Chapter 12
Evictions

Legal Tactics: Tenants' Rights in Massachusetts
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Facing an Eviction

Tenants Rights in Massachusetts

Steps a Landlord Must Take to Evict You

Your landlord can only make you move if they evict you. To evict you, they must get permission from a court. They cannot lock you out, throw your things out on the street, or harass you. If your landlord does not take the right steps, you can stop the eviction.

Your landlord must make sure you get a *Notice to Quit*

The *Notice* tells you to leave in a certain number of days. **You do not have to move out by the date on a Notice to Quit, but do not ignore it.** The number of days depends on the reason for eviction.

- **14-Day Notice**: You owe rent
- **30-Day Notice**: If the landlord is evicting you for no reason, or for a reason that they say is your fault.
- **No Notice**: Your landlord accuses you of illegal activity in your apartment. Get a lawyer before you say anything in court.

Your landlord must serve you with a *Summary Process Summons and Complaint*

This court form tells you your landlord is taking you to court and there will be a hearing. It lists the time, date, and location of the hearing. It also lists the deadline for you to file your *Answer*.

Steps You Can Take to Respond to the Eviction

Every eviction is different. Your options depend on your situation. All options have strict deadlines. If you miss the deadline, you lose the option.

- **Pay rent:** If the eviction is about rent you owe, you can pay the rent and stop the eviction, most of the time. If you pay before a landlord starts a court case, you can avoid paying the landlord's court costs: $135 in Housing Court, $195 in District Court. For deadlines see **Chapter 12: Evictions - Paying the Rent Owed**.

Protect Yourself
Get Help

- Try to get legal help.
- You may be able to get free legal help. See MassLegalHelp.org/find-legal-aid
- If you cannot get legal help, you will need to represent yourself. **Use the Self-Help Forms and Letters in the Eviction** section of MassLegalHelp MassLegalHelp.org/evictions-forms
- Some courts have **volunteer lawyers** who can help you fill out forms or tell you about programs in your area that may be able to help you. Ask the clerk how to find the volunteer lawyers.

- **File your Answer with the court**: If you get a *Summons and Complaint*, file a legal form called an *Answer*. Use this form to explain to the court why you should not be evicted and any problems you had with your landlord. The deadline for filing your Answer is on the *Summons and Complaint*. Do not miss the deadline. Use **The Answer (Booklet 3)**.
- **Transfer your case:** If your case is in District Court you have the right to transfer your case to Housing Court, if there is one in your area. Housing Courts provide more support. You can file a transfer form up until the day before your case is in District Court. Use the **Transfer (Booklet 5)**.
- **Get important documents ready**: Before your hearing, collect the documents you need to prove your case, like rent receipts or pictures of bad conditions. Use the **What to Take to Court Checklist** in **Representing Yourself in an Eviction Case (Booklet 1)**.
- **Arrange for childcare and time-off from work** the day you go to court. It could take all day.
- **Go to court:** If you do not go to your court hearing, you will lose your case automatically. This is called *default*.
- **Ask the judge to dismiss the case:** If your landlord has not followed the right steps, you may be able to get your case dismissed. For reasons why your case could be dismissed see **Chapter 12: Evictions - Motion to Dismiss**.
- **Negotiate an agreement:** Most landlords and tenants resolve evictions through agreements. Be careful when you negotiate an *Agreement*. Only sign an *Agreement* if you understand it and you can do what it says. To protect yourself get **Negotiating a Settlement of Your Case (Booklet 10).**
- **Fight the eviction:** You may be able to prevent the eviction. Use the *Answer* to list the reasons you should not be evicted. Include any complaints you have about your landlord. Do not miss the deadline to file your *Answer*. The deadline is on the *Summons and Complaint*. Use **The Answer** (**Booklet 3).**
- **Ask for time to prepare for your case:** When you file your *Answer* form, you can also file court papers that ask your landlord for information to help you prepare your case. The court will automatically postpone your case by 2 weeks. This is called *discovery*. Use **Discovery (Booklet 4)**.
- **Ask a judge for time to move:** If a judge makes an order to evict you, you may ask the judge for more time to stay in your apartment while you look for another place to live. If the judge agrees to give you more time, they order a *Stay of Execution*. They are more likely to order a *Stay of Execution* if you have started looking for a new place. Use **Stay (Booklet 8).**
- **Appeal the court's decision**: At the end of the court hearing, the judge will make a decision, called a *judgment*. If you do not agree with the judge's decision and you want to fight it, you have 10 days to file an appeal.

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Legal Tactics: Tenants Rights in Massachusetts
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Evictions

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Italicized words are in the Glossary

The first and most important thing to know about ***eviction*** law in Massachusetts is that a landlord cannot make a tenant move out of her home without going to court first. **No matter what a landlord or a landlord's lawyer says, a landlord must go to court and obtain permission from a judge to evict a tenant**.

If you get an eviction notice and you want to stay in your apartment or you want more time to find a new place, **you must respond quickly to any documents you receive and go to court to defend your case**. Depending on your situation and whether the landlord has followed the law, you may be able to prevent the eviction. If you cannot prevent it, you still may be able to postpone it. In either case, if your landlord has violated certain laws, you may be entitled to money to compensate you for these violations.

If you do not defend yourself in an eviction case, chances are a judge will order you to move out and you will have missed the opportunity to raise any legal *claims* or negotiate an agreement about how to resolve the issues.

This chapter tells you how the eviction process works, what rights you have throughout the process, how you can prevent an eviction, and how you might be able to postpone an eviction while you find another place to live.

This chapter does not take the place of having a lawyer or provide you with every detail involving evictions. But it will, along with forms at the end of the book, give you enough information so that you can protect your rights.

When Can a Landlord Evict

In order to legally evict a tenant, a landlord must follow specific procedures. A landlord must:

1. Properly *terminate a tenancy*; and
2. Get permission from a court to legally take possession of your apartment.

Evictions are not easy and can be expensive if a landlord fails to follow the law and a tenant knows and enforces her rights.[1] If you familiarize yourself with the steps in the eviction process and are persistent, you may be able to stay in your apartment longer or be awarded money for the landlord's violations of the law.

There are special rules that apply to eviction cases that are brought after a foreclosure. If your landlord became owner of the property because of a foreclosure you should see **Chapter 18: Tenants and Foreclosure.**

1. Tenants with Leases

A *tenancy* under a *lease* generally lasts until the end date stated in the lease. If you have a lease and your landlord wants to evict you before your lease has ended, she may evict you only for:

- Violating your lease, if the lease states that the landlord may evict for such a violation;
- Not paying rent; or

- Using the apartment for illegal purposes.[2]

If your lease says that your landlord can evict without going to court, this part of your lease is illegal and your landlord will still need to go to court to evict you in spite of what your lease says. Also, if you have a lease, a landlord cannot increase your rent during the lease period and then evict you for not paying the amount of the increase. Your rent is locked in for the entire term of your lease (unless the lease has a valid "tax escalator" clause, which allows your landlord to increase your rent in certain limited situations). For more about tax escalator clauses, see **Chapter 5: Rent**.

2. Tenants without Leases

If you do not have a lease and are a *tenant at will*, a landlord does not have to state any reason for wanting to evict you. Until individual cities or the state changes the law, *no fault evictions,* where a landlord is evicting a tenant who has done nothing wrong, are lawful in Massachusetts.

A landlord may also evict tenants without leases for non-payment of rent and for using the apartment for illegal purposes.[3]

But a landlord cannot bring a discriminatory or retaliatory eviction against a tenant. For more information see the sections in this chapter called **Retaliatory Evictions** and **Discrimination**.

If you do not have a lease, a landlord must send you a proper *notice to quit* to terminate your tenancy.[4] For more information about the notice, see the section in this chapter called **Receiving Proper Notice**. To figure out whether you are a tenant at will, see **Chapter 4: What Kind of Tenancy Do You Have**.

When Is Eviction Illegal

In order to save money or get tenants out quickly, some landlords try to intimidate tenants or force them out of their apartments without going to court first. Others try to take shortcuts and hope that tenants do not know their rights. This section will tell you some of the most common ways that landlords illegally try to evict tenants.

1. Lockouts and Utility Shut-offs

It is illegal for a landlord to take away your apartment through "self-help" tactics. Your landlord has used self-help tactics and violated the law if she does any of the following things without a court's permission:

- Moves your belongings out of your apartment;
- Changes your locks (which is called a "lockout");
- Shuts off your utilities (which is called a "utility shut-off"); or
- Interferes in any other way with your use of the apartment.

If your landlord attempts to take away your apartment in any of these ways, she may be violating both civil and criminal laws.[5]

a. What You Can Do

Write a Demand Letter
If your landlord threatens to lock you out or shut off any of your utilities, you may be able to prevent the landlord from taking this illegal action by sending her a *demand letter*. This letter informs her that she will be committing an illegal act and that you will take legal action to enforce your rights if she breaks the law. See the sample demand letter (**Form 18**). Save a copy of this letter so that if your landlord does not act properly, you have proof that the landlord knew she was violating the law.

Go to Court
If a landlord locks you out of your apartment or shuts off your utilities, you should immediately go to court to get what

is called a *temporary restraining order*, or "TRO." A TRO tells your landlord to stop doing something illegal and orders her to put you and your belongings back into your apartment and restore any utilities she may have shut off. A TRO is usually the quickest way to get your apartment back. You may also be entitled to money *damages* of at least 3 months' rent, plus any court costs and attorney's fees.[6] For more about lawsuits for money damages see **Chapter 13: When to Take Your Landlord to Court - Breach of Quiet Enjoyment**. See a sample **Temporary Restraining Order (Form 15)**.

Call the Police and File a Criminal Complaint

If your landlord locks you out of your apartment or shuts off your utilities and you cannot resolve the problem by dealing directly with the landlord, you can call the police and report the incident. Lockouts and utility shut-offs are crimes. As a practical matter, a few words from a police officer may be enough to convince the landlord to stop the illegal activity. Sometimes, however, the police do not know the law or they are reluctant to get involved in disputes between landlords and tenants. A police officer may tell you that such disputes are "civil," not criminal, matters. This is not true. Lockouts and utility shut-offs are crimes and are punishable by a fine of $25 to $300 or imprisonment of up to 6 months.[7] Unfortunately, filing a criminal *complaint* does not usually lead to a quick solution because it may take a court several weeks to schedule a criminal case for a *hearing*. For more about how to file a criminal complaint, see **Chapter 8: Getting Repairs Made - Criminal Complaint**.

2. Retaliatory Evictions

It is illegal for a landlord to *retaliate* against you because you have engaged in certain activities protected by the law.[8] You cannot be evicted for:

- Notifying your landlord **in writing** of violations of the state Sanitary Code;[9]
- Reporting your landlord to health inspectors or other officials for violations of law;
- Withholding rent because of bad conditions;[10]
- Taking legal action against your landlord to enforce your rights;
- Organizing or joining a tenants organization; or
- Taking action under laws that protect individuals from domestic abuse or harassment by:
  - seeking a restraining order against an abuser, someone who has harassed you, or someone who has sexually assaulted you;
  - asking your landlord to change your locks for safety reasons;
  - reporting to a police officer or law enforcement an incident of domestic violence, rape, sexual assault, or stalking; or
  - reporting a violation of an abuse prevention or anti-harassment order.[11]

If a landlord tries to evict you or sends you an eviction notice, a rent increase notice, or a notice of any substantial changes in the terms of your lease or tenancy within 6 months of your having engaged in any of the activities listed above, a court must "presume" that the landlord is retaliating against you.[12] If a court decides that

the landlord was retaliating, you cannot be evicted.

If you have to fight an eviction in court, see the section in this chapter called **Defenses May Prevent Eviction** for information about how to raise the issue of retaliation.

3. Discrimination

It is illegal for your landlord to evict you on the basis of your race, color, religion, national origin, sex, gender identity, sexual orientation, age, genetic information, ancestry, marital status, disability, or status as a veteran. It is also illegal for a landlord to evict you because you get a rent subsidy or receive public assistance.[13]

Your landlord is also discriminating against you if she subjects you to unwanted sexual attention or harassment.[14]

If you feel that your landlord is evicting you based on any of these factors, read **Chapter 7: Discrimination** for more information about what constitutes illegal discrimination.

Receiving Proper Notice

Before a landlord can evict you, she must properly notify you that she is ending or *terminating your tenancy*. To do this, a landlord must give you a written notice called a *notice to quit*.[15] **Do not ignore a notice to quit**.

A notice to quit says that you must "deliver up" or "vacate" your apartment by a certain date. This can be a very intimidating document, but **you do not have to move out by the date listed on the notice.** The purpose of a notice to quit is to give you warning of the landlord's desire to *terminate your tenancy,* which is only the first step in the eviction process. If you do not move out, the landlord can begin an eviction action against you in court.

The notice should tell you if the landlord is terminating your tenancy for reasons related to non-payment, some other lease violation or violation of the law, or for no reason at all (*no fault*). Save the notice to make sure that if your landlord does bring you to court, she states the same reason for the eviction on the court notice, which is called a *summons and complaint*.[16] Furthermore, the notice to quit must have your correct address on it and should name all tenants (anyone who signed the lease or all adults in a *tenancy at will* situation).[17]

A notice to quit does not determine who is allowed to have legal *possession* of your apartment. If your landlord decides to take you to court, only a judge can decide whether you or your landlord should have possession of your apartment**. Again, you do not have to move out by the date on the notice to quit**.

If you receive a paper that says ***execution*** on the top of it, **you must act IMMEDIATELY**. An *execution* is a court *order* that says the landlord can move you out. **If you get an execution, you may be able to stop or postpone an eviction, but you need to act immediately**. For more information read the section at the end of this chapter on **Postponing the Eviction**.

1. Receiving a Notice to Quit

A landlord can use a variety of methods to deliver a notice to quit, including the following:

- Anyone can personally deliver it to you, including the landlord.
- A landlord may leave it with your spouse.[18]
- A landlord may send it to you through regular first-class mail.
- A sheriff or constable may personally deliver it to you, although this is not necessary.

A landlord must always prove to a judge that you actually received the notice in order to proceed with an eviction.[19] One way that a

landlord may do that is if your case goes to trial, she can put you on the stand to ask if you received the notice to quit.

2. Non-Payment of Rent

If your landlord wants to evict you for non-payment of rent, you must receive a 14-day notice to quit.[20] **A 14-day notice to quit does not mean you have to move in 14 days**. A 14-day notice to quit means your tenancy is terminated 14 days after you get the notice. This is the first step in an eviction.

If you have a lease, any clause in the lease saying that the landlord can end your tenancy for non-payment of rent without giving you a 14-day notice is illegal.[21]

Whether or not you have a lease, you can prevent an eviction if you "cure" the non-payment (pay the rent owed). If you do not have a lease, a notice to quit must tell you that you have a right to cure the non-payment. If you have a lease, a notice to quit does not need to state that you have a right to cure, but you have that right to cure up to the date that your *answer* is due in court.[22]

For more information about how to cure non-payment of rent in a way that protects your tenancy, read the section in this chapter called **Paying the Rent Owed**.

3. Rent Increases

At the same time that a landlord gives a tenant at will a notice to quit terminating the tenancy, she can also offer a new tenancy at a higher rent.[23] You may accept the increase by paying the higher rent or you can reject the increase and just pay the old rent.

If you continue to pay your old rent and refuse to pay the increase, your landlord must accept your old rent, although she can start an eviction case in court. The only way you can be evicted, however, is if the notice you receive is a 30-day (or *rental period*) *no fault* notice to quit.[24] The landlord cannot send you a 14-day notice to quit for non-payment of rent because you are paying the rent.[25] You just never agreed to pay the new rent. If your landlord attempts to use a 14-day notice to evict you based on your non-payment of an increase in rent, bring the rent increase letter, rent receipts or canceled rent checks, and the notice to quit to court and ask a judge to dismiss the case.

If your landlord accepts the old rent amount after the expiration date on the notice to quit and the notice to quit does not state clearly that any future payment will be for "use and occupancy only" and not for rent, your landlord has given up the right to evict you using this notice.

If your landlord refuses to accept the rent, send your payment to her (or better still to her lawyer if the notice to quit came from a lawyer) with a letter explaining that you are paying the old rent and refusing the offer to enter into a new tenancy at the higher rent. You should send it to your landlord by certified mail and keep a copy for yourself. If your landlord returns the money to you, put it aside in a safe place so that if you are ordered to pay it sometime in the future, it will be available to you.

4. Tenants with Leases

If you have a lease, it will specify the reasons that your landlord can terminate your tenancy and the steps she must take to do this (which must happen before the date the lease is scheduled to end).

If your landlord tries to evict you before your lease has ended, most leases require landlords to terminate your tenancy by first giving you a written *notice to quit* before proceeding to court. Although many leases require 7 days' notice, the amount of time is not set by law and may vary from lease to lease. Check your lease to see how many days' notice is required before a landlord can take the next step in the eviction process, which is to go to court.

If your lease has an option to renew and you fail to renew it, your landlord does not need to send you a notice to quit if she wants you out at the end of your lease. In this case, the day after your lease ends, your landlord can immediately file papers in court and begin an eviction case without giving you a notice to quit.

Check your lease to figure out whether it automatically renews itself or whether you must renew it to prevent it from automatically ending. For more about how to figure this out, see **Chapter 4: What Kind of Tenancy Do You Have - How Long Is Your Lease Valid**.

If your landlord accepts your rent after your lease ends, you automatically become a *tenant at will* and you are entitled to get a 30-day (or *rental period*) notice to quit before a landlord files an eviction case in court.[26]

5. Tenants without Leases

If you do not have a lease, you need to first figure out whether you are a *tenant at will* or a *tenant at sufferance* (for more information see **Chapter 4: What Kind of Tenancy Do You Have**).

If you are a tenant at will, your landlord must send you a notice to quit. There are basically 2 types of notices your landlord can send you if you are a tenant at will:

- 14-day notice for non-payment of rent; or
- 30-day *(or rental period)* notice for any other reason or for no reason.

