. The impact of this on housing stability and on families' economic security is often underestimated.

5. Disability

Litigants with physical disabilities like hearing loss or blindness may require additional assistance in court. Litigants with mental health or cognitive disabilities may be unable to interact effectively with untrained or harried court personnel or to present their defenses and claims in an understandable and persuasive manner. Assistance can be equally necessary to reasonably accommodate such litigants' disabilities, but courts are less likely to understand whether and how to provide it. *Guardians ad litem* are often in short supply, without any specialized training to work with litigants with severe cognitive or mental impairments and without a clear understanding of their role.

6. Prohibitions on Cell Phones in Courthouses

In some courts, cell phones are prohibited, putting *pro se* tenants and small landlords who have traveled to court on public transportation or secured a ride from a friend in a bind. Often, having not realized that they cannot bring their phones with them, they have to choose between abandoning their expensive possessions in an unsecured area to appear in court, or defaulting in order to protect their phones. As noted above, phones can also contain crucial evidence like text messages between landlords and tenants or photographs of conditions of disrepair in an apartment. They can also be a lifeline to the outside world – for children to reach their parents in an emergency or for the litigant to arrange transportation home at the end of a court day of unpredictable duration, for example.

B. Interventions at the Court Stage

1. Scheduling of Hearings and Trials

a. The initial court date should become an ADR/mediation date instead of a trial date. The parties could jointly request alternate dates or times throughout the day of the initial court date to spread the ADR load more evenly for both litigants and court staff and avoid unnecessarily long waits.

b. Evening court sessions and phone and videoconference appearances should be offered to accommodate litigants' work and childcare schedules consistent with all parties' needs. For similar reasons, initial court dates could be rescheduled to dates other than the date on which summary process cases are typically called, by mutual agreement or where there was no undue prejudice to either party. Parties could appear by written submission for hearings other than trials if appearing in person would pose a proven medical hardship or severe economic hardship (or risk thereof) like loss of employment income needed to pay the rent.

c. At a minimum, where necessary, court should start and end at times that enable litigants to discharge family obligations like getting children to daycare or school (and pick them up) without waiving legal rights.

d. Mediation services should be offered on dates other than the primary court date and at off hours to facilitate efficiency and accommodate parties' work obligations.

e. Routine scheduling could be done via email with clerk magistrates and would not require a personal appearance. This helps protect litigants' employment, saves money for litigants paying lawyers, and preserves scarce legal aid time. [The Boston/Eastern Housing Court is experimenting with a system whereby two-week stipulated continuances can be effectuated this way.]

f. Cellphones should be permitted in all courthouses. If they are not permitted for security reasons, on-site lockers should be offered, with access allowed as needed to access evidence or other documents needed for trial, mediation, or stabilization programs.

g. Every notice that the court sends to litigants should include the intake phone numbers for local legal aid or pro bono programs and the masslegalhelp.org url.

2. Access to Same-Day Resources

a. Every court hearing housing cases should have an LFD program offering same-day advice and, resources permitting, assistance with negotiations, mediations, and hearings. Lawyers regularly appearing in court on behalf of landlords would be recruited to either establish a rotation to staff a table or create an "on-call" system whereby a lawyer who is already in the courthouse on other matters agrees to provide free LFD assistance to *pro se* landlords who cannot afford counsel (the lawyers stationed at the table can make the day-of referrals by cellphone or in person in smaller courthouses).

b. Along with LFD tables, there could be a Limited Assistance Representation ("LAR") kiosk for landlords and tenants who do not qualify for free legal aid. The kiosk would be staffed by private attorneys willing to provide LAR and offer flat-fee LFD assistance with negotiations, hearings, and trials. A list of other lawyers willing to represent individual landlords or tenants on a fee basis (including via fee-shifting) could be made available at the kiosk and at any LFD table. It would be important to ensure that the LAR kiosk and the LFD tables were distinguished so that offers of free advice did not double as solicitations for paid work.

c. In all areas of the state, there should be efforts to recruit and train private attorneys to 1) volunteer in LFD programs, 2) offer LAR assistance to moderate-income landlords and tenants, and 3) represent tenants with fee-shifting claims, with active bar association involvement.

d. Non-attorney "navigators" or "concierges" could be offered to direct pro se litigants to resources available inside and outside the courthouse and to answer basic questions about the court date, like how long it will take and in what order things will happen.

