

BETTING AGAINST THE HOUSE¹: MICHIGAN SHOULD ESTABLISH THE RIGHT TO APPOINTED COUNSEL IN EVICTION PROCEEDINGS AND EXPAND EVICTION DIVERSION MEASURES

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¹ In the world of gambling, there is saying that “the house always wins.” In other words, the games are designed so that ‘the house’ (i.e., casino owners) will always net a profit, regardless of the successes of the patrons. The title of this article uses ‘the house’ metaphorically, to refer to landlords in the eviction system and illustrate how the odds are stacked up against tenants facing eviction.

INTRODUCTION

In July 2020, the Michigan State Housing Development Authority launched a \$60 million statewide Eviction Diversion Program.² The goal of the program was to reduce evictions by providing financial relief for renters who have experienced a loss of income resulting from the COVID-19 pandemic and offer legal representation to tenants in eviction proceedings.³ In March 2021, Michigan replaced the state's Eviction Diversion Program with the federally funded \$282 million COVID Emergency Rental Assistance program.⁴ In August of 2021, the United States Supreme Court struck down a federal moratorium banning evictions for nonpayment of rent that had been put in place throughout the COVID-19 pandemic.⁵

In anticipation of an influx of eviction cases, the City of Detroit launched its own Eviction Assistance and Prevention Program on September 17, 2021.⁶ The Eviction Assistance & Prevention Program is a three-pronged plan aimed to help those facing eviction, by offering free legal assistance, financial assistance and fast track hiring for Detroiters facing eviction.⁷

What can be reasonably inferred from some of the key features of these programs is that irrespective of whether there is an ongoing global pandemic, there are inequities within the eviction system that could be resolved with legal and/or judicial tools. Specifically, establishing a right to appointed counsel for tenants in eviction proceedings and implementing and expanding eviction diversion measures.

THE RIGHT TO APPOINTED COUNSEL IN EVICTION PROCEEDINGS

A. The Inequity of The Michigan Eviction System

² The Eviction Diversion Program (EDP) | Michigan State Housing Development Authority, NCSHA (2021), <https://www.ncsha.org/resource/state-hfa-emergency-housing-assistance-programs/article/the-eviction-diversion-program-edp/> (last visited Nov 1, 2021).

³ Id.

⁴ Anna Liz Nichols, How will Michigan do once Eviction Guard Goes? The Holland Sentinel (2021), <https://www.hollandsentinel.com/story/news/state/2021/06/27/how-michigan-do-once-eviction-guard-goes/5347564001/> (last visited Nov 1, 2021).

⁵ See *Alabama Ass'n of Realtors, et al. v. Dep't of Health and Human Services, et al.*, Case No. 21A23, 594 U.S. ____ (2021).

⁶ Hayley Harding, Detroit announces \$130 million program to prevent evictions The Detroit News (2021), <https://www.detroitnews.com/story/news/local/detroit-city/2021/09/17/detroit-announces-new-eviction-assistance-prevention-program/8378250002/> (last visited Nov 2, 2021).

⁷ Id.

According to The Michigan Eviction Project, Michigan has an eviction rate of 17% — or roughly 1 eviction case filed for every 6 rental housing units in the state.⁸ Michigan’s eviction filing rate appears to be significantly higher than those reported in other cities during a similar period. Chicago had an eviction filing rate of 3.9% while Philadelphia had an eviction filing rate of 7.8% and Cincinnati, 8.7%.⁹

Every year, Michigan landlords file almost 200,000 eviction cases, leading to the loss of around 40,000 Michigan households due to court ordered evictions.¹⁰ In Michigan eviction cases filed from 2014-2018, less than 5% of tenants were represented by counsel, compared to 83% of landlords.¹¹ Not surprisingly, where tenants were represented by counsel, they were more likely to receive a favorable outcome. In a study conducted in Washtenaw County, 56% of eviction cases were dismissed and 11% received a judgment in favor of the tenant when they were represented by an attorney. In contrast, 45% of cases were dismissed and 0% received a judgment in favor of the tenant when they were not represented by an attorney.