Some landlords try to cover all bases by sending both a 14-day and a 30-day notice to quit. The reason is that if you stop the non-payment eviction by paying the rent you owe, they want to still go ahead with the eviction based on a 30-day notice. This violates the legal requirement that the notice state an absolute termination date.[27] If you get both a 14-day and a 30-day notice, you should pay the rent within the "cure" period, if you can, and file a motion to dismiss because the date that the tenancy is supposed to terminate is not clear.[28] For more about how to cure non-payment of rent, read the section in this chapter called **Paying the Rent Owed**.

If your lease has expired or you are otherwise a tenant at sufferance, your landlord can begin an eviction case in court without giving you a notice to quit.

a. 14-Day Notice

A landlord can send you a 14-day notice to quit for non-payment of rent on any day of the month. A notice to quit for non-payment of rent cannot demand any fees (such as late fees, attorney's fees, or constable fees), only unpaid rent.[29] If your landlord sends you a 14-day notice to quit, it must tell you that you have a right to "cure" the non-payment.[30] This means that if you pay the amount of rent you owe within 10 days of receiving the notice, you can prevent an eviction, as long as this is your first 14-day notice within the past 12 months.[31] If the notice to quit does not tell you about this right, you actually have until the *answer date* to pay all rent.[32] **If you do not pay the amount of rent you owe within this 10-day cure period, you still do not have to move out in 14 days**. For more information about "curing" a non-payment of rent, see the section in this chapter called **Paying the Rent Owed**.

b. 30-Day (or Rental Period) Notice

If your landlord tries to evict you for any reason other than non-payment of rent, or for no reason at all, she must give you a 30-day *(or rental period)* notice to quit. You must receive the notice at least 30 days or 1 full rental period in advance, whichever is longer.[33] (A rental period is the time between the dates when rent payments are due.)

The date on the 30-day notice must *terminate your tenancy* on a day on which your rent is due.[34] If you pay weekly, the notice must terminate on the day of the week on which your rent is due. If there is no agreement on the specific rent

day, the *rent day* is considered to be the last day of the month.[35] For example:

> If your rent is due monthly on the first of the month, and your landlord states in the notice that she wants to terminate your tenancy by September 1, you must receive the notice to quit in writing on or before August 1. If you do not receive the notice until August 2, it is invalid and you cannot be evicted based on it.

c. No Specific Time Stated on the Notice to Quit

You may receive a notice that says that your tenancy terminates "at the end of the rental period which begins after receipt of the notice."[36] For example, if you receive this notice before August 1, it will terminate your tenancy on September 1. If you receive it on August 1 or any time between August 1 and August 31, it will terminate your tenancy on October 1.[37]

> Note: Any agreement between you and your landlord to terminate your tenancy without giving you a notice to quit is illegal and will not be enforced by the court.[38]

6. When Can a Landlord Go to Court

A landlord cannot begin an eviction case in court until after you receive a proper notice to quit and the time period on the notice has completely passed. If a landlord files an eviction case before the time period on your notice has passed, a judge must *dismiss* the case upon your request.

7. Evictions for Drug-Related or Other Unlawful Activity

The problem of illegal drug dealing has become a growing concern of both tenants and landlords. While tenants fight for the right to live in a safe environment, free from the violence that often accompanies illegal drug dealing, and while landlords may be obligated to evict tenants whose illegal activity may endanger other tenants, the mere mention of the word "drugs" by a landlord or her lawyer immediately brands tenants. As a result, tenants and their families who may not be guilty of any crime are being illegally evicted without notice or a chance to defend themselves.

In Massachusetts, a law enacted over 150 years ago, commonly referred to as a nuisance law, gave landlords the right to *terminate a tenancy* with no notice to the tenant if an apartment was used for prostitution, illegal gambling, or the illegal keeping or sale of alcoholic beverages.[39] This meant that a landlord could skip the notice to quit step in the eviction process and could proceed straight to court to get permission to take *possession* of an apartment. Over the years, the legislature amended the law to include the possession, sale, or manufacturing of illegal drugs and certain weapons and explosive devices. This law also allows a subsidized housing provider to end or *void* a lease where a tenant or household member used or threatened use of force or violence against an employee of the housing provider or against any other person who is legally present on the premises.[40]

Tenant advocates take the position that under this nuisance law, a landlord must still file an eviction case, known as a *summary process* case, and that the only difference between an eviction under the nuisance law and a regular eviction case is that the landlord does not have to terminate a tenancy or give a tenant a *notice to quit* before going to court.[41] This nuisance law, however, can cause great confusion on the part of landlords.[42] As a tenant, you may be faced with any one of the following situations:

a. You Are Illegally Locked Out

Some landlords think this nuisance law means they do not need to go to court to evict a tenant. This is absolutely wrong. If a landlord tries to evict you by changing the locks or moving you out without an order from the

court, this is an illegal lockout and you can use all the strategies described in this chapter in the section called **Lockouts and Utility Shut-offs**.

b. You Receive a Court Summons and Complaint

If the first notice you get that a landlord wants to evict you is a court *summons and complaint* for a summary process case, you may have only a week or so to respond to the court. If a landlord sends you a summons and a complaint, there are a number of steps you can take to protect your rights:

1. Read the section in this chapter called **Fighting an Eviction in Court** and try to contact an attorney as soon as possible. For information about where to find a lawyer go to: www.masslegalhelp.org/FindLegalAid.

2. If the *complaint* says that the landlord wants to evict you because of illegal drug activity or other illegal activity, and if a criminal case has been filed against you or someone in your household, you should immediately go to court and ask a judge to postpone the eviction case until after the criminal case has been heard.

3. It is also very important that you consult with the lawyer handling the criminal case to avoid problems concerning self-incrimination. **Anything you say during your eviction case may be used against you in a criminal case**.

4. If you want to stay in your apartment, get more time to move, or challenge the landlord's accusations, as in any eviction case, you have a right to file an *answer* to the compliant, ask for a jury trial, and get information from the landlord by filing what is called *discovery*. See the section in this chapter called **Getting Information Through Discovery** for more about the discovery process.[43]

   If you file discovery, you should find out exactly what type of proof your landlord has about the allegations involving illegal activity in your apartment.

c. You Receive a Notice of a Temporary Restraining Order or Injunction

If you get a civil *summons and complaint* (not a *summary process* summons and complaint) telling you that your landlord is seeking an emergency *order* to have you removed from your apartment, you must act immediately. This order is called an *injunction* or *temporary restraining order (TRO)*. What this means is that your landlord is using the nuisance law to avoid going through the regular eviction process.[44] It also means that your landlord is trying to evict you without having to prove in a full trial that someone in your household was involved in an illegal activity and without allowing you the opportunity to dispute her accusations in a full trial. If a landlord uses the injunction process to try to evict you, there are a number of steps that you can take to protect your rights:

1. Immediately contact a lawyer for advice on how to proceed. For information about where to find a lawyer go to: www.masslegalhelp.org/FindLegalAid.

2. If you have been charged or think you may be charged with violating a criminal law and may have to go to court on those criminal charges, anything you say in the eviction case may be used against you in the criminal case. You should talk with a criminal lawyer about how to handle this situation before you go to court.

3. If you want to stay in your apartment, whether or not you get a lawyer, you should go to court on the date listed on the summons and complaint. It is very important to try and stop this TRO from going forward. When your case is called, tell the judge that:

- You are entitled to a proper eviction *hearing* (including a jury trial if you wish) and to get *discovery*;
- The landlord will not be unduly harmed by proceeding through the normal eviction process (summary process); and
- You will be harmed because you will not be able to defend yourself or find out what the landlord is claiming.

4. If there are neighbors who will verify that you do not pose a threat to the neighborhood, try to get them to testify on your behalf at the injunction hearing. Remember: be very careful about saying anything that may later be used against you.

5. You should ask the judge to exclude any evidence, such as an arrest warrant, a police report, a criminal complaint, or affidavits. These documents, unless verified by the person who wrote them, are considered *hearsay*. Hearsay is not good evidence because there is no one in court to verify that it is true. In addition, you should ask the judge to exclude any evidence that was obtained without a valid search warrant.[45]

6. If the court agrees with your landlord that there is reason to order an injunction or TRO to have you removed from your apartment, you can argue that the injunction should be limited to preventing the particular problem the landlord wants stopped. For example, the court can order that all illegal activity stop; or, if only one person in the household may be or has proved to be involved in illegal drug activity, you can ask the court to prohibit only that person from being on the property.[46] Although this may not be a good solution, if you have no other place to move to, it may be your only option.

d. You Receive an Execution

If you receive a court document called an *execution*, it may mean that your landlord has used the nuisance law to get the court's permission to evict you without giving you an opportunity to defend yourself. See **Sample Execution (Form 21)**.[47]

If a sheriff or constable serves you with an execution, you must take immediate action to stop or delay the eviction. For more information see the section at the end of this chapter called **Delaying the Eviction**.

Stopping an Eviction Before a Trial

1. Paying the Rent Owed

a. Tenants with Leases

If you have a lease and you receive a notice to quit for non-payment of rent, you can "cure" the non-payment and prevent the eviction by paying your landlord all the past and present rent owed. Your landlord cannot evict you for non-payment of rent if she is claiming that you failed to pay something other than rent (like portions of a security deposit, late fees, or repair costs).[48] Therefore, you do not need to pay those charges in order to cure.

If you cure the non-payment after you receive a *summons and complaint*, you must pay all the rent owed, interest on the amount owed, and your landlord's costs of filing an eviction case, **on or before the *answer date***.[49]

> Note: The answer date is typically the Monday after the day the landlord has filed the case. It is sometimes shown on the summons and complaint. If the answer date is not clear from the summons and complaint, contact the clerk and ask her when your *answer* is due.

The costs of filing an eviction case include the purchase of a summons and complaint form, the cost of *serving* these papers on you, and the cost of actually filing them in court ($135 in housing court, $195 in district court). These

costs cannot include fees for the landlord's lawyer or any of the costs of serving a notice to quit on you (like constable fees).

If you cure a non-payment of rent after your landlord has filed an eviction case in court (that is, after you receive a summons and complaint), make sure you get a written, dated receipt for the amount that you paid and a written agreement from the landlord that she will dismiss the case. Get a copy of this agreement immediately after you and your landlord sign it. On the date your eviction case is scheduled for trial, you should go to court with your rent receipt and copy of the written agreement and be sure that the landlord also gives the court the agreement and that the judge actually dismisses the case. Landlords have been known to sign written agreements to dismiss cases and not show them to a judge. If the landlord does not show up in court, you should show the court the agreement.

b. Tenants without Leases

If you are a *tenant at will* and are being evicted for non-payment of rent, you can "cure" the non-payment and stop the eviction by paying all the back and current rent you owe within **10 days after receiving a notice to quit**. However, if you have received another 14-day notice to quit for non-payment of rent from your landlord within the previous 12 months, you do not have a right to cure the non-payment.[50]

If the 14-day notice to quit does not contain a statement that tells you that you can cure the non-payment within 10 days, you can stop the eviction by paying all rent owed by the *answer date*.[51] The answer date is sometimes shown on the summons and complaint. If the answer date is not clear from the summons and complaint, contact the clerk and ask her when your *answer* is due.

c. Your Landlord Refuses Payment

If you attempt to "cure" the non-payment of rent by offering to pay the full amount owed but your landlord refuses to accept it, you should either have a witness watch you try to pay the rent or send the rent again by *certified mail* and request a return receipt. If the landlord refuses to accept the certified mail, save the return receipt that proves she refused delivery. If your landlord brings an eviction case against you in court, this return receipt will be important proof that you tried to cure the non-payment within the time period allowed by law, and your witness can testify about your attempt to pay the rent.

d. Your Landlord Accepts Rent After Sending Notice

If your landlord accepts rent after sending you a notice to quit, the acceptance of rent may result in the creation of a new *tenancy at will*.[52] Your landlord can prevent creating a new tenancy and reserve her rights to evict you by notifying you that she will accept your money "for use and occupancy only." This is called a "reservation of rights," and a landlord must notify you of this before or at the time you make the rent payments; writing "for use and occupancy" on the back of the rent check is not sufficient because you do not receive it until you receive your next monthly bank statement.[53] Although acceptance of even 1 rent payment may be sufficient to cure the non-payment,[54] whether or not the tenancy has been reinstated is a question of fact that must be decided by the court under the particular circumstances of each case.[55]

2. Late Government Assistance Check

If non-payment of rent is caused by a late rental subsidy check or late check from the Department of Social Security or Transitional Assistance and you receive a *notice to quit* and a court *summons and complaint*, you should immediately ask the court to *continue* (postpone) the hearing date for at least 7 days so that the check can arrive. Once you receive the check, if you pay the landlord the rent owed, interest on this amount, and the landlord's costs of filing an *eviction* through this *continuance* period, the court

must treat the *tenancy* as not having been terminated and must dismiss the case.[56]

The costs of filing an eviction case include the purchase of a summons and complaint form, the cost of *serving* these papers on you, and the cost of actually filing them in court ($135 in housing court, $195 in district court). These costs cannot include fees for the landlord's lawyer or the cost of serving a notice to quit on you.

If part of the rent owed should have been paid by a housing agency, you may want to consider bringing the housing agency in to the case as a party in the lawsuit through a legal process called "impleading."[57] This is complicated, you may want to seek legal help.

3. Motion to Dismiss

If a landlord fails to follow the proper steps to *terminate your tenancy* or file an *eviction* case in court, you may be able to get your case *dismissed* before the trial.[58] For example, if your landlord does not send you a proper notice to quit, you have paid all the rent you owe, or you were not properly served with a summons and complaint, you should file what is called a *motion to dismiss* as soon as possible.

To do this, fill out the **Motion to Dismiss** form **(Form 20)**. Bring it to court and deliver a copy to the landlord or her attorney. If you do this on or before the *entry date* listed on the *summons and complaint* and a judge rules in your favor, your case will be dismissed and you do not need to do any further preparation for trial.[59] If a judge rules against you, or if the judge does not decide the motion that day, you must file your *answer* and *discovery* (as described in this chapter), prepare to go to court, and appear in court on the trial date.[60] Your answer should include the reasons for dismissal that you wrote in your motion to dismiss.

If you do not file the motion to dismiss by the entry date, you have until the *answer date* listed on the summons to file it.[61] You should then go to court on the *original trial date* and ask a judge to dismiss the eviction.[62] See the section in this chapter called **Important Dates** for a description of different dates to keep in mind.

If you have sent the landlord a request for information using the Discovery forms at the end of this book (Booklet 4), you do not have to be prepared to present your case on the original trial date. A clerk will automatically postpone your hearing for 2 weeks. However, a judge will hear your motion to dismiss on your original trial date.

If you have not sent your landlord discovery forms, when you go to court on your original trial date to ask the judge to dismiss the eviction, you should be prepared to present your case in the event that the judge does not dismiss it. To prepare, read **Fighting an Eviction in Court** in this chapter. If a judge denies your request to dismiss the case, you should raise at trial the same reasons that you checked off in the motion and in your *answer*.

> Note: When landlords go to court to evict tenants, they sometimes make legal *claims* against tenants for money *damages* other than rent. For example, a landlord may claim that you have damaged the apartment and that she should be compensated. The law does not allow a landlord to ask for such money damages in an eviction case, and you should ask a judge to dismiss any claims for money other than rent.[63]

4. Negotiating a Settlement

Before you get to court, you may want to try to negotiate a resolution to the case, called a *settlement*, with the landlord. A landlord may agree to what you want in exchange for some promise on your part. Keep in mind that, even if you lose the case, it will cost your landlord both time and money to go to court. Saving of time and money are two incentives for a landlord to settle. Depending on what you want, it may also be more advantageous for you to settle out of court than to go through a trial.

Before attempting to reach a settlement, you should carefully consider what you want and what you can reasonably expect to get from the court, based on the strength of your case.

- Use **The Answer** (**Booklet 3**) to help you identify and evaluate potential *defenses* and *counterclaims*.
- Do not agree to a payment plan for back rent that is more than you can afford.
- If you do not have another place to live, do not agree to move.

Before you accept any agreement, read it very carefully. If you reach an agreement, you should file it with the court. Do not trust your landlord or her attorney to do this without your being there. Too many tenants have found out the hard way that their landlord could not be relied upon to file the settlement agreement, but instead decided to proceed with the eviction case—without the tenant being there.

You may settle your case at any time during an eviction before a judge or jury makes a final decision after the *hearing*. For more on how to negotiate a good settlement, see **Chapter 14: Using the Court System - Negotiating a Good Settlement**.

5. Tenancy Preservation Program

The Housing Court has a special program called the Tenancy Preservation Program (TPP). TPP seeks to prevent homelessness. It works with individuals and families facing eviction because of a reason related to a physical or mental health disability. Disabilities may include developmental health issues, substance abuse, and aging related impairments.

TPP is voluntary. TPP staff work with landlords and tenants to develop *a reasonable accommodation* for the disability. TPP staff identify the reasons for the eviction and needed services, then develop a treatment plan to keep the tenancy going. TPP makes regular reports to all parties involved in the case including the court, the landlord, and the tenant. And TPP monitors the case for as long as is necessary.

To be eligible for TPP a household member must have a disability and the disability must relate to the lease violation. If you are in housing court and feel that TPP can help you ask the Clerk to direct you to TPP staff.

Fighting an Eviction in Court

1. Overview of the Eviction Process

Eviction cases are technically called *summary process* actions. This is because the procedures for eviction cases are designed to "process" cases in a "summary" or swift fashion.[64] The purpose of a summary process case is for a judge to determine who should have *possession* of your apartment—you or your landlord. Only a court can force you to leave your home before you are ready. At the end of this chapter is a timeline that will give you a general overview of the eviction process. The timeline will give you important time frames to keep track of.[65] As you can see, there are many steps that a landlord must take before she can have a sheriff or constable move you out; **remember, you do not need to move out when you get a notice to quit**.

Unfortunately, tenants do not have a right to an attorney in eviction cases (as people usually do in criminal cases). However, volunteer attorneys come to some courts on eviction days and offer advice and limited assistance to unrepresented people. These volunteers are not there to become your lawyer in the case, but rather to offer trial day brief advice and assistance. If you see that there are volunteer attorneys in court on your hearing date be sure to approach them and ask for help.