e. Interpreters should be available for mediations and LFD consultations in addition to hearings. Language lines like those in the Court Service Centers could be used in lieu of in-person interpretation.

f. LAR should be encouraged, and withdrawal should be permitted where the attorney is satisfied that withdrawal is permitted under the Rules of Professional Responsibility and the LAR rules.

g. If, contrary to the recommendation above, the first court date remains the trial date, answers with jury demands should be accepted on that date, which is the first time most tenants have access to a lawyer or nonlawyer advocate and learn what an answer is and how to file one. Under existing Uniform Summary Process Rule 10, the court date can be extended by one week if the landlord so elects. Where there are factual disputes, both parties should also be permitted to serve discovery requests on the first hearing date, with the trial date rescheduled for two weeks later rather than one.

h. The judges' pre-court speeches should be uniform and be user-tested to solicit *pro se* litigants' perspectives on their effectiveness. Written copies of the main points of the speech should be provided in multiple languages, including English.

i. Notwithstanding the recommendation in Part I that stabilization resources be made available "upstream," before cases are filed, the courts should not accept agreements for judgment (e.g., move-out agreements or repayment or behavioral agreements that waive the right to summary process defenses or trial in the event of an alleged breach) that have been signed by tenants before a case is filed. This is particularly important where a tenant has not had access to legal advice or representation before signing the agreement.

3. Conduct of mediations and trials

a. Checklists should be developed for different kinds of cases (fault/subsidized tenancies, nonpayment, no-fault) to elicit information from the parties about legal and non-legal issues that might be relevant to the mediation. The mediation checklists would prompt the litigants to explain what they are looking for and elicit information about their claims, defenses, and other relevant concerns or interests (like landlords' concerns that are not reflected in the notice to quit or tenants' complaints about conditions of disrepair). This will help ensure that mediation does not merely reflect or amplify the information-imbalance between the parties and that mediations result in successful and balanced agreements.

b. The "standard" agreement forms provided by the court should not presuppose a judgment in favor of the landlord, but rather a stipulation between the parties. Sample stipulation forms (Reinstate, Vacate, and Continuance with Terms) have been

created and are increasingly in use in several courthouses, including at the Lawyer for a Day Program in the Northeast Housing Court. During mediation, it should not be presupposed that a tenant must vacate ("how much time do you need to move?") or that the tenant must repay all unpaid rent, until there has been consideration of the tenants' claims. Waiver of tenant claims with little or no consideration should also be avoided.

c. Where a mediator learns that a *pro se* litigant has evidence of defenses or counterclaims but cannot access it, a two-week continuance should be granted to permit the litigant to bring the information. This becomes less necessary if the first court date is a mediation date rather than a trial date.

d. Mediators should have resources available (in mediation rooms or waiting areas, when they exist) to help tenants accurately assess the viability of settlement agreements. These might include, for example, budget worksheets to help tenants figure out how much they can realistically pay towards a rent arrearage each month, waitlist times for tenants seeking to move into subsidized housing, and shelter eligibility rules (to ensure that families do not agree to move out under the mistaken belief that they are eligible for EA shelter).

e. Litigants should be clearly advised of the difference between mediation and negotiation, and if a lawyer indicates a willingness to engage in mediation, negotiations should occur first with the mediator. Lawyers and their nonlawyer staff should clearly inform pro se litigants that they represent the opposing side of a case and are not "mediators" or neutrals.

f. In accordance with their obligation to ensure that any waiver of rights by *pro se* parties is knowing and voluntary, judges should conduct colloquies in all cases involving *pro se* parties and should include questions about common defenses and claims the party appears to test for understanding.

g. Litigants who require assistance and have given consent in writing should be able to have family members or friends appear with and assist them in court, including hearings and mediation, though they could not formally represent the litigant.

h. When it becomes evident that a low-income litigant's mental health or cognitive disabilities are impairing his or her ability to participate equally in the court process, and assistance is required as a reasonable accommodation, counsel should be appointed at the Commonwealth's expense. Where counsel is not required, other accommodations should be explored, including a more active judicial role in eliciting relevant testimony, changes to the pace of court proceedings to facilitate equal understanding, flexible deadlines that provide equal opportunity to file relevant documents or product relevant evidence, and the like.