An eviction can negatively impact a tenant’s credit report, limiting their ability to receive loans, may subject them to taxable costs¹², court costs and attorney’s fees. Thus, a tenant who cannot afford to pay their rent or hire an attorney, may end up having to pay both. Even if they are able to make the payments, the judicial system effectively still punishes them. The mere filing of an eviction, irrespective of the outcome, can stain a tenant’s rental history and make obtaining future housing difficult. Because eviction filings are matters of public record, prospective landlords may be less inclined to rent to tenants with a history of eviction proceedings.

B. The Right to Appointed Counsel

Today, the right to appointed counsel in criminal cases seems so fundamental, that it is easy to forget that the right, as we know it, was not recognized until the 1963 landmark Supreme Court case of *Gideon*.¹³ In

⁸ Robert Goodspeed, Margaret Dewar & Jim Schaafsma, Michigan's Eviction Crisis Poverty Solutions (2020), <https://poverty.umich.edu/publications/michigans-eviction-crisis/> (last visited Nov 1, 2021).

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² MCL 600.5759

¹³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Gideon, the Supreme Court held that the right to counsel, which imposed requirements on the federal government, under the Fifth and Sixth Amendments, extended to state governments as well. In rationalizing the court's holding, Justice Hugo Black stated:

“Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.¹⁴”

The same rationale can be reasonably applied to eviction proceedings. Simply put, without the benefit of counsel, one is not assured the benefit of fairness. Detroit's Theodore Rice, who was profiled for a piece in *the Detroit Free Press* during his own eviction proceedings, admittedly has no knowledge of the law and has probably never heard of *Gideon*, but somehow instinctively seemed to echo its core sentiments:

“I know right from wrong, but I don't know the law. . . [a]nd unless you have someone representing you who does know the law, and how courts operate, the average person doesn't stand a chance.¹⁵”

Expanding the right to appointed counsel to tenants facing eviction proceedings is arguably the best way to remedy the inequities of the eviction system. Michigan has already expanded the scope of the right to appointed counsel beyond criminal proceedings. In child protective proceedings, an indigent respondent has a statutory right to appointed counsel at any hearing (including the preliminary hearing).¹⁶ While Federal law has yet to explicitly adopt a *right* to counsel, it does provide federal courts with the discretion to *appoint* counsel in cases alleging housing discrimination,¹⁷ among other things.¹⁸

¹⁴ *Id.* at 344.

¹⁵ Anna Liz Nichols, How will Michigan do once Eviction Guard Goes? The Holland Sentinel (2021), <https://www.hollandsentinel.com/story/news/state/2021/06/27/how-michigan-do-once-eviction-guard-goes/5347564001/> (last visited Nov 1, 2021).

¹⁶ MCL 712A.17c(5); MCR 3.915(B)(1)(b)

¹⁷ 42 U.S. Code § 3613 (b) (“Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may— (1) appoint an attorney for such person”)

¹⁸ 28 USC 1915(e)(1) states that a federal court "may request an attorney to represent any person unable to afford counsel." The U.S Supreme Court has held that this provision does not give a court the authority to "appoint" counsel, only to ask an attorney to serve willingly. *Mallard v. United States District Court*, 490 U.S. 296 (1989).

The right to counsel movement has quickly gained traction across the nation. In 2021, Washington State, Maryland and Connecticut became the first 3 states to adopt the right to counsel for tenants facing eviction.¹⁹ Major cities such as New York City, Minneapolis, San Francisco, Cleveland, Philadelphia, Denver and Baltimore have also enacted right to counsel laws.²⁰ Data shows that cities with a right to counsel have seen positive results. 86 percent of tenants who had representation as a result of New York City's right to counsel legislation were able to remain in their homes. In San Francisco, the eviction filing rate decreased by 10 percent between 2018 and 2019, and of those receiving full representation, 67 percent stayed in their homes. Providing a right to counsel allows people and families to keep their homes and communities.²¹