2. Getting a Summons and Complaint

To start an eviction case in court, a landlord must serve you with a summary process *summons and complaint*. This document must tell you why the landlord is evicting you and why your landlord *terminated your tenancy*.[66] The summons and complaint cannot be served on you until after your tenancy has been properly terminated.[67] See a sample copy of a **Summary Process Summons and Complaint** (**Form 19)**. This sample will show you the information you need to pay attention to on your summons.

The summons and complaint must be *served* by a sheriff or a constable who is authorized by law to serve court papers.[68] A sheriff or constable must personally hand you a summons and complaint or leave it at your apartment.[69] You may find it under your door, in the entrance hallway, or in your mailbox. If a summons and complaint is left at your apartment instead of handed to you personally, the landlord must also send you a copy by first-class mail.[70] If a summons and complaint is not served by someone legally authorized to serve court papers, you may ask a court to *dismiss* the case.[71]

3. Important Information on the Summons and Complaint

When you receive a summons and complaint, read it carefully. It will tell you the reason your landlord is trying to evict you. The summons and complaint should state the same reason for eviction listed on your notice to quit. If it does not, the court may decide to dismiss the case.[72]

The summons may say that you are behind on your rent. If it does it should list the months and amounts owed at the time the case was filed, but cannot include late fees, any unpaid portions of a security deposit, or other property maintenance or constable fees. [73] It may say that you have violated your lease or rental agreement in some other way or that you are a tenant at will and that your landlord is evicting you for "no fault," which means that she is not claiming that you did something wrong, but she wants her apartment back nevertheless.

4. Important Dates

As soon as you get a summons and complaint, you will need to pay attention to four important dates:

- **Entry Date**
- **Answer Date**
- **Original Trial Date**
- **Rescheduled Trial Date** (this is not listed on the summons and complaint, it is 2 weeks after your original trial date)

The **Summary Process Summons and Complaint** (**Form 19**) will show you where you will find these dates. Form 19 is a sample; this form may vary from court to court.

- **Entry Date**
  Before a landlord gives a summons and complaint to a sheriff to serve, the landlord must choose an *entry date*. An entry date is the deadline by which your landlord must actually enter or file the complaint with the court, pay the entry fee, and prove that she has actually served it on you.[74] An entry date can be any Monday at **least 7 days**, **but not more than 30 days**, after the date that you were served the summons.[75] If the entry date is a legal holiday, the complaint is entered on the next day the court is open.[76]

  When the landlord files a summons and complaint, she must attach a *notice to quit*, if it is legally required, and other necessary papers.[77] **If the landlord fails to file the necessary papers by the entry date, you should ask a judge to dismiss the case**.

- **Answer Date**
  The *answer date* is the date by which you must deliver to the court and your landlord (or the landlord's lawyer, if she has one) a document called an *answer.*[78] The answer is the written document you use to tell the court your side of the story. The answer date is sometimes shown on the summons and complaint. If it is not clear from the summons and complaint, contact the clerk and ask her when your answer is due. You can use **The Answer** form **(Booklet 3)**. Before filling it out, read the section in this chapter called **Filing Your Answer**.

- **Original Trial Date**
  The summons tells you the day that your case is scheduled for a *trial* (*original trial date*). It will usually be the second Thursday after the *entry date*, although it may be different in some courts.[79] If you file *discovery* with the court and your landlord or landlord's lawyer (if she has one) by the *answer date*, the court will automatically reschedule the original trial date and postpone it for 2 weeks. For more information see the section in this chapter called **Getting Information Through Discovery**.

- **Rescheduled Trial Date**
  If you request *discovery* from your landlord, your original trial date will automatically be postponed for 2 weeks to a *rescheduled trial date.*[80] You have to calculate this date yourself; it is not listed on the summons and complaint. Most courts do not send out notice of this new date and it is your responsibility to be sure that you are in court on time on the Rescheduled Trial Date.

  Note on Postponing Your Case:
  If you know that you will not be able to appear in court on your trial date, you should ask your landlord to postpone (*continue*) the case to another date. If the landlord agrees, ask the court to make sure that the date has been changed. If your landlord refuses to continue the case and you have a good reason for a postponement—for example, you will be in the hospital on the trial date—explain your situation to the court clerk and ask for a *continuance*.[81]

5. Transferring to Housing Court

Currently, not every community in Massachusetts has a housing court. If you live in an area with a housing court and your landlord files an eviction case in a district court, you have a right to *transfer* your case to a housing court.[82] The advantage of transferring an eviction case to housing court is that judges in housing court are more familiar with housing laws than district or superior court judges, who handle many different types of cases. Housing courts also have the staff and expertise to better help people who do not have a lawyer to complete the process.

There are five housing courts in Massachusetts.[83] To figure out whether there is one that covers your area, see **Chapter 14: Using the Court System**. To transfer your case, you only have to do two things:

1. Fill out a **Transfer** form (**Booklet 5**).

2. Deliver the form to the district court, the housing court, and your landlord (or her lawyer) before your case is heard in the district court. Keep a copy for yourself. You can deliver this form up until the day before the original trial date.[84]

If you transfer your case to housing court, your case may be postponed and the housing court will contact you about the rescheduled trial date.[85] Even if you transfer your eviction case to housing court, however, you must still file your *answer* and *discovery* on the *answer date* listed on the summons. If the case has not been transferred by the answer date, you must file your answer and discovery with the district court.

6. Filing Your Answer

After you receive a summons and complaint, you must fill out a document called an *answer*.[86] The answer tells your side of the story and outlines what laws protect you. An answer includes:

> **Defenses**: The legal reasons why you should not be evicted. *Defenses* are very important because they can help you win your case.
>
> **Counterclaims**: Your legal *claims* for money against your landlord. *Counterclaims* are important because you can use them to reduce the amount of rent you owe your landlord, and sometimes they can help you win your case. **If your landlord owes you more money than you owe her, you cannot be evicted in a non-payment or *no-fault eviction* case**. Also, in certain situations if you win a counterclaim and are able to pay back the difference between what your landlord owes you and what you owe your landlord, you can also win your eviction case.

You can obtain an **Answer** form from the court, write your own answer, or use the form in **Booklet 3**.[87] This answer form lists the most common defenses and counterclaims tenants can use to prevent an eviction. When you fill out the answer form, do not be afraid to list all defenses supported by the facts. If you want to add more defenses after you file your answer in court, you will have to ask permission from a judge, and she might not grant it. For more information see the section in this chapter called **Important Legal Defenses and Counterclaims**.

The answer date is also your deadline to ask for a **jury trial**. A trial by a jury of your peers is a constitutional right, but you must make your request (called a "demand") by the answer date deadline to be entitled to one. A trial by a jury of your peers may lead to a better outcome, though this is not a guarantee. Be sure to tell the judge on your hearing day that you have requested a jury trial because if the judge holds a trial (called a "bench trial") without being informed of your jury request, you could lose your right to a jury trial. [88]

> Note: Since jury trials are sometimes difficult for the court to accommodate, they can take some time to schedule. During the time between your demand and the trial, your landlord has a right to ask the court to order you to pay rent pending the trial.[89] This is called a *motion for use and occupancy*. If your landlord files this motion, be sure to explain to the court what you believe the apartment is worth given its current condition (meaning, tell the judge about any problems in the apartment and how they impact your ability to use your home).[90] The court will set an amount that you need to pay, and if you fail to do so, you may lose your jury demand.

You must file your answer with the court and then give a copy to your landlord or, if she has a lawyer, to the lawyer by the *answer date*. If the answer date falls on a legal holiday, you may file your answer on the next day court is open.[91]

7. Showing Up in Court

Even if you have not filed an *answer*, you should still show up for *trial*. When you go to court, bring your answer and ask the judge to allow you to file it. Be prepared to tell the judge why you have not yet filed it. If the judge lets you file your answer on your trial date, the landlord will then have the option to proceed with the case that day or have the trial postponed for one week.[92]

If you do not show up in court on your trial date, you will be *defaulted*. An entry of a *default judgment* in the court records means that you automatically lose your case, unless you can get the court to "remove" the default.[93]

If you have defaulted, the court should send you a notice that a default judgment has been

entered against you.[94] You should go to court as soon as possible to ask the judge to remove the default. In most cases, a judge will remove the default if you go to court immediately, have a good reason for not having come to court on your trial day, and have valid defenses or counterclaims against your landlord. Examples of good reasons for not appearing in court include not receiving notice of the hearing, serious and documented illness, or your landlord's having told you the case was worked out and that you did not have to go to court. The judge may not consider lack of transportation, not having childcare, or not wanting to miss work good enough reasons for missing court. For information about how to remove a default, see the section in this chapter called **Removing a Default Judgment**.

If you appear in court on the trial date but the landlord does not appear, the court should dismiss the case.[95] If you file an answer and neither you nor your landlord show up for trial, the case will be dismissed 7 days after the trial date, unless either party requests a new trial date within the 7-day period.[96] If no one requests a new trial date, you win and you get to stay in the apartment. If you have made counterclaims and the landlord fails to appear in court, she should be found in default and you should be awarded damages for your counterclaims. You can also decide to dismiss your counterclaims and defenses *without prejudice*, meaning you can bring them again in the future if you landlord brings another eviction case against you.

8. Getting Information Through Discovery

As a tenant facing eviction, you have a right to get information and documents from the landlord to help you prepare and prove your case. This is called *discovery*. Discovery is an important legal process. If you request discovery, a court will postpone your eviction hearing for 2 weeks in order to give the landlord time to answer your questions and send you documents. If you do not request discovery, you must go to court on the original trial date listed on the summons.

There are three kinds of discovery you can get:

> *Interrogatories:* A written list of up to 30 questions that a landlord must answer in writing and under oath.
>
> *Request for Production of Documents:* A written request for copies of documents that are in the landlord's possession.
>
> *Request for Admissions:* A written request asking the landlord to admit or deny certain statements.[97]

There is a sample form for **Discovery** at the end of this book (**Booklet 4**). You must file your discovery papers with the court and deliver a copy to your landlord or her attorney on or by the answer date. Your papers must also include a notice to the landlord that the trial has been postponed for 2 weeks.[98]

a. Getting the Information

Your landlord must respond to your discovery within 10 days of receiving it.[99] If your landlord does not respond within 10 calendar days or does not completely answer questions or give you the documents you requested, you have 5 business days to ask the court to order the landlord to give you this information. To do this, you must file what is called a **Motion to Compel Discovery** (find at the end of **Booklet 4**). If a judge grants your motion and the landlord does not comply with the judge's order, the court can impose a variety of legal punishments on your landlord, including prohibiting the landlord from opposing certain defenses or counterclaims, dismissing the case entirely,[100] or postponing it until the landlord complies with your request.[101]

b. Reviewing the Information

When you receive the discovery you have requested from your landlord, read through all of the documents carefully. As you read through everything, try to:

- **Identify statements or information that back up your case**. For example, if you ask the landlord whether you offered to pay all the rent you owed, she may admit that you did try to cure the non-payment.

- **Watch for contradictions in your landlord's story**. For example, your landlord may deny knowing about bad conditions, but give you receipts during discovery that show that she hired people to make certain repairs.

- **Look for information that backs up your landlord's case and think about ways to counter this information**. For example, if your landlord claims that you violated your lease by keeping a pet, you may be able to prove that your landlord knew about your dog when you first moved in and, in fact, gave you permission to keep your pet.

9. Preparing for the Hearing

Before your eviction case goes to court, you should prepare your case. The more prepared you are, the better you will be able to present your side of the story to a judge. Here are some things you can do to prepare:

- Take pictures of any serious defects or code violations in your apartment. Mark on the back of each photo the date when the picture was taken.

- Collect any documents that you need to prove your case and bring them to court with you. Bring the originals if you can and keep copies for yourself.

- Get copies of any Board of Health inspection reports. Be sure that the reports state that they are signed "under the penalties of perjury" by the person who inspected the premises.[102]

- Prepare a list of the questions you want to ask your landlord.[103]

- If you have any witnesses, notify them of the time and place they should be in court.[104]

- Prepare a brief statement that summarizes for the court how the landlord violated the law and why you should not be evicted. Use your answer form to help you.

- Consider asking the court to order that your landlord make repairs even before your trial is scheduled if those conditions are very difficult for you to live with.[105]

If you have time, it may be helpful to observe some eviction cases the week before your trial date. For more tips about getting ready for court, read the section in **Chapter 14: Using the Court System** called **Preparing for Trial**.

10. Going to Court

Going to court is not something that most of us look forward to. For those who are not familiar with court, it can be an intimidating place. When you go into a courtroom, you will see lawyers in business suits sitting up front near the judge, separated from the defendants and plaintiffs. Even though it can be daunting, remember that courts are there to serve the public and you have a right to have your side of the story heard. Speak up for yourself and be sure to tell the judge what is important to you about your case.

If you are representing yourself (*pro se*), you will need to pay very close attention to what is happening. Read **Chapter 14: Using the Court System** for some practical tips that will help you in court. Here are a few more things to keep in mind that relate to eviction cases.

11. Preparing Your Case

Preparing to go to court is 90% of the battle. The other 10% is what happens the day you go to court. The more prepared you are, the better off you will be. Use the **What to Bring to Court Checklist**, which you will find in **Booklet 1**, and read **Preparing for Trial** in **Chapter 14: Using the Court System** for more information about preparing for trial. Plan to spend the day in court when your case is on for trial because it is very difficult to know when your case will be called. Make sure to plan ahead for time off of work or child care.

Answer When Your Name Is Called
The first thing that will happen in court is that the clerk calls the names of all the cases. When she calls your name, say you are there. If you do not answer, you will be *defaulted* and you will lose your case.

If Your Landlord Does Not Appear
If your landlord does not appear, the case should be *dismissed*. Ask the clerk if you can file your appearance (a piece of paper that tells the court that you appeared on the correct day). Then ask the clerk to give you a copy of the order of dismissal.

Patience Is the Name of the Game
After the clerk calls the entire list of cases scheduled for the day, the trials start. One of the most discouraging things about being in court is the waiting. You may have to wait for hours before your case is called. You may wind up going to court as many as three or four times, perhaps losing pay each time you go.

12. Settling Your Case

Very often, while you are in court waiting for the judge, your landlord or her attorney will approach you in the hall and want to talk about settling your case. This is called *negotiation*. Negotiation is when parties and/or their attorneys talk through the issues with the goal of compromising and reaching an agreement that settles the matter. Be clear about telling the other side what you want, and don't make any agreement you are not positive you can comply with. If you start to negotiate with the landlord or her attorney remember that you must be your own advocate because they will be protecting the landlord's interests.

Use **Booklet 11: Negotiating a Settlement of Your Case**. It has a worksheet, common questions and sample forms.

In some courts, while you are waiting for your case to be called, court staff may ask you if you are interested in meeting with a *mediator* (also called a "housing specialist"). A mediator is a person who works or volunteers for the court. A mediator will try to help you and your landlord identify and discuss issues with the goal of arriving at a settlement that is acceptable to both of you. A mediator can ask questions and provide information, but must be impartial and not take either parties side. Everything said in mediation is confidential and should not be discussed in court if there is a hearing later.[106] If either you or your landlord does not want mediation, the case will go to trial with the judge (or a jury, if you requested a jury trial before the deadline).

The difference between mediation and negotiation in a housing case is that mediation is done by a person connected to the court, and negotiation happens directly between the parties without an impartial third-party. What is important in mediation or negotiation is to be clear about telling the other side what you want and being sure not to make any agreement you are not certain you can comply with.

a. Pros and Cons of Mediation and Negotiation

The advantages to using mediation or negotiation are that you can craft an agreement that is tailored to the exact needs of the parties. Issues that might be difficult for a judge can be decided by give-and-take. For example, you can simply agree with your landlord that the value of the clothing you lost when the roof leaked was equal to what it cost your landlord to make

repairs after your child flushed several small wooden toys down the toilet, without calling witnesses and proving the exact cost of these items. Mediation or negotiation usually provides a swifter and cheaper resolution to problems. It can also provide an opportunity to repair the often very personal relationships between landlords and tenants by opening channels of communication and fostering greater cooperation in the future.

The disadvantages of using mediation or negotiation must also be recognized. Often, you are not on an equal footing with your landlord, so you are unable to negotiate from a position of strength. If you are fearful of *retaliation* or feel intimidated by your landlord or her attorney, mediation or negotiation may result in an unfavorable outcome for you. In addition, many mediators are not trained in landlord-tenant law, and, unlike a judge, a mediator is not required to know the law. While it may be acceptable to ignore the legal issues in your search for an amicable agreement, you should do so only after you thoroughly understand what these issues are. You do not want to find yourself in the position of giving up too much because you are unaware of what may be due to you based on the law.[107]

A successful mediation or negotiation will result in a written agreement between the parties. If you are not able to resolve your dispute through mediation or negotiation, you will still be able to have a hearing before the judge (or jury).

b. Tips When Settling Your Case

In mediation or negotiation:

- Before you sign an agreement, read it very carefully.
- Be sure you understand its terms and can carry them out.
- If you do not understand what something means, ask the mediator or the other side to rewrite the agreement using clearer terms that you understand.
- Be careful not to sign any agreement that you know you will not be able to keep.
- Do not agree to move in a short time if you have no other housing available to you.
- If you have agreed to a payment plan for back rent, make sure you can afford it and that it is realistic because, if you do not keep to the agreement, a landlord may be able to evict you.

c. Settlement Agreements

If you reach a settlement, you must put it in writing and file it with the court as an Agreement. Once you have signed the Agreement, it will be very difficult to make any changes. In fact, under most circumstances an Agreement can only be modified later if both parties agree to the change.[108] In addition, at the request of a party, the agreement can be enforced by the court.

Many landlords insist that any settlement be an *Agreement for Judgment* where you agree that the landlord has won her case, but both sides agree that you won't have to move out right away (or that you won't have to move out at all if you pay all of the back rent according to a schedule and pay all current rent on time).

It is important to know that an *Agreement for Judgement* will likely hurt your credit rating and housing history because it is a court judgment. Also, in spite of what you may be told, an *Agreement for Judgment* is not the only framework available for settlement. You should try to negotiate with your landlord or her attorney for an *Agreement* (as opposed to an *Agreement for Judgment*) that the case will be dismissed if you do everything you have agreed to do. Agreements are not judgments and should not be reported as a judgment on a credit report.

