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Eviction and Rent Claim Defenses and Counterclaims; Trial Practice

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I. [4.1] SCOPE OF CHAPTER

This chapter is designed to help practitioners represent tenants in eviction actions. These actions are brought pursuant to the forcible entry and detainer statute (forcible statute), 735 ILCS 5/9-101, *et seq.,* and are often called "forcible actions." The plaintiff-landlord may file a single action (seeking possession of the subject premises) or a joint action (seeking possession plus rent).

II. PRE-LITIGATION PHASE

A. [4.2] Introduction

You must first gather facts about the landlord-tenant relationship, examine the relevant documents, and advise your client about the risks (if any) associated with each potential course of action.

B. [4.3] Initial Client Interview

Elicit from your client a detailed history of the landlord-tenant relationship. When you schedule an interview, instruct the client to bring every document related to her tenancy, including leases, rent receipts or cancelled checks, a list of any complaints she has regarding the condition of the apartment, and any photographs of defects in the apartment.

An initial client interview outline follows:

I. Basic information

A. Client name and address (with apartment number)

B. Landlord, management company, manager — names, addresses, and telephone numbers

C. Number of units in building

D. Any federal subsidy? (See Chapter 10 for a description of the federal subsidy programs. An unusually low rent often indicates a government subsidy.)

II. Information regarding tenancy

A. Written lease?

1. When signed?

2. Does client have a copy?

3. Still in effect? If not, when did it expire? Rent paid and accepted after expiration? Receipts to corroborate?

4. Any documents or riders to lease?

5. Any summary of relevant municipal ordinance provided? If so, when?

6. Any oral agreements either before or (more importantly) after lease signed?

B. Date client moved into premises?

C. Date rent due each month?

D. Date rent paid each month? Receipts?

E. Method of payment, *e.g.,* cash, money order, check?

III. Information regarding problem leading to notice of nonrenewal or termination

A. Date of last rent payment?

B. If not current in rent, why not?

C. Any disputes with landlord regarding something other than rent?

IV. Information for each notice of termination received

A. Copy of notice?

B. When was it served?

C. How was it served?

D. On whom was it served? If handed to a member of client's household, how old is that member?

E. Who served it?

F. What did tenant do or say in response to notice?

1. When done?

2. Any witnesses?

3. Landlord response?

4. Rent tendered?

a. When?

b. By what method?

c. Amount tendered?

d. Accepted?

e. Rejected? If so, why?

f. Witnesses?

G. Other tenants also receive notices?

H. If ten-day notice, why was it served?

1. What part of lease allegedly violated?

2. Date of alleged violation, if client knows.

3. Date landlord found out about alleged violation.

4. Date(s) on which landlord accepted rent after learning about alleged violation.

V. Information regarding potential substantive defenses

A. Condition of apartment? (Describe in detail, by room, each problem with the condition of apartment.)

B. Building currently in housing court? Ever in housing court?

C. Tenant ever complain to anyone about conditions?

1. Date of complaint?

2. To whom did client complain?

3. Oral or written complaint? If written, copy kept?

4. Landlord aware of complaint having been made?

5. Did tenant appear in housing court?

6. Any photographs or other proof?

D. Landlord ever promise to do repairs?

1. When?

2. Oral or written promise?

3. Witnesses?

4. Was repair ever completed?

E. Tenant ever repair and deduct or withhold rent?

1. When?

2. Why?

3. Notify landlord?

4. Documents available?

F. Inspections of dwelling

1. Who inspected?

2. When?

3. Results?

4. Any government officials contacted?

G. Problems with utilities?

1. Has landlord intentionally interfered with utility service or intentionally failed to pay bills?

2. When?

3. Which utility or utilities?

4. For how long was tenant without utilities?

5. Did tenant pay rent for all or a portion of the time that she was without utility service?

VI. Any "improper" reason for notice (in client's opinion)?

A. Race, sex, national origin, etc.?

B. Termination because of children?

C. Termination because public aid recipient?

D. Termination because of complaint to governmental entity about conditions?

E. Termination because of activities in connection with tenant group?

VII. Client's objectives

A. Remain in apartment?

B. Repairs?

C. Willing to pay partial rent to landlord?

D. Willing to pay rent into escrow during litigation?

E. Willing to pay some or all back rent? If so, money readily available?

F. Prefer to move? On what terms?

VIII. Witnesses

A. Name, address, and phone number of all persons who have firsthand knowledge of material facts.

B. Client's assessment of witnesses' willingness to testify on tenant's behalf? On landlord's behalf?

C. [4.4] Initial Legal Assessment

After interviewing the client and obtaining the relevant documents, you should be able to make an initial assessment regarding the client's claims and the likelihood of prevailing on these claims. The following sections discuss issues that must be considered in making this assessment.