The most obvious critique of the enacting a right to counsel is probably the cost of administration. However, the benefits of providing a right to counsel would likely outweigh the costs. Issues important to local municipalities such as blight reduction, homelessness and a shrinking population/tax base are intertwined with the ability of tenants to remain in their homes.²²

ESTABLISHING AND EXPANDING EVICTION DIVERSION MEASURES

In addition to the right to appointed counsel, Michigan should also adopt both pre and post eviction diversion measures. Specifically, Michigan should require longer notice provisions before eviction proceedings, require parties to make initial disclosures and automatically expunge evictions.

A. Longer notice periods

Michigan currently requires landlords to provide tenants with seven days'

¹⁹ The Right to Counsel For Tenants Facing Eviction: Enacted Legislation, Civil Right to Counsel (2021), http://civilrighttocounsel.org/uploaded_files/283/RTC_Enacted_Legislation_in_Eviction_Proceedings_FINAL.pdf (last visited Nov 1, 2021).

²⁰ Id.

²¹ Sandra Park & John Pollock, Tenants' Right to Counsel is Critical to Fight Mass Evictions and Advance Race Equity During the Pandemic and Beyond American Civil Liberties Union (2021), <https://www.aclu.org/news/racial-justice/tenants-right-to-counsel-is-critical-to-fight-mass-evictions-and-advance-race-equity-during-the-pandemic-and-beyond/> (last visited Nov 1, 2021).

²² Bonsitu Kitaba-Gaviglio, Why Detroit needs a 'right to counsel' ordinance for tenants facing eviction: Opinion Detroit Free Press (2021), <https://www.freep.com/story/opinion/contributors/2021/09/15/eviction-moratorium-detroit-tenants-right-counsel/5497536001/> (last visited Nov 2, 2021).

notice prior to beginning eviction proceedings for nonpayment of rent.²³ Other jurisdictions may require as little as three days' notice²⁴ or as high as thirty days' notice.²⁵ A small extension of this notice period would likely reduce the number of evictions filed in Michigan by providing tenants who are merely late with their rent, additional time to pay before court intervention is necessary.

B. Require Parties to Make Initial Disclosures

In 2021, the Michigan Court Rules were amended to require parties to make initial disclosures in Circuit Court cases detailing the factual basis for their claims and defenses; the legal theories on which the party's claims and defenses are based and the production of certain documents.²⁶ These rules currently exempt district court cases, which generally have jurisdiction over landlord tenant matters²⁷, from such disclosures but arguably, could allow parties to reach quicker resolutions of cases just like they are intended to do in any other civil case. States like Utah, already require initial disclosures in eviction proceedings.²⁸

C. Automatic Sealing/Expungement of Evictions

As mentioned earlier, the mere filing of an eviction can adversely impact a tenant's ability to move on with their life. Currently, to seal a court record, the moving party must file a written motion, meet a series of requirements and whether the record gets sealed is within the court's discretion.²⁹ Thus, a key feature of a meaningful diversion program should include the automatic expungement of evictions.

For evictions that are dismissed, those should be sealed or expunged immediately and judgments of evictions that are obtained by landlords should be sealed or expunged after a reasonable number of years. Because the current format for sealing records, requires affirmative action and is at the discretion of the court, tenants are unlikely to avoid the negative implications of being a party to an eviction regardless of the outcome of their eviction

²³ MCL 554.134

²⁴ See Florida, Florida Statutes Secs. 83.56,

²⁵ See District of Columbia, DC Code 42-3505.01

²⁶ MCR 2.302

²⁷ MCL 600.5704

²⁸ See URCP 26.3

²⁹ MCR 8.119 (I)

proceeding.

CONCLUSION

By establishing the right to appointed counsel in eviction proceedings, Michigan can reduce some of the inequities within the eviction process. Further, the adoption of eviction diversion measures may reduce the need to file evictions and reduce the negative impact of tenants who have had evictions filed against them.