13. Putting On Your Case

When your case is called for trial, you, your witnesses, and your landlord will be sworn in. Your landlord will present her case first.[109] She can put on her case by testifying herself or by calling you or someone else as a witness. You have the right to question *(cross-examine)* your landlord or any other witness she calls to testify.

After the landlord has finished her case, it is your turn to present your case. You should tell your story to the judge and give her all the documents that back up what you are saying. The more documents you have proving what you say, the stronger your case will be. (Make sure you save copies of everything for yourself.)

Think carefully about what you want to say to the judge and consider writing yourself some short notes. The section in this chapter called **Important Legal Defenses and Counterclaims** will give you specific information about how to prove your claims. Remember that sometimes there are facts that are important to you but do not have the same legal significance of other facts. Focus on the facts that will help you win your case. Be prepared to be cross-examined and answer questions by the landlord, her lawyer, or the judge.

If you do not have a lawyer, the judge may push you in an effort to speed the case along, and you may find it difficult to tell your full story. Some judges only want to know how much the rent is and whether you always paid it on time. If you are well organized and you stick to the point, it will be easier to get the judge's attention and tell your story. Although you do have the right to be heard, do not expect the court to be your advocate. In fact, it may be helpful to take some friends to court for support.

14. The Court's Decision

After you and your landlord each tell your side of the story, the judge will make a decision. This decision is called a *judgment*. The judge may announce a decision immediately after the trial, or will say that the case will be "taken under advisement" and send you a written decision in the mail. If you do not get a judgment within several days of the trial, call the court clerk. Tell her the case number and the day you were in court and ask her if a judgment has been made. The official judgment will be entered, or take effect, at 10:00 a.m. on the day after the court makes its decision (not the day you receive it).[110]

Read the decision carefully.

If you lose the case and want to challenge the decision, you have a right to *appeal* it within 10 days of the date the judgment was entered.[111] For example, if judgement entered on May 8, you must have your appeal papers filed with the court and delivered to the landlord or her attorney by May 18th. If the tenth day falls on a weekend or holiday, you have until the end of the next court day to file your appeal. For more information see the section in this chapter called **Appealing**.

If you lose the case and do not appeal the court's decision, a clerk will send the landlord an execution on or about the 11th day after the judgment has entered. An execution is the court's eviction order.

If your landlord wins the case, the execution gives her permission to have a sheriff or constable physically move you out. **If you win any defenses, the landlord will not obtain the execution and you will have the right to stay in your home.** If you win your counterclaims in the case, you may get an execution that says that you are entitled to money *damages* from your landlord. For information about how to collect money from your landlord, see the section called **Enforcing Court Judgments** in **Chapter 15: Using the Court System**.

Important Legal Defenses and Counterclaims

In an eviction case, *defenses* are the legal reasons why you should not be evicted. If you have a defense, you may be able to prevent your eviction. *Counterclaims* are your legal claims for money. Counterclaims are important because you can use them to reduce the amount of rent you owe your landlord and sometimes win your eviction case. **If the amount you win through your counterclaim is more than the amount you owe, then you will not be evicted in a non-payment or *no-fault eviction* case. In some cases, if you win a counterclaim and you can pay the difference between what your landlord owes you and what you owe to your landlord, you can also win your eviction case.** There are separate rules that apply to eviction cases following foreclosures. If your landlord owns the property as the result of a foreclosure, see **Chapter 18: Tenants and Foreclosure.** There is also a special **Discovery form for Tenants in Foreclosed Properties (Booklet 4A)**.

Below is a list of the most common defenses and counterclaims tenants use to win eviction cases. Additional defenses are listed in the **Answer** form (**Booklet 3**).

1. Defenses that May Prevent Eviction

a. Your Landlord Did Not Terminate Your Tenancy Properly

Your landlord must prove that she properly *terminated your tenancy*.[112] You have a defense to the eviction if:

- You received an invalid *notice to quit*. (For example, the notice does not give you the right amount of time.)
- Your landlord, after sending you a notice to quit, accepted rent without notifying you right away that it is "for use and occupancy only."
- You received a 14-day notice to quit for non-payment of rent at a time when you were not behind on your rent.
- You received a 14-day notice to quit for non-payment of rent for refusing to pay the amount of a rent increase (that you did not agree to pay).[113]
- You paid or offered to pay the landlord the rent you owed within the time allowed by law.

If any one of these situations applies to you, you should ask a judge to *dismiss* your case. For more information, see the section in this chapter on **Motion to Dismiss**. Make sure you bring all important documents to court to prove your claims, such as the invalid notice to quit and rent receipts or canceled checks to prove you paid your rent. If you are successful in having the case dismissed, the landlord must send you a new notice to quit if she still wants you out.

b. Your Landlord Has Not Properly Brought the Case

Your landlord must show that she has properly filed the eviction case in court. If any of the following is true, you have a defense to the eviction.

- Your landlord did not properly *serve* you a *summons and complaint*.
- Your landlord began the court case before the time period on your notice to quit expired.
- The complaint does not state the reasons for eviction.[114]

c. Bad Housing Conditions

When your landlord knows about conditions that violate the state Sanitary Code prior to you falling behind on your rent and allows these conditions to remain uncorrected, you may have a *defense* that can prevent your eviction in a non-payment or *no-fault eviction* case.[115] This defense can be used by:

- All "occupants" of residential property, except people who have been living in a hotel, motel, or lodging or rooming house for less than 3 consecutive months;[116]
- Tenants who are being evicted for non-payment of rent; or
- Tenants who are being evicted for a reason that is not the tenant's fault, often referred to as a *no-fault eviction*. A no-fault eviction would be, for example, if you refuse to pay a rent increase or if your landlord wants the apartment for a family member.

If you are being evicted for a reason that the landlord claims is your fault, such as disturbing other tenants or destroying property, you may not be able to use bad conditions as a defense to prevent an eviction. In this situation, if your landlord wants to prevent you from raising bad conditions as a defense, she must send you a notice to quit that specifies the reasons for the eviction.[117]

If your defense is based on bad conditions, a judge must be convinced of the following things:

- Bad conditions existed.
- Your landlord knew about the bad conditions before you were behind in your rent.
- Neither you nor anyone else under your control caused the bad conditions.
- You do not live in a hotel or a motel or hotel or you have lived in a rooming house for more than 3 months.
- The conditions can be repaired without your moving out.[118]

Bad Conditions Existed
The best way to prove that the bad conditions exist or existed and that the landlord has violated the state Sanitary Code is with a *certified* inspection report from the Board of Health.[119]

A certified inspection report is one signed under the pains and penalties of perjury.[120] If you have photographs or videotapes of the conditions, show them to the judge. Dead mice and roaches can be sealed in jars to be presented as exhibits. It is also important for you to testify about the harm that these conditions caused you and your family. Make a diagram of your apartment and use it to show the judge where bad conditions existed and indicate how long these problems have gone on. Keep in mind that the judge has not seen or lived in your apartment and does not know how bad things are or how they affected you.

Your Landlord Knew About the Bad Conditions
If you are raising bad conditions as a defense, you will need to prove to the court that your landlord or her employee knew about the bad conditions. If you are being evicted for non-payment, you will need to prove that your landlord knew about the bad conditions before you fell behind or began to withhold your rent. Your best proof will be a copy of any written letters you sent to the landlord telling her about the bad conditions or a report from the Board of Health dated before you stopped paying rent. You can also try through the process of *discovery* to get your landlord to admit she knew about the bad conditions. You can testify about conversations with your landlord in which you discussed the violations; and witnesses who overheard these conversations can testify that your landlord had notice of the bad conditions. If the bad conditions existed at the time you moved into your apartment, the law

presumes that your landlord knew about them, even if the landlord did not actually know of these conditions.[121] For more information see **Chapter 8: Getting Repairs Made - Establishing That Your Landlord Had Knowledge of Illegal Conditions**.

Neither You nor Anyone Else Under Your Control Caused the Bad Conditions
Your landlord must prove that you or someone in your household caused the defective conditions. If your landlord took a security deposit when you moved in, you should have a statement of conditions. If the defective condition is listed on this statement, that will be proof that you did not cause it.

You do not live in a hotel or a motel or you have lived in a rooming house for more than 3 months.
If you live in a hotel or motel or you have lived in a rooming house for less than 3 months, you cannot use the fact that there are bad conditions to prevent an eviction.

The Conditions Can Be Repaired without Your Moving Out
If the landlord claims the conditions cannot be repaired without your moving out, you can argue that you should be able to move back in after the repairs are made.

Paying What You Owe
If a judge is persuaded that all of these conditions have been met, she will then determine what the *fair rental value* of the apartment is in its defective condition. A judge may then order you to pay some or all of the rent you have withheld. **If you do owe money and you pay within 7 days the amount the judge says you owe, you cannot be evicted**. If you proved your claim of bad conditions and don't owe the landlord any money, you cannot be evicted and you may be entitled to money damages from your landlord. Of course, if you do owe money and don't pay it within 7 days, you can be evicted.

d. Rent Withholding

If you have been withholding rent because of serious Sanitary Code violations in your apartment, you can wait to cure the non-payment until after a judge holds an eviction trial, evaluates the conditions, and determines how much of the rent you actually owe the landlord. Within 7 days of being notified of the court's ruling, you must pay the court the entire amount a judge says you owe in order to cure the non-payment and keep your apartment.[122] For more information about rent withholding, see **Chapter 8: Getting Repairs Made**.

e. Retaliation

If your landlord tries to evict you in *retaliation* for your engaging in certain activities protected by law, you have a defense to an eviction. These protected activities are listed in the section in this chapter called **Retaliatory Evictions**. If a landlord sends you a *notice to quit* or tries to evict you by going to court within 6 months after you did any of the activities protected by the law, a judge must "presume" that your landlord is retaliating. If you raise retaliation as a *defense* in an eviction, your landlord must prove "by clear and convincing evidence" that the eviction is based on a reason other than your engaging in legally protected activities and that she would have brought the eviction in the same manner and at the same time if you hadn't engaged in those activities.[123]

f. Discrimination

If you have been discriminated against, violation of the discrimination laws is a defense to an eviction, even if you are being evicted for a reason that the landlord says is your fault.[124] See **Chapter 7: Discrimination** for a detailed description about illegal discrimination.

A major principle of discrimination law that can be used to prevent an eviction is the

requirement that landlords make *reasonable accommodations* for tenants with physical and mental disabilities.[125]

A reasonable accommodation is open to creative interpretation, but is an accommodation that would allow a person to remain in her home despite her disability. Failure to reasonably accommodate a tenant with a disability constitutes discrimination, and may be raised as a defense to the eviction, as well as a counterclaim.[126] For example, you may be able to use the theory of reasonable accommodation to prevent a landlord from evicting a tenant with a mental disability who was causing minor damage to her apartment because she hears voices.[127] You also may be able to prevent the eviction of a disabled tenant by allowing that person to keep a service or therapy animal even though pets are prohibited under the lease.[128]

If you are being evicted for non-payment of rent, you would have a defense to the eviction if your landlord refused to accept an agency voucher sufficient to cover the full amount owed so long as it was offered to her within the time provided by law for "revival" of your *tenancy*.[129] Similarly, it is illegal discrimination for a landlord to refuse to accept any federal or state rent subsidy and then evict you for non-payment of rent.[130]

If you suspect that your landlord is discriminating against you, read **Chapter 7: Discrimination** for information about what other steps, in addition to raising discrimination as a defense to an eviction, you can take to protect yourself.

g. Your Landlord Says You Broke the Lease

If you are being evicted because the landlord said that you violated your lease, you may have a defense to an eviction if you can show any of the following:

- You did not break a condition of your lease. Your landlord has the burden of proving that you did.

- The lease clause that your landlord says you violated is or should not be legal in Massachusetts. Some lease provisions are automatically illegal and cannot be enforced.[131] You may argue that others should not be enforced.[132] (See **Chapter 1: Before Moving In**).

- Your landlord gave up (*waived*) her right to object to your *breach* because she consented to it[133] and did not expressly reserve the right to proceed with the eviction.[134] It is best to get this consent in writing, because verbal consent is hard to prove and sometimes not admissible in court.[135]

- Your landlord gave up (*waived*) her right to object to your breach because she accepted the rent after sending you a notice to quit without reserving her rights (which means she accepted your rent without notifying you that the money was "for use and occupancy only").[136]

  Note: The acceptance of rent by the landlord does not always act as a permanent *waiver*.[137]

- The violations occurred prior to the renewal or during the term of the previous lease.[138]

- A new owner is trying to evict you for a breach that occurred before she acquired the property.[139]

- Even though you may have technically violated a term of your lease, your violation was accidental, a mistake, or a very minor violation; you have corrected the violation; and the landlord was not substantially harmed or your violation was related to a disability for which you have requested a reasonable accommodation.[140]

h. Sale of the Premises

If your landlord sells the building you live in while the eviction action is pending[141] or even after a judge has ordered an eviction, you have a defense against the new owner if she proceeds with the eviction,[142] unless the old landlord *assigned* her rights to the new landlord prior to or at the time of the sale.[143] Use the *discovery* process to ask the new owner for any assignment agreement.

i. Landlord's Violation of Law

Massachusetts law provides a defense to a non-payment or *no-fault eviction* where the **landlord** has breached any material term of the rental agreement or violated any other law related to the *tenancy*.[144] If you can prove that the landlord has broken any rental agreement (either a term of the lease or the terms of a tenancy-at-will agreement) or broken any other law related to the tenancy, such as the security deposit law or the law protecting your right to "quiet enjoyment" of the apartment,[145] the court should not allow the landlord to evict you.

j. Fairness

Courts can determine that even if an eviction is technically allowed, the eviction is unfair based on principles of equity and fairness (this is called the "doctrine of prevention of forfeiture").[146] Sometimes a court will try to seek an alternative to eviction which preserves the tenancy, but also takes into account the impact on the landlord. A court might be more likely to do this if the reason for eviction is not minor or where the harm to the landlord can be addressed.

2. Counterclaims that May Prevent Eviction

You can sue your landlord for money as part of your eviction case if your *claims* are related to your tenancy.[147] These claims are called *counterclaims* if you raise them during an eviction case. They are claims for money. Here are some common counterclaims that tenants can bring against landlords in eviction cases:

- **Breach of the Warranty of Habitability.**[148] Under Massachusetts law, all landlords owe tenants what is called a warranty of habitability. If your landlord does not keep your apartment in good condition, she has "breached" her warranty of habitability. You may have a claim that the value of your apartment has decreased and that it is not worth all of the rent that your landlord is charging you or that you have paid in the past.[149]

- **Interference with the Covenant of Quiet Enjoyment**: In Massachusetts, if your landlord interferes with your use and enjoyment of your apartment or your utilities, you may sue her for money damages in the following situations:

  - If your landlord is required to provide utilities or other services and she intentionally fails to provide them,
  - If your landlord is required to provide utilities or other services and she directly or indirectly interferes with the furnishing of them,
  - If your landlord transfers the responsibility for payment for the utility to you without your consent,
  - If your landlord requires you to pay utilities that go to common areas or areas you do not occupy.[150]
  - If your landlord comes into your home without notice or attempts to

move you out without first taking you to court,[151] or

- If the landlord in any way intentionally interferes with your "quiet enjoyment" of your apartment.[152]

- **Violation of the Security Deposit Law:** If a landlord takes a security deposit, the law says that she has certain obligations. These obligations include providing you with a written receipt, giving you a statement that describes the condition of your apartment, holding your money in a bank account that is separate from the landlord's money, paying you interest every year, keeping records of deposits and repairs, and returning your security deposit to you within 30 days of the end of your tenancy.[153] Failure to comply with this statute may be a defense to eviction in summary process.[154]

- **Violation of the Consumer Protection Law:** The Massachusetts legislature has recognized that tenants are consumers of one of the most significant consumer products—housing.[155] Under the state Consumer Protection Act, it is illegal for a landlord to threaten, attempt, or actually use any unfair or deceptive acts against you or anyone in your house.[156]

- **Retaliation**: You may be entitled to damages under the retaliation counterclaim statute if you prove that your landlord threatened to take legal action against you for enforcing your rights. For more see the section in this chapter called **Retaliatory Evictions**.

- **Discrimination**: You may be entitled to damages under the laws that prohibit discrimination if you can show that your landlord engaged in discrimination against you.[157]

If you have a claim against your landlord and you do not bring it as a counterclaim in an eviction case, you still have the right to file a separate lawsuit on that claim.[158] For a list of counterclaims, see **The Answer** form (**Booklet 3**).

When you bring counterclaims in an eviction case, the judge will decide whether you have proved your claim and will decide how much money to award you based on each of your counterclaims. You should read **Chapter 13: When to Take Your Landlord to Court - Grounds for Filing a Civil Lawsuit** to see what you need to prove in court and how much money you can be awarded. The court's rulings on your counterclaims may determine whether or not you can be evicted.

a. If You Are Being Evicted for Non-Payment of Rent

Counterclaims may reduce or eliminate the amount of rent you owe. If you are being evicted for non-payment of rent, the judge will compare the amount she awards you on your counterclaims to the amount she awards your landlord for rent. If you are awarded more money than your landlord, you win the eviction case and get to stay in your apartment.

If the amount you win on your counterclaim is less than what the judge says you owe the landlord, you have 7 days after receiving notice from the court to pay the difference to the court and prevent the eviction.[159]

If the judge rules against you on all of your counterclaims and does not find that any of your defenses are valid, you have lost the eviction case.

b. If You Are Being Evicted for a Reason That Is Not Your Fault (or for No Reason)

Counterclaims may be used as a defense if you are being evicted for a reason that is not your fault, such as if your lease expired or your landlord wants to rent your apartment to her sister.[160]

c. If You Are Being Evicted for a Reason That Is Your Fault

If you are being evicted for a reason that the landlord claims is your fault (other than non-payment of rent), such as destruction of property or disturbing neighbors, you cannot use counterclaims to prevent the eviction.[161] You can, however, still use counterclaims to get money damages in a separate case.[162]

You also may still have defenses you can use to prevent the eviction.

d. Personal Injury Claims and Lead Paint Poisoning

If you have been injured due to your landlord's negligence or your child has been poisoned by lead paint, you can bring a counterclaim for your injuries. These legal claims, however, can be complicated and may involve substantial amounts of money. It is best to speak to a lawyer about bringing one of these claims.