1. What Laws Apply to the Landlord-Tenant Relationship?

a. [4.5] State Law

State law governs many aspects of the landlord-tenant relationship in Illinois. The most important statute is the forcible entry and detainer statute, 735 ILCS 5/9-101, *et seq.* This statute, codified as Article IX of the Illinois Code of Civil Procedure, governs the procedure for evicting tenants and, in some cases, obtaining judgments against them for unpaid rent. Other important state statutes include the following:

1. Rental Property Utility Service Act, 765 ILCS 735/0.01, *et seq.* (authorizing tenants to (a) pay for utility service and deduct the cost of such service from rent or (b) seek appointment of a receiver);

2. Retaliatory Eviction Act, 765 ILCS 720/0.01, *et seq.* (prohibiting retaliatory evictions);

3. Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.* (prohibiting discrimination in rental housing);

4. Security Deposit Return Act, 765 ILCS 710/1 (regulating the return of tenants' security deposits);

5. Security Deposit Interest Act, 765 ILCS 715/1 (regulating payment of interest on security deposits);

6. 65 ILCS 5/11-13-15 (authorizing tenants to seek injunctive relief, damages, and attorneys' fees when landlords fail to comply with local building, health, and safety codes);

7. 735 ILCS 5/9-108 (rendering unenforceable any lease provision that purports to waive either party's right to trial by jury in a forcible action); and

8. 735 ILCS 5/2-1301(c) (rendering unenforceable any lease provision that purports to grant the landlord a confession of judgment).

b. [4.6] Local Ordinances

Before July 1, 1971, local municipalities were deemed to have only those powers specifically granted by the Illinois Constitution or by statute. The 1970 Constitution, however, greatly expanded

these powers. It provided that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs." ILL.CONST. art. VII, §6(a). Any municipality with a population of more than 25,000 is a home rule unit. *Id.* The powers and functions of home rule units must be construed liberally. ILL.CONST. art. VII, §6(m). Nevertheless, the Illinois legislature may, by a three-fifths majority vote, deny or limit home rule powers. ILL.CONST. art. VII, §6(g). It may also "provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit." ILL.CONST. art. VII, §6(h).

Pursuant to their home rule authority, many municipalities enacted local ordinances governing the landlord-tenant relationship. In upholding the validity of these ordinances, the Illinois Supreme Court rejected the contention that the state retains exclusive control over the area of landlord-tenant relations. *City of Evanston v. Create, Inc.,* 85 Ill.2d 101, 421 N.E.2d 196, 199 – 201, 51 Ill.Dec. 688 (1981). The court also held that

> **an ordinance enacted by a home rule unit . . . supersedes a conflicting statute enacted prior to the effective date of the Constitution. . . . "An Act to revise the law in relation to landlord and tenant" was enacted in 1873. Although minor revisions to various sections have taken place both before and after the effective date of the 1970 Constitution (July 1, 1971), we have found no action to have been taken in the landlord-tenant area by the legislature under either section 6(g) or section 6(h) of article VII to either limit or deny power to home rule units or to expressly declare the area one requiring exclusive State control. [**Citations omitted.**]** 421 N.E.2d at 199.

