

Eviction Defense

By Marcia Henry

[*Editor's note:* Much of the material in this article that describes general trends among states is adapted from Janet Portman and Marcia Stewart, *Every Tenant's Legal Guide* (2d ed. 2001), published by Nolo Press. Appendices give citations, for every state, of statutes governing landlord-tenant law generally, rent withholding and repair and deduct remedies, notice requirements to change or terminate tenancies, landlord retaliation, and much more. For further information, see www.nolo.com.]

While the particulars of landlord-tenant law are highly state-specific, eviction proceedings everywhere tend to follow a similar pattern. The law is more tenant-friendly in some states and localities than in others, particularly on matters such as whether tenants are protected by rent control and the existence and scope of tenant protections such as a warranty of habitability. Certain landlord-tenant themes, however, recur nationwide. Representing tenants in eviction proceedings has always been a major part of legal services programs' work. As the crisis in the supply of affordable housing deepens, helping housed clients remain housed is more important than ever. All attorneys who practice poverty law, including those who specialize in areas other than housing, should have a basic familiarity with the stages of an eviction proceeding and the points at

which advocacy can make a difference in helping clients stay in their homes.

Almost all states now prohibit “self-help” eviction, whereby a landlord directly seizes possession of a rental unit from a tenant by changing the locks or putting the tenant's possessions on the street or both. Instead, as a rule, the landlord must obtain a court order to evict a tenant, and law enforcement personnel, such as a sheriff or marshal, must execute the actual eviction. Eviction proceedings break down into three stages: the notice from the landlord to the tenant terminating the tenancy, the court proceeding, and the notice and physical eviction by law enforcement. Depending on the circumstances of a particular case, an advocate may be able to intervene successfully on behalf of a tenant at any of these stages.

Notice

To evict a tenant, the landlord must first serve the tenant properly with a notice that terminates the tenancy (a “notice to quit”) and states the reason for termination. Grounds for eviction generally fall into one of three categories: nonpayment of rent, breach of a term of the lease, or holding over beyond the term of the lease. The notice usually must be in the alternative, that is, it must give the tenant the choice between doing what the rental agreement requires and vacating the unit. However, in some cases, the tenant does

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not have a legal right to cure the breach and remain in the unit.¹

Nonpayment. If the tenant is late paying rent, the landlord may serve a notice demanding that the tenant “pay or quit.” State law usually specifies the time within which the tenant may “cure” the breach by making payment; generally this period is a few days. However, in a handful of states, once rent is late, landlords need not offer tenants any time within which they may still pay; any nonpayment is grounds for eviction. In other states, while the landlord must respond to the first late payment by giving the tenant an opportunity to cure, habitual late payment can become grounds for eviction without opportunity for the tenant to cure.

Breach of Lease. If the tenant breaches a lease provision (e.g., the tenant has noisy parties, acquires a pet where pets are prohibited, allows an unauthorized household member to move in), the landlord may serve a notice demanding that the tenant “cure or quit.” A written lease may list specific provisions that, if violated, are grounds for the landlord to terminate the lease. However, grounds for eviction may also be implied; they need not be explicit in a written agreement. As with nonpayment, a notice to cure breach of a lease term or quit must specify the time within which the tenant must comply.

Holdover. If the lease term has expired or if the rental agreement is month to month, the landlord may end the landlord-tenant relationship simply by giving proper notice (the tenant, of course, may do so as well). Thirty days’ notice is usually required to terminate a month-to-month rental agreement (technically thirty days or one month is the length of the lease term that is renewed each month through offer and acceptance of rent). The landlord does not need cause to serve a thirty-day notice, although the landlord may not serve notice on the basis of a *bad* reason, such as dis-

crimination or retaliation.² Also, jurisdictions covered by rent control generally allow eviction only for cause.

Unconditional Notice to Quit. Egregious acts by the tenant can be grounds for a notice to quit without the opportunity to cure. Grounds vary by state but can include engaging in illegal activity on the premises, repeated late payment of rent, or other repeated breach. Drug activity has become a particular focus in recent years of statutes allowing for unconditional notice to quit, and evicting tenants on this basis has become easier for landlords. In fact, some states affirmatively *require* landlords to evict on the basis of drug activity in a rental unit or risk confiscation of their property. Evictions on the basis of criminal activity are often expedited even beyond the general summary nature of eviction proceedings (see below).