You may be better off bringing the claim as a separate lawsuit against your landlord as opposed to a counterclaim. If you bring these claims as counterclaims, you will not be able to sue your landlord for these claims later. For example, if your child has been exposed to lead, you may not know how badly she has been hurt until many years after the exposure and so you would most likely not want to bring a claim at the time of your eviction case.

Challenging a Court-Ordered Eviction

If a judge enters an *order* in an *eviction* in favor of your landlord, depending on what kind of order it is, there may be a way that you can prevent or postpone the eviction. You must, however, act quickly.

1. Removing a Default Judgment

If you missed your eviction trial and a court entered a *default judgment* against you, this means your landlord wins the case and can evict you approximately 2 weeks from the trial date. If you had a good reason for missing the trial and you have a *defense* to the landlord's case, you can ask a judge to remove the default judgment.

To do this, fill out the **Motion to Remove Default Judgment** form (**Booklet 6**). Bring this form to the court as soon as possible. Ask the clerk to schedule a hearing so you can tell the judge why she should remove the default. Ask the clerk to schedule the hearing within 10 days of the trial date that you missed.

If you do not file your Motion to Remove Default within 10 days of the default judgment, you should you should fill out both the **Motion to Remove Default Judgment** form (**Booklet 6**) form and the form in **Stay (Booklet 8)**, the Motion to Stay Execution, which will ask the judge to stop the eviction until you are heard on these motions.

2. Appealing

If you lose your eviction case and you think the judge or the jury made a legal mistake in deciding your case, you may *appeal* the court's decision. This means that you may have your case heard or reviewed again by a higher court. To appeal, you must **act quickly** within 10 days of the court's decision in your eviction case.[163]

a. Where Do You Appeal

Where and how you appeal depends on what court your original eviction case was in.

If your eviction trial was originally in a housing court or a superior court, you appeal to the Appeals Court, which reviews the original decision to see if the judge made any legal mistakes. There is no second trial.

If your eviction trial was in a district court, you may appeal to the Appellate Division of the district court, which reviews the original decision to see if the judge made any legal mistakes. Again, there is no second trial.

b. How Do You Appeal

At the end of this book are three different appeals forms (**Booklet 7**, **Booklet 7A**, **Booklet 7B**). Make sure you use the right one. These forms will only get you started with an appeal. Appeals are complicated; you should try to get an attorney to represent you.

Before you can appeal your case, you may have to pay money into the court to cover back rent and other costs. This is called an *appeal bond*.[164] If you cannot afford an appeal bond, you should fill out the **Affidavit of Indigency (Booklet 9)** and ask the court to *waive* the bond (not require you to pay it). You must convince a judge that you either receive certain welfare or public benefits, have an income below 125% of the federal poverty level, or cannot pay the bond without depriving yourself or your family of the necessities of life (see **2017 Poverty Guidelines Chart** at the end of **Chapter 6: Utilities**). You must also be able to show that your appeal is not frivolous.[165]

If a judge *waives* the bond, she can still require you to pay all or part of your current rent each month until your appeal is heard. If a judge denies your request to *waive* the bond, or if you believe the monthly payments ordered are too high, you have 6 days to appeal this decision.

If the apartment is in bad condition, you should ask that the amount of the appeal bond or rent payments be reduced to reflect the "decreased value" of the apartment and bring witnesses or evidence to the hearing to help you convince the judge of the reduced value of the apartment

Failure to make the ordered payments on time will end your appeal rights. The first payment is due 6 days after the court's decision.[166] If, due to some substantial hardship, you cannot afford to keep paying the full rent while waiting for your appeal to come up, it may be possible to ask the court to reduce the payments. The court should balance the landlord's need to meet her expenses against your right to continue your appeal and the particular hardship you are facing.[167]

If the higher court orders you to pay the bond, you have 5 days to pay it or else your appeal is dismissed.[168]

3. Postponing the Eviction

If, after a hearing, you lost your eviction case and you need more time to move, you can ask a judge to postpone your eviction. You can also ask for a postponement if you agreed to move out and have not been able to move yet. To do this, you must fill out the **Stay of Execution** form (**Booklet 8**).

If a judge grants you a *stay of execution*, this order prevents the landlord from evicting you until the stay order is over. A judge has the power to freeze the eviction order and give you permission to stay in your apartment for up to 6 months.[169] If you or someone living with you is disabled or 60 years of age or older, and you are being evicted for a reason that is not your fault (*no fault* eviction) the court can grant you a stay for up to 12 months.[170] A judge is less likely to grant a stay if you are being evicted for non-payment of rent or for some other reason which was your fault, or if you live in a hotel, lodging house, or rooming house.

If you are willing to leave, but need more time to find an apartment, ask the judge to grant you

a stay. Bring a list of apartments you've called about or have seen to show the judge that you are making a sincere effort to find another apartment. As a practical matter, your chances of getting more time are greatly improved if you are sick, elderly, or have children. But remember that the judge is not required to give you more time.[171]

Also, Massachusetts has an eviction storage law that provides important rights to tenants who are facing an eviction or who have been evicted. It is important to understand this law so that you can make sure your property is protected. For more information read the booklet: **Eviction Storage Law: Protecting the Belongings of Tenants Facing Eviction available at:** www.masslegalhelp.org/housing/booklets/eviction-storage-law.

4. What Happens If a Court Orders You Out

If your landlord wins the eviction case, she will get a piece of paper called an *execution*, which gives the landlord permission to have a sheriff or constable move you out and put your things in storage. See sample **Execution (Form 21)**. This form may vary from court to court.

A landlord can get an execution on the 11th day after the court enters a *judgment*.[172] When the landlord gets the execution, she must then give it to a constable or sheriff and pay that person to move you out.[173] **Only a constable or sheriff can deliver the execution to you and move you out**.[174] A constable must give you at least 48 hours written notice that you are going to be evicted. This paper is sometimes referred to as a "48 hour notice". Usually, a constable does this by tacking a notice to your door or giving it to you.[175] This notice must state the date and time a constable will move you out. A sheriff or constable can only move you out Monday through Friday between 9:00 a.m. and 5:00 p.m. You cannot be moved out on a legal holiday or a weekend.[176]

5. You Can Request an Order to Try to Stop the Move-Out

Even if you have lost your case and received a 48 hour notice from the constable or sheriff there is one last legal avenue you can use to try to get more time. A *Temporary Restraining Order (TRO)* is a civil action you can file in court requesting emergency postponement of the constable's move out. When granted, a typical TRO is for only 10 days. It may be extended at the court's option (but this is unusual).

To request a TRO:

1. Go to the court in which your eviction case was heard and bring the constable's 48 hour notice with you.

2. Find the housing court clerk or the civil clerk's office. Request an immediate hearing to stop the constable's move-out.

3. Fill out any forms the clerk says are necessary.

4. If you cannot afford the fee for the TRO, ask the clerk for an Affidavit of Indigency form and fill it out completely.

5. The court will usually call your landlord to come into court that same day for an immediate hearing.

6. During the hearing tell the judge why you need more time to move out and if there is someone who is elderly or disabled in your household. If you have a place to go, but need more time to voluntarily move out, the court is more likely to grant you some additional time. Bring any evidence about your new living arrangement to show that you will be able to move if given more time. If you do not have a place to move to,

explain to the judge why becoming homeless will be dangerous for you or your family.

Keep in mind, since you have lost your case, the court is not required by law to give you any more time. A TRO is completely within the judge's discretion.

6. Getting More Time From Your Landlord

You can ask the landlord for more time, although he does not have to give it to you. Because the removal and storage of your possessions can cost the landlord as much as $2,000 or more, you can try to work out an agreement with the landlord where, if she gives you more time to move out, you will leave voluntarily. The court must issue the execution within 3 months of the date the judgment was entered by a judge,[177] and the landlord must use it within 3 months after it is issued.

If your eviction case was based on non-payment of rent and you have paid all of the rent due before your landlord uses the execution, your landlord will not be able to have you moved out and must return the execution to the court. In other words, **if you pay all of the rent owed and your landlord accepts it, she will give up her right to use the execution and will not be able to have you moved out**. However, your landlord does not have to accept the rent at this point.[178]

If the constable physically evicts you from the premises, she must see to it that your possessions are placed in storage.[179] **Be sure to remove your vital documents, medications, and valuables before the constable physically evicts you.** It's a good idea to remove anything you can before the constable places your possessions in storage since you may have difficulty accessing your possessions later. The warehouse that stores the goods secures storage fees by taking what is called a *warehouser's lien* on the goods, which can be enforced by sale of your property after it has been held for 6 months without payment.[180] You can postpone the sale for 3 months by paying half of the accrued fees plus reasonable costs.[181] If your goods are damaged by the mover or storage company, they are probably responsible for the damage, and you may have legal claim against them.[182] For more information about storage, go to: www.MassLegalHelp.org/housing/booklets/eviction-storage-law.

Eviction Timeline

	Notice to Quit Tenant receives notice to quit, ending or terminating the tenancy. Tenant does not have to move out by the date on the notice.
	Tenancy Terminates If tenant receives 14-day notice to quit, tenancy terminates 14 days after receipt, unless tenant revives the tenancy by paying. If tenant receives 30-day (or rental period) notice to quit, check to make sure the notice is properly done.
After tenancy terminates	**Service of Summons and Complaint** Landlord can have summons and complaint served, but only after tenancy is terminated.
7 - 30 days after service of summons and complaint	**Entry Date** Landlord can file (enter) complaint in court. Must file it on a Monday at least 7 days, but no more than 30 days, after she has summons and complaint served on tenant.
On entry date	**Tenant's Motion to Dismiss** Tenant may file a motion to dismiss the case on the entry date or with the answer.
7 days after entry date	**Tenant's Answer and Discovery Due (Answer Date)** Landlord and court must receive answer and discovery forms 7 days after the entry date (which is the Monday after the entry date).
3 - 9 days after answer date	**Pretrial Motion to Dismiss Hearing** Tenant may have motion to dismiss heard on the original trial date if she has not done so sooner. (Housing court usually allows these motions at any point.)
3 - 9 days after answer date	**Original Trial Date** Eviction trial held unless tenant files discovery form or transfer form
10 days after landlord receives discovery	**Landlord's Discovery Response Due** Landlord's response to discovery due 10 days after tenant serves discovery.

5 days after landlord's failure to respond	**Tenant's Motion to Compel Discovery** Tenant must serve motion to compel discovery on landlord within 5 business days after the landlord's failure to respond or inadequate response to discovery.
17 - 23 days after answer date	**Rescheduled Trial Date** Eviction trial automatically rescheduled to this date if tenant files discovery forms.
1 day after trial	**Entry of Judgment** Court can enter judgment the day after the court makes its decision.
10 days after judgment	**Appeal** Tenant or landlord must appeal within 10 days from entry of judgment.
11 days after judgment	**Execution** Landlord can get an execution from court and give to sheriff or constable to serve.
1 day after execution	**Notice of Eviction** Sheriff can serve the execution (48-hour notice of eviction) on tenant.
2 days after execution	**Sheriff Can Move Tenant Out** Sheriff can move tenant out 48 hours after landlord gets the execution.

Rental Period Notice to Quit for Tenants at Will for Thursday Trials

Month 1

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Tenant must get **rental period notice to quit** before 1st if rent is due on 1st	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31 **Tenancy terminates at midnight**			

Month 2

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1 Landlord can serve tenant Summons & Complaint	2	3
4	5	6	7	8	9	10
11	12 Entry Date	13	14	15	16	17
18	19 **Answer Date** Tenant's Answer & Discovery Due	20	21	22 **Original Trial Date**	23	24
25	26	27	28	29 Landlord's Discovery Response Due	30	

Month 3

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3	4	5	6 Rescheduled Trial Date	7 Court could enter judgment	8
9	10	11	12	13	14	15
16	17 Appeal deadline	18 Landlord could get Execution	19 Sheriff could serve a 48-hour notice	20	21 Sheriff could move tenant out	22
23	24	25	26	27	28	29
30	31					

14-Day Notice to Quit for Non-payment of Rent for Thursday Trials

Month 1

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22 Tenant gets **14-day notice to quit**	23	24	25	26	27
28	29	30	31			

Month 2

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4	5 Tenancy terminates at midnight	6 Landlord can serve tenant Summons & Complaint	7	8	9	10
11	12	13	14	15	16	17
18	19 Entry Date	20	21	22	23	24
25	26 **Answer Date** Tenant's Answer & Discovery Due	27	28	29 **Original Trial Date**	30	

Month 3

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3	4	5	6 Landlord's Discovery Response Due	7	8
9	10	11	12	13 **Rescheduled Trial Date**	14 Court could enter judgment	15
16	17	18	19	20	21	22
23	24 **Appeal deadline**	25 Landlord could get Execution	26 Sheriff could serve a 48-hour notice	27	28 Sheriff could move tenant out	29
30	31					

Endnotes

1. The usual costs of an eviction include: (a) the fee to file the case in court, which is $195 in District Court and $135 in Housing Court; (b) fees for hiring a constable or deputy sheriff to serve court papers on the tenant, G.L. c. 262, §8(A); (c) attorney's fees; and (d) fees for the constable to actually evict the tenant and for movers to move and store the tenant's household furnishings, which may run $2,000 or more.

2. G.L. c. 139, §19.

3. G.L. c. 139, §19.

4. Your landlord may not have to give you a notice to quit if she is claiming that you used your home for certain illegal activities. G.L. c. 139, §19. She must still bring you to court for a hearing before moving you out.

5. Lockouts are prohibited by G.L. c. 186, §§14 and 15F and G.L. c. 184, §18. They are also prohibited by the Attorney General's Consumer Protection Regulations, 940 C.M.R. §3.17(5). Under G.L. c. 186, §§14 and 15F, a landlord may be liable for triple damages or 3 months' rent (whichever is greater) plus costs and attorney's fees for a lockout. Lockouts are also a criminal offense under G.L. c. 186, §14. However, if a co-tenant has sought a lock change from the landlord for safety reasons under G.L. c. 186, §27, or if someone in your home has obtained a restraining order under G.L. c 209A which vacates you from the home, you could be legally barred from returning even if you landlord hasn't evicted you yet.

6. G.L. c. 186, §14.

7. G.L. c. 186, §14.

8. G.L. c. 239, §2A.

9. *Manzaro v. McCann*, 401 Mass. 880 (1988). The owner's retaliatory actions are not the basis for a lawsuit or counterclaim unless the tenant's complaints are in writing. Therefore, oral complaints to the owner cannot be the basis for retaliation.

10. G.L. c. 239, §8A.

11. An Act Relative to Housing Rights For Victims of Domestic Violence, Sexual Assault and Stalking:

- **Allows Victims to Break a lease for safety reasons**: G.L. c. 186, §24 allows a tenant or co-tenant to terminate a rental agreement and quit the premises upon written notification to the owner if a member of the household is a victim of domestic violence, rape, sexual assault, or stalking. Notification must be made within 3 months of the most recent violence or the tenant can terminate the rental agreement if a member of a tenant's household is reasonably in fear of imminent serious physical harm.
- **Bars discrimination against prospective tenants because they have sought the protection of this law:** G.L. c. 186, §25 provides that an owner shall not refuse to enter into a rental agreement, nor shall a housing provider deny assistance, based upon an applicant having terminated a tenancy under G.L. c. 186, §24 or requested a lock change under G.L. c. 186, §26.
- **Requires landlords to change the locks when required for safety reasons**: G.L. c. 186, §26 provides that an owner shall, upon the request of a tenant, co-tenant, or household member, change the locks if the tenant, co-tenant, or household member reasonably believes that such individual is under an imminent threat of domestic violence, rape, sexual assault, or stalking.
- **Prohibits retaliation against tenants who seek protection against their abusers**: The statute also explicitly amends G.L. c. 239, §2A to include, in "activity protected from reprisal," taking action under G.L. c. 209A or G.L. c. 258E, seeking relief under the new act, reporting to a police officer or law enforcement an incident of domestic violence, rape, sexual assault, or stalking, or reporting a violation of an abuse prevention or anti-harassment order.

12. To convince a court that a landlord is not retaliating against you, your landlord will have to show that she would have brought this eviction case against you at the same time and for the same reasons, whether or not you engaged in the protected activities. *See* G.L. c. 186, §18 and G.L. c. 239, §2A. *But see Xiaobing Xin v. King*, 87 Mass. App. Ct.

1126 (2015) (Rule 1:28 decision) (where the court found that there is no presumption built in to the counterclaim for retaliation under G.L. c. 186, §18 where the tenancy has been terminated for nonpayment of rent.).

13. G.L. c. 151B, §4(10).

14. *Gnerre v. Massachusetts Commission Against Discrimination*, 402 Mass. 502 (1988)(tenants may establish discrimination in housing by demonstrating that a landlord subjected her to unsolicited sexual harassment which made the tenancy significantly less desirable to a reasonable person in the tenant's position.)

15. G.L. c. 239, §1 provides that the landlord "may recover possession" through court procedures if, among other things, her tenant "holds possession without right after the determination of a lease by its own limitation or by notice to quit or otherwise." The landlord does not have to give you a notice to quit if your lease has expired and she has not accepted any rent from you since the expiration of the lease, and she may not have to give you a notice to quit if she is trying to evict you under G.L. c. 139, §19 for using your home for illegal activities.

16. *Moylan v. Williams*, Boston Housing Ct., No. 09-SP-5006 (Muirhead, J., Jan. 12, 2010) (action dismissed despite failure to pay rent because notice to quit did not state such failure was grounds for notice); *Brown-Carriere v. Moore*, Boston Housing Ct., No. 14-SP-1267 (Muirhead, J, May 20, 2014) (where grounds in notice to quit and complaint were inconsistent, action must be dismissed).