i. Evidence stored on litigants' mobile devices should be accepted by the court; methods of printing such evidence should be available in clerks' offices or courtrooms and made available without cost to indigent litigants on their hearing or

trial dates. Where it becomes clear during a trial that relevant evidence is stored on a mobile device, the trial should be suspended to permit printing of the evidence, or the record should remain open after the trial until the evidence can be printed and placed in the court file. Alternatively, methods of electronic submission of evidence should be offered in every court hearing housing cases.

j. Judges should be permitted to apply loosened evidentiary standards in cases involving *pro se* litigants. At a minimum, judges should be trained and encouraged to exercise discretion liberally in favor of *pro se* litigants to give them the opportunity to meaningfully present their cases, as currently permitted by Rule 3.2 of the judicial conduct guidelines. Such discretion could include, for example, asking questions about defenses and counterclaims to ensure that all relevant testimony and documents are offered, allowing undisputed documents that are not properly authenticated into evidence, or leaving the record open to permit submission of documents that were brought to court in inadmissible format (e.g., an official Board of Health report that is not properly certified).

k. Childcare should be available in courthouses for litigants while they are in hearings or mediations.

l. Judges, clerks, and other court personnel should receive ongoing training and resources aimed at improving cross-cultural understanding and communication and reducing bias.

4. Reducing Defaults

a. There should be no entry of default or nonsuit for litigants who arrive late to court if the opposing party/counsel is still in the building and the court is still in session. [Some but not all courts currently utilize a "second call" that helps reduce defaults. In others, on the contrary, defaults are not removed if the tenant appears late, even if the landlord and/or landlord's counsel are still in the building and readily available, and the court is still in session.]

b. There should be a check-in system whereby a party's presence is noted electronically so that if the case is called, the party is not defaulted if s/he is getting assistance at the LFD Program.

c. There should be no entry of default where one person in a household appears in court but the others do not as a result of misunderstanding the nature of the summons. In such cases, a one-week continuance is offered for all defendants to appear.

d. Clerk's offices (and court websites) should make available simple forms for removing defaults and impounding cases for people who should not have been named as defendants in the first place (e.g., nonresidents and minors who are listed on their parents'/guardians' leases). Impoundment should be routinely allowed in such cases given the lasting impact of a mere summary process filing on a tenant's ability to secure future housing.

e. Where extraordinary relief is being sought outside a first summary process trial date (e.g. a preliminary injunction, or issuance of execution that would result in speedy eviction), an outreach call should made to the tenant by the Housing Specialist (or TPP where appropriate) to ensure notice and opportunity to be heard.

IV. POST-JUDGMENT

A. Post-judgment Barriers to Housing Stability

For those courts where "Agreements for Judgment" (AFJs) predominate (currently the standard form used by most courts hearing summary process statewide, both District and Housing Court), judgment now typically enters for the landlord. With such AFJs, there are generally two scenarios. In one, the tenant has a fixed move-out date, perhaps with a "stay of execution" to provide time to move, either requiring payment of a sum of money for the additional time and/or toward back rent owed, or obtaining a rent waiver in exchange for vacating. In the second, there is the possibility of tenancy reinstatement, provided certain "probationary" terms are met by the tenant for a set period of time. In either scenario, the landlord can request issuance of execution alleging the tenant's failure to make a payment or to comply with a probationary term. The terms of such AFJs are designed to hamper judicial discretion to consider mitigating circumstances in favor of tenancy preservation and to limit a tenant's right to appeal at best to single justice review.

Requiring a tenant to pay for their current housing while facing relocation costs (moving expenses, first and last month's rent and security deposit for a new apartment, etc.) can present an impossible predicament. Additionally, having a judgment on a tenant's publicly viewable record can serve as a barrier to relocation, and adversely affect a tenant's credit. Tenants typically cannot obtain a positive reference from their landlord after the culmination of an eviction process.

The lack of adequate housing search assistance and difficulties navigating public and subsidized housing options (closed or long waitlists, obtaining applications, understanding "priority" or "emergency" status requirements) are endemic. Tenants with Section 8 or MRVP vouchers also face barriers, from landlords not wanting to deal with seemingly bureaucratic program requirements (e.g. inspections, paperwork and the like) to market rents exceeding the rental amounts set by HUD.