Numerous advocacy opportunities may exist at the “notice” stage. The notice must meet statutory requirements both in its written language and the form of service. If the notice itself or service of it is defective in any way, the defect may be grounds for dismissal of an eviction complaint that the landlord subsequently files. Many states require that the notice state specific facts regarding the tenant’s breach; a mere conclusory demand (e.g., “cease violation of tenancy within five days”) would be grounds for dismissal. If nonpayment is the issue, in most states the notice must specify the exact amount of rent due and the time period that amount covers. In the majority of states where tenants must be given the option to pay the rent owed, a notice that is not phrased in the alternative (“pay rent or quit”) is defective. Partial payment of rent due cancels the notice. The time frame for the demand is also specified by law in most states (“pay rent or cure other breach within *x* days or quit”), and in those locations a notice that gives the tenant less time is defective.

¹ Public housing and subsidized housing residents typically have fourteen days to cure a breach. See Fred Fuchs, *Overview of Public Housing, HUD Federally Subsidized Housing, and Section 8 Housing Voucher Programs*, in this manual.

² See, e.g., Wendy R. Weiser & Geoff Boehm, *Housing Discrimination Against Victims of Domestic Violence*, 35 CLEARINGHOUSE REV. 708 (Mar.–Apr. 2002).

The landlord who relies on an improper notice or defective service can, of course, immediately serve a new, valid notice on a tenant who challenges a defective one. Nonetheless, challenging defective notices can at least get tenants a few more days to gather rent money, find a new home for the dog, or look for a

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new apartment. A tenant may want to stop the eviction process at this point, by curing or moving, because if the landlord goes to the next step and files an eviction complaint in court, the tenant's credit record will reflect the complaint even if the tenant moves before the court awards judgment to the landlord.

Court Proceedings

Eviction proceedings are “summary proceedings,” that is, they make their way through court much faster than other civil cases. In exchange for this speed, the landlord must strictly comply with various requirements. Just as with the notice elements described above, many of these requirements involve specified time periods, and advocates should be sure to determine whether the landlord has complied with all of them. The landlord's failure to do so may be grounds for getting the complaint dismissed.

Most eviction proceedings are heard in municipal or county court. Small-claims courts have jurisdiction over eviction proceedings in some states, and a number of these states give landlords the option of filing in municipal or small-claims court. Landlords who rely on attorneys to represent them in eviction proceedings are likely to reject the small-claims court option since parties in that court must represent themselves. Some places, particularly large cities, have specialized housing courts.

An eviction proceeding usually takes a matter of weeks (and as few as two weeks) from the filing of the complaint to entry of judgment. However, a case that is on an expedited track, due, for example, to allegations of criminal activity on the tenant's part, may proceed even faster. A complicated case involving discovery and a jury trial may take much longer.

An eviction proceeding begins with the filing of a complaint that specifies the grounds for eviction and asks the court to award possession of the property to the landlord. The complaint may also seek an award of back rent, damages, and attorney fees, but in the case of low-income clients landlords may forgo these claims if they assume that they are unlikely ever to be able to collect a money judgment. The court clerk assigns the case a return date, and the landlord has a summons for this date and a copy of the complaint served on the tenant.

To avoid a default judgment for the landlord, the tenant must answer the complaint within the short time frame of eviction proceedings. If the landlord has not followed proper procedures, some of which can be quite technical in a summary proceeding, the tenant may be able to get the complaint dismissed. Some of the typical grounds for a motion to dismiss are the following:

- Improper notice (see discussion above) or waiver of notice by a landlord who, for example, accepts a partial rent payment.
- Improper service of the summons and complaint. State law specifies the requirements for service. States typically prohibit a party from serving a complaint; some mandate that the sheriff serve the summons and complaint while others allow service by anyone over 18.
- Complaint filed too soon. If state law gives the tenant ten days to pay rent following service of a notice to pay or quit, the landlord does not have grounds for eviction until the eleventh day. A complaint filed sooner would be grounds for a motion to dismiss.

■ Absence of required allegations in the complaint. For example, state law may require the complaint to demand possession, describe the property and type of rental agreement, and allege underlying facts. If these elements are missing, the tenant may have grounds for dismissal.

If grounds for dismissal are lacking or the court denies the motion, the tenant must file an answer. Depending on the case, the tenant may deny the landlord's allegations (e.g., avow that rent has been paid, that no one but persons authorized by the lease live in the apartment, or raise affirmative defenses or both. The following are some of these defenses:

■ *Rent withholding*: In eviction proceedings based on nonpayment, some tenants may affirmatively raise as a defense the allegation that the conditions of the rental unit make it uninhabitable. Nearly every state has adopted an implied warranty of habitability that governs rental units, and in most of these the warranty is in effect even if a written rental agreement purports to waive it. Many states allow tenants whose landlords refuse to address uninhabitable conditions to enforce the warranty, in effect, by withholding rent; in some of these states, however, the tenant must deposit the funds into an escrow account. The tenant may also argue that conditions in the unit are such that the market value of the apartment is reduced and the amount of rent owed therefore should be abated.