17. The court can dismiss the eviction if the notice to quit gives the wrong address or does not clearly identify the portion of the property involved, particularly if there is no proof that it was served at the correct address. See *Media v. Diaz*, Boston Housing Ct., No. 14-SP-4345, (Muirhead, J., Nov. 20, 2014); *Jones v. Leach*, Boston Housing Court No. 10-SP-4586 (Muirhead, J., Dec. 29, 2010); *Dixon v. Myers and Young,* Boston Housing Court, No. 10-SP-1656 (Muirhead, J., June 4, 2010); *Coriano v. Espino,* Boston Housing Court, No. 07-SP-2157 (Muirhead, J., June 28, 2007).

    And: If the landlord's notice to quit has not terminated the tenancy of every individual who may have a tenancy interest, the action may be dismissed. See, e.g., *Hobbs v. Dixon,* Boston Housing Court, No. 07-SP-2071 (Muirhead, J., June 20, 2007); *Santana v. Brooks,* Boston Housing Court, No. 05-SP-00541 (Pierce, J., Apr. 14, 2005); *Smith v. MacDonald,* Boston Housing Court, No. 02-SP-05448 (Edwards, J., Mar. 11, 2003). Similarly, every individual with a tenancy interest should be named in the proceeding. Otherwise, there may be a motion to dismiss for failure to join a necessary party. *See* sample **Motion to Dismiss, Form 20**.

18. *Ashkenazy v. O'Neill*, 267 Mass. 143, 145 (1929) held that a notice left with the tenant's spouse "would furnish presumptive evidence that the defendant received the notice." It may be possible to rebut the presumption that the notice was actually received.

19. If you claim you did not get the notice, your landlord cannot rely merely on the fact that a constable left it at your last and usual place of abode. *Ryan v. Sylvester*, 358 Mass. 18 (1970). *See also Bakis v. Mroue*, Boston Housing Court, 07-SP-1679 (Muirhead, J., May 23, 2007); *Beacon v. Doe*, Boston Housing Court, 03-2551 (Winik, J., July 15, 2003).

20. G.L. c. 186, §§11 and 12.

21. G.L. c. 186, §15A.

22. If you have a lease, although a notice to quit does not have to inform you of your right to cure, a judge may dismiss an eviction case if a landlord sends a notice that misstates your right to cure. *Springfield II Investors v. Anita Marchena,* Hampden Housing Court, 89-SP-1342-S (Abrashkin, J., Jan. 4, 1999). In *Springfield*, the court dismissed a summary process action brought against a tenant under a lease for non-payment of rent where the landlord served the tenant with a notice to quit that contained right to cure language appropriate to a tenancy at will (i.e., one cure as of right in a 12-month period and tender of cure required within 10 days of receipt of the notice). The tenant did not claim that she was misled or prejudiced by the failure to provide the cure rights under G.L. c. 186, §11 for lease tenancies. Citing *Oakes v. Munroe*, 62 Mass. 282 (1851) and *Maguire v. Haddad*, 325 Mass. 590 (1950), the court noted that "the standard applied . . . is not whether the tenant was misled to his prejudice but whether the notice conforms with the statute and is sufficiently clear, accurate, and certain so that it cannot reasonably be misunderstood." Based on this standard, the court held that the notice was facially defective and could not form the basis for a summary process action.

23. G.L. c. 186, §12.

24. A claim for rent at the higher amount may also be an unfair or deceptive practice in violation of the Consumer Protection Act, G.L. c. 93A. *See Small d/b/a The Apartment Co. v. Gonzales, et al.*, Hampden Housing Court, SP-6412-S-85 (Peck, Jr., J., July 29, 1985).

25. *Williams v. Seder*, 306 Mass. 134, 137 (1940).

26. Your landlord is allowed to file an eviction in court up to 30 days before the end of your lease if your lease covers a period of at least 6 months. G.L. c. 239, §1A. (This provision was passed at the insistence of landlords with seasonal rentals who feared that the other provisions of the law that outlawed self-help evictions would make it harder for them to get rid of low-income tenants before the beginning of the high-rent season. But there is nothing explicit in G.L. c. 239, §1A that limits its use to those situations.) A landlord must also show a court that there is a likelihood you will stay in the apartment beyond the end of your lease. If a court gives the landlord permission to evict you, the landlord cannot evict you until the day after your lease ends. Before that date, you have a right to ask a judge to delay the eviction. G.L. c. 239, §1A. *See* the section in this chapter called **Delaying the Eviction**.

27. *English v. Moore,* Boston Housing Court, SP-43972 (Daher, C.J., July 10, 1987); *Thomas v. Pelletier,* Hampden Housing Court, SP2006-S87 (Abrashkin, J., May 23, 1987), *citing McGuire v. Haddad*, 325 Mass. 590 (1950). Similarly, a landlord should not be permitted to send both a rental period notice alleging tenant fault and a 14-day notice for non-payment of rent in the hope that she can preclude the tenant from raising conditions defenses under G.L. c. 239, §8A. *See Nichiniello v. Akerly,* Somerville Dist. Ct., CV-910 (Coven, J., Oct. 30, 1990) (by sending 14-day notice, landlord must forgo right to proceed on 30-day notice and may proceed solely on landlord's non-payment claims, thereby allowing tenant to raise G.L. c. 239, §8A defenses).

28. *See Sukhorukova v. Farmer*, Western Division Housing Court, No. 10-SP-2501 (Fields, J., July 19, 2010).

29. A notice to quit for nonpayment of rent that includes both rent due and late payment charges may be defective, since the late payment charges are not rent and cannot be pursued in a summary process action. *See* G.L. c. 239, § 2 (owner's claims limited to those for possession and rent or use and occupancy); *Deep v. Tatro*, Western Housing Court, No. 08-SP-2658 (Fein, J., Nov. 17, 2008); *see also Hackett v. Smith*, Boston Housing Ct., No. 14-SP-1109 (Muirhead, J., Apr. 11, 2014) (finding that water usage and mailbox replacement fees could not serve as grounds for terminating a tenancy when served as a notice to quit for nonpayment of rent). Moreover, late payment charges can be recovered only if there is a written agreement providing for them and the rent is more than 30 days overdue. *See* G.L. c. 186, § 15B(1)(c); *Harris v. Wilson*, Boston Housing Ct., 09-SP-0177 (Muirhead, J., Jan. 28, 2009) (plaintiff not entitled to late fees because there was no written agreement). The unlawful assessment of late payment charges may lead to liability under G.L. c. 93A. *See Halabi v. Suriel*, Boston Housing Court, No. 09-SP-3931 (Muirhead, J., Oct. 19, 2009).

30. G.L. c. 186, §12.

31. G.L. c. 186, §12.

32. If the owner fails to state the statutory cure rights within the 14-day notice to quit received by a tenant-at-will, the statute provides that the tenant's opportunity to cure is extended to the answer date (without any requirement for tendering interest or costs of suit). See, e.g., *Olivier v. McFarlane,* Boston Housing Court, No. 09-SP-0032 (Muirhead, J., Jan. 20, 2009) (lack of language in notice about cure rights affects not notice's validity, but time for tenant to cure; since tenant did cure prior to entry of action, eviction must be dismissed).

33. G.L. c. 186, §12.

34. *U-Dryvit Auto Rental Co. v. Shaw*, 319 Mass. 684, 685 (1946); *Connors v. Wick*, 317 Mass. 628, 630-631 (1945); *Prescott v. Elm*, 61 Mass. 346, 347 (1851). Although, typically, rent is due on the first of each month, you and your landlord may have agreed on a different "rent day." If there was no agreement on a specific rent day, the rent day is considered to be the last day of the month. *Connors v. Wick*, 317 Mass. 628, 631 (1945). If a landlord files an eviction action in court, it will be her burden to prove that the notice terminated your tenancy on a rent day. *Connors v. Wick*, 317 Mass. 628, 631 (1945).

35. *Connors v. Wick*, 317 Mass. 628, 631 (1945).

36. *U-Dryvit Auto Rental Co. v. Shaw*, 319 Mass. 684, 685 (1946).

37. February is a special case because it has only 28 days. You must receive a notice to quit on or before Jan. 30 to terminate your tenancy on March 1st. There is some support for counting the day of service. *See Callahan v. John Hancock Mutual Life Ins. Co.*, 331 Mass. 552, 554 (1954); *Lawrence v. Commissioners*, 318 Mass. 520, 525 (1945) ("a thing done at any time in a day is taken the same as though it had been done in the first minute of the day"); "Fundamentals of Residential Real Estate," *MCLE*, vol. 85-47 (1985), pp. 463-464. *See also Hodgkins v. Price*, 137 Mass. 13, 17 (1884) (day of receipt counted as first day of 14-day period for non-payment notice).

38. G.L. c. 186, §15A.

39. G.L. c. 139, §19.

40. 1985 Mass. Acts 421, §3. The law covers certain behaviors by certain people. The behavior of guests is not always covered by the law, and the court should dismiss cases brought under G.L. c. 139, §19 if they address guest, rather than household member behavior.

41. In *Bennett v. Dean*, Boston Housing Court, 27618 (Daher, C.J., Sept. 20, 1989), Chief Judge Daher held that the statute would be unconstitutional if it authorized evictions without any process of law, stating: "This Court has to interpret G.L. c. 139, §19 in light of the present day constitutional requirement of due process. It was the Legislature's determination that anyone violating G.L. c. 139, §19, be deemed a trespasser. But an occupant has a right to be heard before being deemed a trespasser. 'The fundamental requisite of due process is the opportunity to be heard.'" The general prohibition against self-help eviction found in G.L. c. 184, §18 provides further evidence that the landlord's right of entry under G.L. c. 139, §19 does not include the right to forcibly eject the tenant without court process. G.L. c. 184, §18 itself distinguishes "entry" from ejection. It prohibits a landlord's entry "except in cases where his entry is allowed by law[,]" but goes on to prohibit any "attempt to recover possession of land or tenements in any manner other than through an action brought pursuant to chapter two hundred and thirty-nine [summary process] or such other proceedings authorized by law." Although it could be argued that G.L. c. 139, §19 provides a case in which "entry" is allowed by law, the actual ejectment of a tenant cannot take place without court process.

42. The statute, G.L. c. 139, §19, provides, in relevant part, that "such use [of the apartment for illegal activity] shall, at the election of the lessor or owner, annul and make void the lease or other title under which such tenant or occupant holds possession and, without any act of the lessor or owner shall cause the right of possession to revert and vest in him, and the lessor or owner may seek an order requiring the tenant to vacate the premises or may avail himself of the remedy provided in chapter two hundred and thirty-nine."

43. In *New Bedford Housing Authority v. Olan*, 435 Mass. 364 (2001), the Supreme Judicial Court held that a public housing tenant being evicted under G.L. c. 139, §19 has a right to a jury trial and to discovery.

44. Cases in which injunctions have been issued include: *Morris v. Davis*, Boston Housing Court, 05-00192 (Winik, J., Apr. 6, 2005); *Boston Housing Authority v. Coleman*, Boston Housing Court, 99-CV-01130 (Daher, C.J., Nov. 22, 1999); *Wingate Management Co., Inc. v. Pikovsky,* Boston Housing Court, 29705 (Daher, C.J., Dec. 28, 1990) (issuing injunction against drug-dealing husband, but not his wife); *Boston Housing Authority v. McDonald,* Boston Housing Court, 24666 (Daher, C.J., Aug. 9, 1989); *Reserve Realty Corp. v. Cooper*, Boston Housing Court, 27243 (Daher, C.J., Aug. 3, 1989) (enjoining tenant's son from entering or residing at his father's residence, but allowing father to retain tenancy).

    While it may be difficult to challenge the use of injunctions against specific individuals and for specific acts where the summary process laws are not sufficient to eliminate a danger to the community, many questions can be raised about the appropriate remedy in any specific case. Although in *McDonald* drugs were found in the tenant's apartment, it was not clear from the record that the tenant was charged with a criminal offense. Her apartment was apparently being used by others. Advocates need to ask, if the tenant was not, in fact, dealing drugs, why was it necessary to obtain an emergency injunction against her and why wouldn't the summary process procedure have provided the landlord with an adequate remedy? Injunctions can be granted only if certain requirements are met. Most importantly, the landlord must be able to show that there is no other adequate legal remedy available to her.

See, e.g., *Conlon v. Teamsters*, 409 F. Supp. 1165, 1167 (D. Mass. 1976). Since the landlord can always use the ordinary eviction process, she should not be able to get an injunction unless she can show that the ordinary eviction process is inadequate. In addition, the landlord must meet the other requirements for getting an injunction. In order to get an injunction, the landlord must show:

1) Threat to the landlord of irreparable harm if the injunction is denied;
2) Landlord's likelihood of success on the merits of the case;
3) That risk of harm to the landlord outweighs threatened harm to the defendant; and
4) That the public interest will be better served by issuing the injunction than by denying it.

See Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 615-17 (1980).

45. The Hampden County Housing Court has held that evidence seized without a warrant may be suppressed in a civil action. *Hollywood Park Assoc. v. Elsa Morales,* Hampden Housing Court, 89-SP-1176-S (Abrashkin, J., Mar. 21, 1990). *See also Boston Housing Authority v. Andrews*, Boston Housing Court, 05-SP-01781 (Pierce, C.J., Feb. 28, 2006). However, it may be necessary to bring a pretrial motion *in limine* to suppress such evidence. *Hollywood Park Assoc. v. Anne Marie Diaz,* Hampden Housing Court, 90-SP-0078-S (Abrashkin, J., Mar. 1, 1990). Evidence obtained pursuant to a no-knock warrant may also be suppressed where a court finds no basis for the no-knock warrant. *Caribe Management Corp v. Serrano*, Hampden Housing Court, 90-SP-2872 (Abrashkin, J., Jan. 4, 1991).

46. *Reserve Realty Corp. v. Cooper,* Boston Housing Court, 27243 (Daher, C.J., Aug. 3, 1989). In *Reserve Realty*, an owner sought to have a tenant family declared trespassers under G.L. c. 139, §19, alleging that police seized 58 grams of cocaine and $4,400 in cash from the son. The tenant father argued that he had no knowledge of his son's activities and that the family should not be penalized. The court allowed the family to stay but entered an injunction barring the son from the premises. *See also Wingate Management Co., Inc. v. Pikovsky,* Boston Housing Court, 29705 (Daher, C.J., Dec. 28, 1990) (court issued permanent injunction against husband based on his drug activity but denied injunction against wife, finding that, although she knew about husband's drug activity, she was not responsible for his illegal activity and was in fear of him).

47. *See New Bedford Housing Authority v. Olan*, 435 Mass. 364 (2001), in which the Supreme Judicial Court noted in footnote 8 that there is an "apparent conflict in the provision of [G.L. c. 139,] §19 stating that an execution for possession may issue with a preliminary injunction. An execution issues after a final judgment, whereas a preliminary injunction is an interlocutory order."

48. *See Patti v. White*, Boston Housing Court, No. 11-SP-2116 (Pierce, C.J., Dec. 27, 2011) (costs of missing trash containers and removal of personal property stricken); *Deep v. Tremblay*, Western Housing Court, No. 10-SP-4716 (Fields, J., Apr. 15, 2011) *upheld without addressing specific issue*, 81 Mass. App. Ct. 1131 (2012, Rule 1:28) (late fees); *Alzamora v. Voguenel*, Boston Housing Court No. 06-SP-3517 (Edwards, J., Nov. 15, 2006); *Miguel v. Veenstra*, Southeast Housing Court, No. 05-SP-3364 (Edwards, J., Dec. 9, 2005); *Hackett v. Smith*, Boston Housing Court, No. 14-SP-1109 (Muirhead, J., Apr. 11, 2014) (mailbox replacement and additional water usage).

49. G.L. c. 186, §11.

50. G.L. c. 186, §12.

51. G.L. c. 186, §12.

52. *Mastrullo v. Ryan*, 328 Mass. 621, 624 (1952); *Jones v. Webb*, 320 Mass. 702, 705 (1947); *Collins v. Canty*, 60 Mass. 415 (1850).

53. *Whitehouse Restaurant, Inc. v. Hoffman*, 320 Mass. 183, 186-87 (1946).

54. *Roseman v. Day*, 345 Mass. 93 (1962) (applying the rule to business lease).

55. *Slater v. Krinsky*, 11 Mass. App. Ct. 941, 942 (1981) (*rescript*).

56. G.L. c. 186, §§11, 12.

57. Mass. R. Civ. P. 14.; *Loring Towers Assocs. v. Furtick*, 85 Mass. App. Ct. 142, review denied, 468 Mass. 1107 (2014).

58. Mass. R. Civ. P. 12(b). The most common ground is that the court lacks jurisdiction or power to decide the case. Mass. R. Civ. P. 12(b)(1). Jurisdiction in summary process is limited by statute to cases in which the defendant is in possession of the premises "unlawfully against the right of the plaintiff." G.L. c. 239, §2. If the tenancy has not been "terminated" properly, the tenant is not in unlawful possession and the courts lack jurisdiction.

59. The rules for eviction cases in court are the Uniform Summary Process Rules (U.S.P.R.), which are reprinted at the end of this book.

60. U.S.P.R. 6.

61. U.S.P.R. 6.

62. If the tenant files a demand for discovery, the trial date will automatically be postponed for two weeks. The motion to dismiss, however, will be heard on the original trial date.

63. G.L. c. 239, §2 defines the court's jurisdiction in summary process and allows the landlord only to recover possession of the premises, rent, and/or use and occupation. "Summary process is a purely statutory procedure and can be maintained only in the instances specifically provided for in the statute." *Cummings v. Wajda*, 325 Mass. 242, 243 (1950).

64. The rules for eviction cases in court are the Uniform Summary Process Rules (U.S.P.R.), which are reprinted at the end of this book.

65. U.S.P.R. 2(c) specifies Thursdays as the day for summary process cases, but some courts also schedule summary process cases for other days of the week. Other days may also be used for eviction cases. Check with your court.

66. U.S.P.R. 2(d). The reason should be stated in the complaint form following the words "unlawfully and against the right of said landlord/owner because." Mass. R. Civ. P. 12(b)(6). *See also* the commentary to U.S.P.R. 2(d).

67. G.L. c. 239, §1.

68. Mass. R. Civ. P. 4(c); U.S.P.R. 2(b). *See also* G.L. c. 220, §7.

69. *See* G.L. c. 223, §31; U.S.P.R. 2(b).