Furthermore, the terms of AFJs (and regardless of those terms, the allegations set forth in the notice to quit and summons and complaint) can result in termination of a housing subsidy *and* disqualify a family for state-provided family shelter under the "Emergency Assistance" program regulations. An eviction from a subsidized apartment for non-payment of rent, for example, will bar that family from accessing shelter.

Finally, many legal aid programs do not newly assist tenant at the post-judgment stage, opting instead to commit limited resources to pre-judgment cases where there is a greater chance for tenancy preservation. Many of the above barriers are best addressed in practical terms at earlier stages of the process: e.g. through a different form of settlement agreement than an AFJ, or by

simply agreeing to continue the case under certain terms after which it gets dismissed if all goes well. That said, the following interventions are proposed for when judgment has already entered in an attempt to avert homelessness.

B. Post-judgment Interventions

1. Preserving tenancies where possible

a. Lawyer for a Day programs should be available in each court hearing eviction cases, and at a minimum in each Housing Court, to provide help defending against motions for issuance of execution (or for entry of judgment) or assistance seeking timely requests for stays from landlords or, if necessary, the court.

b. Tenancy Preservation Program intervention should be provided to tenants with disabilities after the signing of AFJs to avoid issuance of execution where possible.

c. Exorbitant "cancellation" fees for scheduled constable evictions now borne by tenants seeking reinstatement of tenancy or stays of eviction should be regulated.

d. Tenants should be able to find assistance with motions for appeal bond waivers.

e. Tenants should be able to find assistance with targeted appeals of denials of stays or trial judgments, perhaps expanding the current pro bono project to include such appeals (especially given that they can be complicated, involving single justice practice, and short-term, limiting a pro bono attorney's time commitment).

2. Promoting smooth transitions to new housing

a. Courts should be affirmatively enabled to provide stays (time to move) in fault and non-payment cases (expanding the current affirmative statutory provision limited to no-fault cases).

b. TPP should assist with post-AFJ transitions, particularly where a tenant's disabilities will make finding new housing difficult.

c. AFJ terms "waiving" the right to ask for more time to vacate should be deemed void as contrary to public policy and unenforceable.

d. Routine training should be provided to judges, housing specialists, TPP and LFD Programs on the ways in which summary process disposition can create barriers to EA shelter eligibility.

e. A workshop/orientation program within the Housing Court should be created for potential EA applicants to assist families with applications (including coordination with the Department of Housing and Community Development to accept EA applications sent in from Housing Court), advise them regarding their rights in the EA

system, and provide information about when to contact legal services for assistance (e.g., wrongful denials).

f. Information should be made broadly available on shelters for individuals including locations and applicable hours/rules

g. Legislative advocacy is needed to reform the rules for eligibility for EA shelter, allowing for mitigating circumstances and eliminating requirement that any family must first stay in a place "unfit for human habitation" to access family shelter

   i.
   ii.

h. A social services worker should be available at each court session with support, including applications, a list of applicable social services (Elder Services, Health Centers, etc.), and updated information on RAFT and any available charitable assistance (with criteria) to assist with:
   i. Moving expenses
   ii. First and last month's rent and security deposit
   iii. Storage of belongings
   iv. Disposal costs (and how to avoid spreading bed bug or other infestation)
   v. Furniture Banks
   vi. Parents' employment risks
   vii. Children's school attendance
   viii. Therapeutic counseling for trauma risk

i. Landlord-tenant information should not be on public display on MassCourts because the benefits gained from online publication are outweighed by the risk of blacklisting of tenants who appear in the database, regardless of the nature or outcome of the case, and the consequent chilling effect on tenants who fear asserting their rights in court. At a minimum, impoundment and other masking measures should be freely available, particularly for minors or others improperly named in eviction complaints, tenants in no-fault eviction cases, and tenants who bring affirmative claims against their landlords (such as Sanitary Code enforcement actions). Moreover, error correction should be simple and speedy. To facilitate this:
   i. Clerk's offices should have clear error correction procedures and simple forms that can be completed to secure correction within a short period of time (akin to criminal record sealing procedures)
   ii. Clerk's offices and court websites should offer fillable motions for impoundment of landlord-tenant cases
   iii. The Housing and District Courts should adopt Standing Orders addressing the unintended consequences of online publication of landlord-tenant records