■ *“Repair and deduct”*: An additional (or, in some states, an alternative) option for tenants is referred to as “repair and deduct.” Under this remedy, tenants whose landlords refuse to make necessary repairs may pay for the repairs themselves and deduct the cost from their rent payments. Many states that allow “repair and deduct” limit the amount tenants may spend in this

way to a certain multiple of the monthly rent. While this cap likely means that an individual tenant may accomplish only less costly repairs, tenants in a multiple unit building can sometimes pool their rent to accomplish major repairs using the “repair and deduct” remedy.

■ *Fair housing laws*: Violation of fair housing laws may also be grounds for an affirmative defense in an eviction proceeding. For example, if a tenant has a new baby and the landlord claims too many people now reside in the apartment, but the household is within per capita square footage requirements as set forth in the local building code, the tenant can assert protection against familial status discrimination under the federal Fair Housing Act.³

■ *Retaliation*: Most states protect tenants from landlords who want to evict them because the tenants exercise their rights to complain to a building inspector about housing conditions, to organize or participate in a tenants' union, or to use rent money to make needed repairs.⁴ In some of these states, an eviction that the landlord prosecutes within a certain amount of time from the tenant's protected act is presumed to be retaliatory; the presumption remains in effect for periods ranging from three months to one year.

The creative advocate may be able to find numerous other affirmative defenses to raise on a tenant's behalf. For example, the tenant may argue that the landlord has constructively reinstated the tenancy, or that the landlord has unclean hands and should be precluded from pursuing a claim against the tenant. The tenant should raise all colorable affirmative defenses in the answer. If the tenant desires a jury trial, this is also the time to file this demand.

³ 42 U.S.C. §§ 3601 *et seq.* (2000). The Fair Housing Act also prohibits discrimination in housing on the basis of race, color, national origin, sex, religion, and disability. Some states have statutes that give tenants stronger protections than the Fair Housing Act. For further discussion, see Crystal B. Ashley, *An Introduction to Fair Housing Law*, in this manual.

⁴ States that do not protect tenants against retaliatory eviction are Alabama, Colorado, Georgia, Indiana, Oklahoma, Pennsylvania, South Dakota, and Wyoming. JANET PORTMAN & MARCIA STEWART, *EVERY TENANT'S LEGAL GUIDE* 15/12 (2001).

If the court enters judgment for the landlord, the judge may be persuaded to stay the eviction for a short time, up to a few weeks, in cases of extreme hardship or to give the tenant time to find a new home. Otherwise the eviction moves immediately into the hands of the law enforcement agency whose job it is to execute the court's order.

Reopening and Vacating Default Judgments

Due to eviction proceedings' fast track through courts, and often compounded by the questionable nature of service of process in low-income neighborhoods, legal services attorneys often find that their clients do not seek help until after the court enters judgment for the landlord. Sometimes clients are simply unable to find legal help before the return date; other times they know nothing of the eviction proceedings until the sheriff or marshal nails an eviction date to the door. Even at this point, preventing the eviction may not be too late.

A tenant sometimes has grounds for a motion to vacate a default judgment, for example if service was defective or failed to result in actual notice of the summons

and complaint on the tenant's part. *Pro se* litigants are often summarily dealt with by the courts. Legal services attorneys may be able to argue that the *pro se* litigant was denied a fair hearing on the merits. Depending on the state, the tenant may allege a meritorious defense to the complaint; additionally or alternatively the tenant may allege that vacating the default judgment would be in the interests of justice. Once the court vacates the judgment, the tenant can raise any defense that the tenant could have asserted initially.

The Eviction

As noted, law enforcement personnel must carry out the actual eviction. Following the court's entry of judgment, the landlord gives a copy of the order to the sheriff or marshal, who serves the tenant with notice of the eviction date. If the tenant is still occupying the unit on that date, the sheriff removes the tenant's possessions and secures the unit to prevent further entry by the tenant. Sometimes, within very limited parameters, the date for eviction may be subject to negotiation with the sheriff if, for example, the tenant can give evidence of having access to a new apartment within a day or two.