70. U.S.P.R. 2(b).

71. Mass. R. Civ. P. 12(b)(5); *Inhabitants of Brewer v. Inhabitants of New Gloucester*, 14 Mass. 216 (1817); *Hart v. Huckins*, 6 Mass. 399 (1810). In fact, it is a crime to impersonate a constable, sheriff, or other authority. G.L. c. 268, §33. It might be worthwhile to check whether the constable's license has expired.

72. Whether a lease or a tenancy-at-will is involved, the grounds for eviction must be supported by the prior notice to quit. *See, e.g.*, *Everett v. Daily*, Boston Housing Court, No. 15-SP-2205 (Muirhead, J., June 17, 2015) (dismissal of case where the landlord claims a lease violation on the notice to quit but then relies on a summons and compliant that simply states that the tenant has not vacated after the expiration of the notice to quit); *Pine Grove Vill., Inc. v. Cardullo*, 2001 Mass. App. Div. 234 (2001) (incumbent on owner to establish that tenant committed the violations that were specifically identified and alleged in the notice to quit); *Charles v. Senatus*, Boston Housing Court, No. 11-SP-838 (Muirhead, J., Mar. 21, 2011) (inconsistent grounds in notice to quit and complaint); *Glover v. Blendman*, Boston Housing Court No. 99-SP-02315 (Winik, J., June 1, 1999) (where landlord originally served 14-day notice for nonpayment but summons referenced only late payment and illegal conduct and did not provide rental period notice, action could not proceed); *Kahaly v. Sinke*, Roxbury Dist. Court Summary Process No. 12164 (Martin, J., Nov. 25, 1987) (where landlord sent 14-day notice to quit for nonpayment but alleged both tenant fault and nonpayment in complaint, claims of fault barred because no rental period notice to quit sent).

73. The complaint may include a claim for unpaid rent/use and occupancy. *See* G.L. c. 239, §§ 2–3. Other items that are not rent (such as the unpaid portion of a security deposit, late fees, or costs for removal or replacement of property) cannot be included. *See Patti v. White*, Boston Housing Court, No. 11-SP-2116 (Pierce, C.J., Dec. 27, 2011) (costs of

missing trash containers and removal of personal property stricken); *Deep v. Tremblay*, Western Housing Court, No. 10-SP-4716 (Fields, J., Apr. 15, 2011) *upheld without addressing specific issue*, 81 Mass. App. Ct. 1131 (2012, Rule 1:28) (late fees); *Alzamora v. Voguenel*, Boston Housing Court No. 06-SP-3517 (Edwards, J., Nov. 15, 2006); *Miguel v. Veenstra*, Southeast Housing Court, No. 05-SP-3364 (Edwards, J., Dec. 9, 2005); *Hackett v. Smith*, Boston Housing Court, No. 14-SP-1109 (Muirhead, J., Apr. 11, 2014) (mailbox replacement and additional water usage). G.L. c. 239, §§ 2–3 makes no provision for recovery of attorney's fees in a summary process action. *See Avalon Bay Comm. Inc. v. Thomas*, Boston Housing Court No. 09-SP-2755 (Muirhead, J., Feb. 15, 2012) (rejecting a motion for attorney's fees because attorney's fees are not provided for in §§2–3, and because the fees were not listed in the complaint and the complaint was not amended).

74. Late filing is not permitted without the written assent of the defendant or the defendant's attorney. U.S.P.R. 2(e). *See also* District Court Bulletin, 2-89 (May 12, 1989). Note that Mass. R. Civ. P. 77(c), which requires clerks to file any papers offered, is inconsistent with U.S.P.R. 2 and therefore does not apply to summary process actions. U.S.P.R. 1.

75. *Spearhead Capital v. Rosado-Craig*, Boston Housing Court, No. 14-SP-4420 (Muirhead, J., Nov. 24, 2014); *Saxon Mortgage v. Johnson*, Boston Housing Court, No. 08-SP-319 ((Winik, J., Feb. 15, 2008).

76. Mass. R. Civ. P. 6(a).

77. U.S.P.R. 2(d).

78. U.S.P.R. 3 requires that the answer date be the Monday after the entry date. Note that filing by mail is not complete until it is received. Courts also have the discretion to allow the late filing of answers, as allowed in U.S.P.R. 10(a) and otherwise. Under U.S.P.R. 3, answer forms must be made available from the court.

79. As described in U.S.P.R. 2(c), the trial is scheduled for the second Thursday after the entry date (although courts are permitted to schedule trials for other days as well).

80. U.S.P.R. 7(b).

81. Mass. R. Civ. P. 40. You may also file with the court a written motion for a continuance requesting that the trial be postponed. You should include an affidavit (sworn statement) stating the reasons for the postponement. If you are unable to obtain a continuance and you are "defaulted," you should file a motion to remove the default.

82. G.L. c. 185C, §20. Housing courts have full equitable powers and the same powers as a superior court. Although district courts generally do not have equitable powers, they are given full equitable powers in summary process cases. G.L. c. 218, §19; G.L. c. 185C, §3. In housing court, you have a right to a jury trial. U.S.P.R. 8. A jury trial must be requested when the transfer form is filed.

83. *See generally* G.L. c. 185C.

84. U.S.P.R. 4. If the case has been postponed for 2 weeks in the district court because discovery was filed, the case can still be transferred the day before the rescheduled trial date.

85. U.S.P.R. 4 requires that the case be scheduled "forthwith." In practice, the transfer may add 2 weeks or more of delay. Check with your local housing court to see whether your case will be rescheduled.

86. U.S.P.R. 3.

87. The answer form included at the end of this book is generally more useful than the form supplied by the court because it includes all of the most commonly used defenses and counterclaims and has complete instructions for its use.

88. If the court fails to notice the jury demand and neither party brings it to the court's attention until after the trial is completed or significantly underway, it may be deemed waived. *See, e.g.*, *Sicard v. Haley*, Boston Housing Court, No. 09-SP-1393 (Muirhead, J., May 19, 2009).

89. Where ongoing rent is not being paid or there is a significant arrearage, a landlord may request that the court enter an order that rent in arrears be escrowed or paid into court and that the tenant be required to pay for current use and occupancy pending the jury trial. If such an order is entered and the tenant does not comply, the court may order that the right to jury trial is waived. *See Chandler v. Johnson*, 78 Mass. App. Ct. 1120 (2011) (Rule 1:28 opinion; text available at 2011 WL 103596); *Wingate Mgmt. v. Taranov*, Boston Housing Court, No. 08-SP-4466 (Muirhead, J., Feb. 20, 2009); *Cushing Constr. Mgmt. v. Weiner*, Boston Housing Court, No. 06-SP-4201 (Edwards, J., Dec. 21, 2006).

90. Conditions of disrepair in the property may be considered in establishing the fair rental value. *See Federal Home Loan Mortgage Corporation v. Young*, Boston Housing Court, No. 12-SP-3801 (Winik, J., Oct. 4, 2013).

91. Mass. R. Civ. P. 6(a).

92. U.S.P.R. 10(a).

93. U.S.P.R. 10(c).

94. U.S.P.R. 10(e).

95. U.S.P.R. 10(b).

96. U.S.P.R. 10(a) and (b).

97. U.S.P.R. 7.

98. U.S.P.R. 7(b).

99. U.S.P.R. 7(c). Note that if discovery is being objected to, the motion for a protective order must be filed within 5 days of the discovery request.

100. U.S.P.R. 7(d).

101. U.S.P.R. 7(e).

102. A report so signed is admissible in evidence without the need to have the inspector present, and is prima facie evidence that the conditions stated in the report exist. G.L. c. 239, §8A. The Board of Health is required to provide this certification on every inspection report. 105 C.M.R. §410.821(A)(8). Note that where a landlord fails to appeal an order of the Board of Health under the administrative appeal process set forth by the state Sanitary Code, the Board's decision becomes final and the landlord is barred from collaterally attacking the decision in a subsequent court action. *Lezberg v. Rogers*, 27 Mass. App. Ct. 1158 (1989).

103. Try to state these questions in a way that would require your landlord to answer in short (preferably "yes" or "no") answers that are helpful to your case. For example, if you are claiming that your landlord is evicting you because you called the Board of Health, you might want to ask (among other things): "You didn't start this eviction until after I called the Board of Health, did you?" rather than "Why are you evicting me?"

104. You may require people to appear, testify, and bring evidence to court by using a subpoena. Mass. R. Civ. P. 45. Anyone can serve a subpoena, but you must serve it according to state law. You can also have a constable serve a subpoena and seek court payment of the cost if you think you may qualify for low-income assistance by filing an **Affidavit of Indigency (Booklet 9)**.

105. The Housing Court can grant equitable relief to enforce the State Sanitary Code prior to trial. *Ciancio v. Ciancio*, Boston Housing Court, No. 15-SP-1555 (Dalton, J., May 7, 2015).

106. G.L. c. 233, §23C. *See also* Supreme Judicial Court Rules, Rule 1:18 Uniform Rules on Dispute Resolution, adopted May 1, 1998, Rule 9(h), about confidentiality.

107. Supreme Judicial Court Rules, Rule 1:18 Uniform Rules on Dispute Resolution, adopted May 1, 1998, Rule 6(i), provides that "[i]n dispute intervention, in cases in which one or more of the parties is not represented by counsel, a neutral [mediator, housing specialist, clerk magistrate] has a responsibility, while maintaining impartiality, to raise

questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case."

108. *Boston Hous. Auth. v. Cassio*, 428 Mass. 112 (1998); *Thibbitts v. Crowley*, 405 Mass. 222 (1989); *but see J.M. Realty Mgmt. v. Espino*, Boston Housing Court, No. 12-SP-4921 (Pierce, C.J., Mar. 13, 2013) (court vacated an agreement where it found that there was no consideration and the tenant gained nothing in exchange for agreeing to move out).

109. If you have filed a motion to dismiss that is to be heard on the trial date, you should remind the judge of this. Since this is a "pre-trial" motion, it would be heard before the landlord begins her case. Also, since you would be the "moving party," you would speak first.

110. U.S.P.R. 10(d).

111. Mass. R. Civ. P. 6

112. Your landlord must file her notice to quit with the summons and complaint. U.S.P.R. 2(d).

113. *Williams v. Seder*, 306 Mass. 134, 137 (1940).

114. U.S.P.R. 2(d) commentary. *See* endnote 65. Although tenants at will can be evicted for no cause, the complaint should at least allege that a valid notice to quit has expired.

115. G.L. c. 239, §8A.

116. G.L. c. 239, §8A. No cases have specifically dealt with the definition of an "occupant" under the statute, but it apparently includes those who may not fit a strict definition of "tenant."

117. A landlord who sends only a 14-day notice for non-payment of rent cannot rely on any allegations of tenant fault since she would have been required to send a 30-day notice for fault-based eviction. *Kahaly v. Sinke*, Roxbury District Court, 12164 (Martin, Jr., J., Nov. 25, 1987).

118. G.L. c. 239, §8A allows a tenant or occupant to base a defense or counterclaim on **any** claim against the landlord that relates to the property, rental, tenancy, or occupancy. It is therefore possible to defend against a non-payment or no-fault eviction whenever your landlord has violated any term of your tenancy agreement, breached the warranty of habitability, or violated any relevant law or regulation. If the tenant's defense or counterclaim is based on the condition of the premises or services provided, the tenant must comply with the specific requirements specified in G.L. c. 239, §8A.

119. G.L. c. 239, §8A, ¶3 makes inspection reports prima facie evidence that a defense and counterclaim exist.

120. G.L. c. 239, §8A. The Board of Health is required to provide this certification on its inspection report. 105 C.M.R. §410.821(A)(8).

121. *McKenna v. Begin*, 3 Mass. App. Ct. 168 (1975).

122. G.L. c. 239, §8A.

123. G.L. c. 239, §2A as amended by St. 1978, c. 149. This amendment added the requirement that the presumption of retaliation can be overcome only if the landlord presents "clear and convincing evidence."

The second part of this standard is often overlooked by the courts, but is very important, especially for tenants at will in a "no-fault" eviction, since it requires the landlord to prove a legitimate reason for the eviction. It is also important in cases where the tenant is "at fault." (For example, if your landlord claims that she is evicting you because you have a pet in violation of your tenancy agreement, but your landlord has known about the pet for a long time and didn't bring the eviction until you engaged in some protected activity, it would be very difficult for her to overcome the presumption of retaliation because she could have previously evicted you for the given reason.) *See Collin v. Eldridge*, Worcester Superior Court, 28794 (Oct. 23, 1984); *Michel v. Monfiston*, Boston Housing Court, 06-

SP-1613 (Winik, J., June 21, 2006); *Genovevo v. Gallagher*, Hampden Housing Court, 94-SP-4371 (Abrashkin, J., May 17, 1995); *Walker v. Lewis*, Boston Housing Court, No. 14-SP-5223 (Muirhead, J., Feb. 4, 2015). But see *Barretto-Morse v. Laiacona*, 2014 Mass. App. Div. 141 (2014) (court finds that where the tenant made a complaint about poor housing conditions after receiving a 14 day notice to quit that tenant may not be entitled to a retaliation defense).

The retaliation defense under G.L. c. 239, §2A applies to all eviction cases, including non-payment of rent cases. *Compare* G.L. c. 186, §18 (sending notice to quit for non-payment of rent does not trigger presumption of retaliation). You may be able to use this defense successfully in a non-payment case where the landlord sent a notice to quit for non-payment shortly after your rent was due and within 6 months of your engaging in protected activities. Your claim would be stronger if your landlord usually waits a month or two for late rent before sending non-payment notices.

124. *Stone Run East Assocs. v. McDonald and Harrison*, Quincy District Court, E-88-0002, E-88-0003 (Sept. 19, 1988). In *Stone Run*, a handicapped tenant raised a discrimination defense in an eviction brought by a landlord because the tenant allegedly interfered with the rights of other tenants and permitted unauthorized occupants to reside in the apartment in violation of the lease. The court rejected the landlord's claim that G.L. c. 239, §8A precluded the tenant's defenses in a fault-based eviction, holding that "the court cannot be in a position to assist a landlord in pursuing a discriminatory eviction. For purposes of this motion I must assume that there has been discrimination. If the defendant is able to establish that discrimination is the motive underlying the termination of the tenancy then it should be a bar to the action."

125. *See* **Chapter 7: Discrimination**, for citations to federal and state laws that prohibit discrimination on the basis of handicap.

126. Discrimination, or failure to reasonably accommodate a tenant with a disability, may be raised as an affirmative defense to eviction and as a counterclaim. *See Boston Hous. Auth. v. Bridgewaters*, 452 Mass. 833 (2009); *Andover Hous. Auth. v. Shkolnik*, 443 Mass. 300 (2005); *City Wide Assocs. v. Penfield*, 409 Mass. 140 (1991); *Whittier Terrace Assocs. v. Hampshire*, 26 Mass. App. Ct. 1020 (1989). *But see FNHMC v. Gomez*, Boston Housing Court, No. 12-SP-1497 (Winik, F.J., June 23, 2014) (a request for below market rent as an accommodation for a disabled person who is unable to work is not reasonable, unlike a situation where such a tenant obtained a subsidy which would assist her in paying the market rent).

127. *City Wide Assocs. v. Penfield*, 409 Mass. 140 (1991) (mentally handicapped tenant who caused damage to unit could not be evicted without reasonable accommodations). *See also Sears v. Colson*, Hampden Housing Court, 93-SP-3174 (Abrashkin, J., Jan. 12, 1993); *Worcester Housing Authority v. Santis*, Worcester Housing Court, 89-SP-0471 (Martin, J., Nov. 7, 1989).

128. *Whittier Terrace Assocs. v. Hampshire*, 26 Mass. App. Ct. 1020, 532 (1989) (*rescript*).

129. *Lengieza v. Popko*, 84-SPR-0058 (MCAD, 1985) (probable cause finding); *Dupont v. White*, 82-WPR-0052 (MCAD, 1983) (probable cause finding).

130. *See East Boston Three Realty Trust v. Piantedosi*, Boston Housing Court, 35497 (Martin, J., July 15, 1985); *McDonagh v. Wible*, Boston Housing Court, 36012 (Martin, J., July 12, 1985).

131. G.L. c. 186, §15F.

132. G.L. c. 93A and the Attorney General's regulations promulgated thereunder prohibit oppressive or unconscionable acts and practices by landlords. This presumably includes insisting on terms that are oppressive or unconscionable. In *Commonwealth v. DeCotis*, 366 Mass. 234 (1974), the Supreme Judicial Court disallowed certain resale fees being charged by mobile home park owners. One of the standards used was the unconscionability provision of the Uniform Commercial Code (UCC): "That provision of the Uniform Commercial Code which permits a court to refuse to enforce a contract or a contract provision which is unconscionable, provides a reasonable analogy here." UCC, G.L. c. 106, §2-302(1), provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." For an overview of this problem and arguments supporting the extension of the UCC, *see* Note, *The Tenant as a Consumer*, 3 U.C. Davis L. Rev. 59 (1971). For a case

holding that a lease is a "good" under the UCC, *see Silverman v. Alcoa Plaza Assocs.*, 37 App. Div. 2d 166, 323 N.Y.S.2d 39 (1971).

Another approach is to analyze unfair leases or clauses as "contracts of adhesion." Contracts of adhesion have been defined as "agreements in which one party's participation consists of his mere 'adherence,' unwillingly and often unknowingly, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise." Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 Colum. L. Rev. 1072, 1075 (1953). The closest a Massachusetts court has come to this view is to say that since the landlord has dictated the terms of the lease, any doubts about restrictive lease terms, whose scope and effect are not clear, will be resolved in favor of the tenants. *Mutual Paper Co. v. Hoague-Sprague Corp.*, 297 Mass. 294 (1937).

133. *Porter v. Merrill*, 124 Mass. 534, 541 (1878).

134. *Paeff v. Hawkins-Washington Realty*, 320 Mass. 144, 145 (1946); *Saxeney v. Panis*, 239 Mass. 207, 210 (1921); *Nelson Theater Co. v. Nelson*, 216 Mass. 30, 34 (1913); *Anderson v. Lissandri*, 19 Mass. App. Ct. 191, 196 (1985); *Roberts Milford Assocs. & Rolling Green Management v. Weaver*, Worcester Superior Court, 84-29046 (Travers, Jr., J., Mar. 5, 1985); *Allen Park Assocs. v. Lewandowski*, Hampden Housing Court, 99-RD-9400-9 (Abrashkin, J., May 8, 1989) (landlord accepted rent from tenant for several years while knowing tenant owned a dog, did not object, and allowed other tenants to keep pets without objection; landlord has waived objection to tenant's dog despite a no-pet clause in lease); *Cardaropoli v. Panagos*, Hampden Housing Court, SP-3144-S-84 (Peck, Jr., J., June 4, 1984).

135. Evidence of oral consent would generally not be admissible if it took place before or at the time of the signing of a written lease.

136. *See M.J.G. Properties v. Hurley*, 27 Mass. App. Ct. 250 (1989); *Tage II v. Ducas (U.S.) Realty Corp.*, 17 Mass. App. Ct. 664 (1984).

137. *London v. Tebo*, 246 Mass. 360, 362-63 (1923) (acceptance of rent does not waive landlord's right to terminate for a continuing breach, which here was the tenant's covenant to repair); *Corcoran Management Co. v. Withers*, 24 Mass. App. Ct. 736 (1987) (landlord's acceptance of rent without reservation of rights did not establish new tenancy where tenant had received numerous notices from landlord that his conduct was considered to be in violation of lease and where tenant signed agreement that provided that acceptance of rent for use and occupation shall not be deemed as a waiver).

138. *Roseman v. Day*, 345 Mass. 93 (1962); *Globe Leather & Shoe Findings, Inc. v. Golburgh*, 339 Mass. 380 (1959) (renewal of month-to-month tenancy by acceptance of rent); *Mulcahy & Dean, Inc. v. Hanley*, 332 Mass. 232, 235 (1955) (sublet breach); *Kaplan v. Flynn*, 255 Mass. 127 (1926) (renewal equitably blocks forfeiture of lease); *CMJ Management Co. v. Paris*, Boston Housing Court, 96-03148 (Winik, J., Nov. 22, 1996); *Cardaropoli v. Panagos*, Hampden Housing Court, SP-3144-S-84 (Peck, Jr., J., June 4, 1984).

139. *Mulcahy & Dean, Inc. v. Hanley*, 332 Mass. 232, 236 (1955) (sublet breach).

140. *Howard D. Johnson Co. v. Madigan*, 361 Mass. 454 (1972); *Atkins v. Chilson*, 52 Mass. 112 (1846); *Goldstein v. Tarantino*, Norfolk Superior Court, 85-69 (Elam, J., July 3, 1985); *Boston Housing Authority v. Bridgewaters*, 452 Mass. 833 (2009).

141. *April v. Abel*, Quincy District Court, E-3962 (Whitman, J., 1987) (landlord's motion to substitute purchasing landlord for selling landlord in pending summary process action denied where building was sold after entry of action but prior to hearing on the merits). Mass. R. Civ. P. 25 does not allow for substitution unless the seller assigns the overdue rents to the buyer.

142. *LaPierre v. Riel*, Worcester Housing Court, 86-SP-0170 (Martin, J., Mar. 7, 1986) (new owner has no right to the judgment or execution where selling landlord did not transfer or assign the judgment and right to the execution to the new owner prior to or contemporaneous with the sale of the property; former owner cannot regain possession in which he has no interest). *But see Poutahidis v. Clingan*, 2001 Mass. App. Div. 217 (notice to quit given by plaintiff's predecessor in title terminated tenancy, and occupant was a tenant at sufferance when plaintiff purchased the property).

143. *Shah v. Shenett*, Boston Housing Court, 98-SP-3811 (Daher, C.J., Feb. 4, 1999) (landlord's claim for possession denied where premises had been conveyed prior to time of decision).

144. G.L. c. 239, §8A. This is a very broad-based defense and includes Sanitary Code violations, breach of the warranty of habitability, breach of any material term of the rental agreement, or any violation of law related to the tenancy, such as a breach of quiet enjoyment or violation of the security deposit requirements. *See Meikle v. Nurse*, 474 Mass. 207 (2015); *Lawrence v. Osuaqwu*, 57 Mass. App. Ct. 60 (2001); *Amory Realty Trust v. Diaz*, Boston Housing Court, 33820 (King, J., May 31, 1985).

145. Interference with quiet enjoyment, under G.L. c. 186, §14, includes: failure to provide utilities required by the law or the rental agreement; cutting off tenant's utilities; transferring responsibility of payment for utilities to tenant without tenant's knowledge or consent; moving tenant out or changing the locks without a court order; requiring tenant to pay for heat or hot water without a written agreement that tenant would do this; interfering with tenant's ability to enjoy the home in any other way.

146. *Cheuk v. Chase*, No. 03-SP-02369 (Boston Housing Ct. (Winik, J., July 8, 2003); *Cruz Management v. Celado*, Boston Housing Court, No. 09-SP-2567 (Winik, J., Aug. 19, 2009); *Father Martin Cooperative Homes v. Berry*, Boston Housing Court, No. 02-SP-00248 (Edwards, J., Oct. 15, 2002); *Diletizia v. Mackie*, Boston Housing Court, No. 01-SP-05825 (Winik, J., Jan. 4, 2002); *The Community Builders, Inc. v. Scarcella*, Boston Housing Court, No. 11-SP-1756 (Muirhead, J July 20, 2011) (exclusion of wrongdoing household member would have been sufficient if court could rely on such exclusion); *Chicopee Housing Authority v. Maldonado*, Hampden Housing Court, No. SP-2682-C87 (Abrashkin, J., May 27, 1987) *Rogerson House, Inc. v. O'Brien*, Boston Housing Court, SP No. 33105 (Nov. 5, 1984); *Maloney Props., Inc. v. Simon*, Boston Housing Court, No. 96-SP-00174 (Winik, J., May 24, 1996); *Benchmark Apartment Management v. Williams*, Boston Housing Court, No. 96-SP-02621 (Winik, J., June 3, 1996).

147. G.L. c. 239, §8A.

148. *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184 (1973).

149. *Haddad v. Gonzalez*, 410 Mass. 855, 872-73 (1991).

150. G.L. c. 186, § 14. *See, e.g.*, *Bermudez v. Anderson*, Boston Housing Court, No. 12-SP-3505 (Muirhead, J., Apr. 5, 2013)

151. G.L. c. 186, §14; *Shea v. Delaney*, 2016 Mass. App. Div. 68 (it was a breach of quiet enjoyment for the landlord to enter the property without notice or permission and remove furniture belonging to the landlord and an award of $15,675.75 were not excessive.) *But see Clark v. Leisure Woods Estates, Inc.*, 89 Mass. App. Ct. 87 (2016) (manufactured home residents could recover only one triple rent award for operator's quiet enjoyment violations.)

152. G.L. c. 186, §14. These damages can be lessened by a set-off claim by your landlord for rent due. *Simon v. Solomon*, 385 Mass. 91 (1982). In order for you to recover under G.L. c. 186, §14, the landlord does not have to intentionally try to disturb you; it is her conduct and not her intentions that is controlling. *Blackett v. Olanoff*, 371 Mass. 714 (1977). For example, the fact that an owner failed to provide heat because she could not afford to buy heating oil does not diminish the tenant's right to recover for the loss of "quiet enjoyment" that occurred during the time the apartment was unheated. *Lowery v. Robinson*, 13 Mass. App. Ct. 982 (1982). *See also Homesavers Council of Greenfield Gardens v. Sanchez*, 70 Mass. App. Ct. 453 (2007), for a full discussion of emotional distress damages under G.L. c. 186, §14.

153. G.L. c. 186, § 15B.

154. *Meikle v. Nurse*, 474 Mass. 207 (2015); *Tringali v. O'Leary*, 2015 Mass. App. Div. 110 (2015); *Karaa v. Kuk Yim*, 86 Mass. App. Ct. 714 (2014); *Stacy v. Zhao*, 2013 Mass. App. Div. 59 (2013); *Gallo v. Marinelli*, Boston Housing Court, No. 15-SP-1469 (Muirhead, J., May 19, 2015; June 8, 2015).

155. The Consumer Protection Act, G.L. c. 93A, was explicitly extended to cover owners and tenants by St. 1971, Chapter 241, approved by the Legislature on April 29, 1971. The 1971 amendment gave the protection of the Massachusetts Consumer Protection Act to "any person who purchases or leases goods or services, real or personal, primarily for personal, family, or household purposes." The next year the Legislature passed St. 1972, Chapter 123. This amendment explicitly expanded the definition of "trade" and "commerce" in G.L. c. 93A to include rental

housing by amending §1(b) of G.L. c. 93A. *In Leardi v. Brown*, 394 Mass. 151 (1985), the Supreme Judicial Court noted that tenants are among those for whose benefit the Consumer Protection law was passed. The Supreme Judicial Court noted that: "The 1972 amendment to the definition of trade or commerce, adding express reference to the renting and leasing of services or property, did not expand, but only clarified, the scope of the words 'trade' or 'commerce'." *Commonwealth v. DeCotis*, 366 Mass. 234, 239 (1975). For a detailed discussion of the purposes of G.L. c. 93A, see *Slaney v. Westwood Auto*, 366 Mass. 688 (1975), and *PMP Assocs. Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596 (1975).

156. G.L. c. 93A, §2(a) prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." The definition of "act or practice" in the Attorney General's "General Regulations" was amended in 1975 to include "any threat or attempt to perform such act or practice." See 940 C.M.R. §3.01(1). The Attorney General has further declared that an act or practice is in violation of G.L. c. 93A, §2 if it is oppressive or otherwise unconscionable in any respect. 940 C.M.R. §3.16(1).

157. *Kachadorian v. Larson*, 87 Mass. App. Ct. 1111 (2015)(compensatory damages awarded to the tenant for landlord's discrimination offset the rent owed when a defense under G.L. c. 239, §8A defense has been established through a conditions claim.)

158. Counterclaims in summary process are not compulsory. U.S.P.R. 5.

159. G.L. c. 239, §8A.

160. G.L. c. 239, §8A. There are several possible rationales for this defense. One is that the plain language of G.L. c. 239, §8A says that claims can be used as a defense. Another is that if the court awards the tenant any money on her counterclaims in a no-fault eviction that is not based on non-payment of rent, then the tenant will have recovered more money than the landlord and will retain possession under G.L. c. 239, §8A. A third possible rationale is that G.L. c. 239, §8A creates a "clean hands" doctrine that prohibits a landlord who has violated her tenant's rights from regaining possession in an eviction where the tenant is without fault.

161. *Spence v. O'Brien*, 15 Mass. App. Ct. 489 (1983). This case did not define "fault," but made it clear that it is more than any "cause" and must involve "wrongdoing" or the toleration of another's "wrongdoing."

162. *Ednson Realty Trust v. Robinson*, Hampden Housing Court, 88-SP-7252-C (Abrashkin, J., Nov. 21, 1988). In *Ednson* Realty, the court rejected a landlord's claim that G.L. c. 239, §8A precludes counterclaims in fault-based evictions. The court noted that §8A and U.S.P.R. 5 state that counterclaims shall be permitted in no-fault cases, but do not say that they cannot be permitted in other cases. It also noted that other counterclaims are available outside of §8A and that courts retain discretion under U.S.P.R. 5 to sever those counterclaims where appropriate.

163. G.L. c. 239, §5; U.S.P.R. 12.

164. G.L. c. 239, §5. "Such bond shall also be conditioned to pay to the plaintiff, if final judgment is in plaintiff's favor, all rent accrued at the date of the bond, all intervening rent, and all damage and loss which the plaintiff may sustain by the withholding of possession of the land or tenements demanded and by any injury done thereto during such withholding, with all costs, until delivery of possession thereof to such plaintiff."

165. G.L. c. 239, §5 has been amended several times. One somewhat recent amendment, St. 1985, c. 754, made waiver of the appeal bond mandatory where the tenant is indigent and has a non-frivolous defense. A defense is not frivolous merely because it lacks merit, and the court should not find a defense frivolous unless it does not have a "prayer of a chance." *See Pires v. Commonwealth*, 373 Mass. 829, 838 (1977).

The indigency requirement is automatically met if the tenant: (a) receives TAFDC, EAEDC, SSI, MassHealth (formerly Medicaid), or Massachusetts Veterans' Benefits or (b) has after-tax income of 125% or less of the federal poverty level. G.L. c. 261, §27A. If the tenant does not automatically meet this standard, she must prove that she cannot pay the bond without depriving herself or her family of the necessities of life by filing a Motion and Affidavit of Income and Expenses.

166. *Kargman v. Dustin*, 5 Mass. App. Ct. 101, 359 (1977) discussed the application of a previous version of the waiver statute. If you are indigent and have a non-frivolous appeal, the entire bond (but not current payments) must be waived. The current statute, G.L. c. 239, §5, as amended by St. 1985, c. 754, requires the tenant for whom the bond has been waived to pay rent in installments as it comes due and further requires that "no court shall require any such person to make any other payments or deposits." If the judge misapplies this law and sets bond in the amount of back rent owed, the tenant should appeal the bond decision, as discussed below.

167. *Kargman v. Dustin*, 5 Mass. App. Ct. 101 (1977). In *Warner v. DeCosta and Eaton*, Essex Superior Court, 86-1994 (Flannery, J., Aug. 28, 1986), the court reduced periodic payments from the contract rent of $600 to $300 based upon hardship to the tenant, who had lost income due to an auto accident.

168. G.L. c. 239, §5.

169. G.L. c. 239, §9. The standard for granting a stay of execution is quite broad but is often overlooked. G.L. c. 239, §10 provides that a stay may be granted if, after making a reasonable effort, "the applicant cannot secure suitable premises for himself and his family elsewhere within the city or town in a neighborhood similar to that in which the premises occupied by him are situated . . . ." It should not be necessary for the tenant to prove that she has not been able to find any apartment anywhere in order to get a stay. However, the law says only that the judge "may" grant a stay. Since the judge has discretion, the more compelling your situation is, the greater your chances of getting a stay.

170. G.L. c. 239, §9.

171. If the judge grants a stay for less than the maximum length of time allowed by law, you can file a motion for an additional stay sometime before the end of the initial stay period. You should allow sufficient time to give the landlord at least one week's notice before the hearing on your motion and have the hearing scheduled before expiration of the initial stay.

172. G.L. c. 239, §5. Note that this time period differs from the standard 30-day period applicable to civil actions in the housing court and superior court.

173. The landlord's expenses for forcibly moving you out are considerable. If the landlord has to have your property moved and stored, it could cost her several thousand dollars. Only $2 is unconditionally allowed by statute, so the landlord may have trouble getting back any more from the tenant. G.L. c. 262, §17 provides: "In the service of an execution of ejectment the fees shall be: for demand, one dollar; for delivery, one dollar; for all necessary expenses, including packing, teaming and labor; and the officer may be allowed additional compensation by an order of the court from which the execution issued."

The courts have held that G.L. c. 262, §17 does not allow a landlord to recover from the evicted tenant the actual constable's fees or moving costs. In *Strang v. Marifiote*, 12 Mass. App. Ct. Dec. 91, 94 (1956), the landlord sued the tenant for $4.80 in court costs, a $25 constable's fee, and $50 in moving costs. The court allowed him to collect only the $4.80, saying, "[t]he plaintiff can only recover from the defendant the officer's fees allowed by [G.L. c. 262, §17]. Since there is no provision in it for a fee of $25.00 charged by the constable, that item was therefore properly disallowed." The court also upheld the disallowance of the $50 moving fee, holding that such a fee did not come under the provision for "necessary expenses, including packing, teaming and labor."

174. *See Bing v. Roach*, Hampden Housing Court, LE 1553-S-80 (Peck, J., Nov. 2, 1983) (tenant awarded double damages and attorney's fees for breach of quiet enjoyment where the landlord himself used lawful execution without assistance of sheriff or constable and did not present writ to tenants). *See also* G.L. c. 239, §4; *McGonigle v. Victor H. J. Belleisle Co.*, 186 Mass. 310, 313 (1904) (landlord has no authority to remove tenant's goods to a warehouse over tenant's objections); *PAB v. Cooper/Cooper v. PAB*, Hampden Housing Court, 98-SP-3796/98-TR-0158 (Abrashkin, J., 1998) (landlord who levies on a summary process execution and removes personal property from the premises cannot sell the property and must place it in storage). *But see Finnigan v. Hadley*, 286 Mass. 345, 347 (1934) (landlord has implicit authority to store the tenant's goods where tenant is absent for 2 months prior to the eviction).

175. G.L. c. 239, §3. Judge Abrashkin of the Hampden County Housing Court issued a memo (Feb. 27, 1989) directing sheriffs and constables that the 48-hour notice period required prior to levying on an execution pursuant to G.L. c. 239, §3 does not include Saturdays, Sundays, and legal holidays. This is consistent with Mass. R. Civ. P. 6, which

provides that in computing any period of time of less than 7 days under any statute or rule, intermediate Saturdays, Sundays, and legal holidays are excluded in the computation.

176. G.L. c. 239, §3.

177 G.L. c. 235, §23 (added at 1987-1 Mass. Acts 728, §1). Any period during which the execution was stayed by the court or by agreement is excluded from the 3-month period.

178. G.L. c. 239, §3. This protection applies where the tenant has paid the underlying money judgment and any use and occupancy that has accrued since the judgment entered.

179. G.L. c. 239, §4. *See* endnote 175.

180. A "lien" is the right to take and sell someone's property to recover money owed, unless that money is paid back. G.L. c. 239, §4 gives the storer a lien for charges for storage that are imposed in accordance with the law.

181. Often, landlords pay from one to 3 months' storage in advance. If you remove your property within the pre-paid period, you would not have any storage charges and should not have to pay the warehouse to get your property out.

182. Cases have held that a constable is liable for damage that he negligently causes, and have said that he has a duty to use reasonable care when removing a tenant's goods. *Gaertner v. Bues*, 109 Wis. 165 (1901) (*dictum*); *State ex rel. Carroll v. Devitt*, 107 Mo. 573 (1891).