On September 8, 1986, the Chicago City Council enacted the Chicago Residential Landlord and Tenant Ordinance (RLTO), Chicago Municipal Code, §5-12-010, *et seq.,* which provides tenants with many rights and protections that state law does not afford. References to this ordinance appear throughout this chapter.

c. [4.7] Federal Laws

Tenants who reside in public or other federally subsidized housing have tenancies that are governed not just by local and state law, but also by federal law and regulations. The first step in advising a client whose tenancy is subsidized pursuant to a federal program is to identify the applicable program and regulations. See Chapter 10 for a detailed description of these programs.

d. [4.8] A Note About Cooperatives

In a recent case, the Illinois appellate court held that the forcible statute applies to cooperatives. *Quality Management Services v. Banker,* ____ Ill.App.3d ____, 685 N.E.2d 367, 226 Ill.Dec. 264 (1st Dist. 1997). In reaching this decision, the court noted that some legal publishers have mistakenly cited a case entitled *Central Terrace Cooperative v. Martin,* 211 Ill.App.3d 130, 569 N.E.2d 944, 155 Ill.Dec. 467 (2d Dist. 1991), for the proposition that cooperatives are excluded from the forcible statute. 685 N.E.2d at 368. In an attempt to correct this mistake, the court discussed *Central Terrace* in some detail and distinguished it from cases involving the "usual" cooperative arrangement:

> **In** *Central Terrace,* **David Martin, a member of the Central Terrace Co-Operative (CTC), appealed from a judgment in favor of CTC on its complaint for forcible entry and detainer. The trial court, relying on this court's earlier decision in** *Sinnissippi Apartments, Inc. v. Hubbard . . .,* **found that a landlord-tenant relationship was created by the cooperative lease agreement and thus CTC's cause was properly brought under the forcible statute. On appeal, this court reversed. We determined that Martin's relationship with CTC did not appear to be the "usual" cooperative arrangement set**

> **forth in** *Sinnissippi***. . . . Thus, we held that the trial court's finding that a landlord-tenant relationship existed was against the manifest weight of the evidence. [**Citations omitted.**]** 685 N.E.2d at 368 – 369.

The court went on to explain why cooperatives are generally governed by the forcible statute:

> **[**A**] cooperative is a "legal hybrid" in that the member possesses both stock and a lease. . . . The proprietary lease, also referred to as an occupancy agreement, is the basic document entitling a member of a cooperative the right to occupy a particular dwelling unit and setting out the member's rights in relation thereto. As set forth in** *Sinnissippi,* **the proprietary lease generally contains many of the provisions found in long-term residential leases. . . . [**I**]n the usual situation, the relationship between a cooperative and its members is, in part, that of landlord and tenant. The existence of such a relationship brings cooperatives within the purview of section 9-102(a)(4) of the Act.** 685 N.E.2d at 369.

The court concluded that there is "no reason to treat the proprietary lease or occupancy agreement differently than other leases for purposes of the Act simply because it has been paired with an ownership interest in the corporation which holds title to the real estate." 685 N.E.2d at 370. Citing *Central Terrace,* however, the court noted that "there may be some instances where there are insufficient indicia of a landlord-tenant relationship to bring a particular cooperative within the coverage of the Act." 685 N.E.2d at 369.

e. [4.9] A Note About Condominiums

When a condominium owner rents his unit to a tenant and then decides to evict that tenant, the eviction action is treated like any other residential eviction. Sometimes, however, the owner is the defendant in a forcible action filed by the condominium association for failure to pay assessments or other fees. The association must follow the procedures specified in 735 ILCS 5/9-104.1 and provide the owner with a written demand for the amount due. This demand must afford the owner at least 30 days to pay. If the purchaser does not comply with this demand, the association may file a forcible action against him. In the event a judgment for possession is entered against the owner, he is entitled to a stay of not less than 60 nor more than 180 days. Furthermore, he may file a motion to vacate the judgment for possession if he (1) satisfies any money judgment entered against him, (2) reimburses the association for its costs and reasonable attorneys' fees, and (3) is not in arrears on his share of the common expenses for the period subsequent to that covered by the judgment. 735 ILCS 5/9-111. "[I]f the court, upon the hearing of such motion, is satisfied that the default in payment of the proportionate share of expenses has been cured, and if the court finds that the premises are not presently let by the board of managers . . . the judgment shall be vacated." *Id.* If the condominium association obtains a judgment for possession against the owner, it may mail the tenants an informational certificate instructing them to pay future rents to the association. 735 ILCS 5/9-104.2(c).

f. [4.10] A Note About Mobile Home Parks

The eviction of a tenant from a mobile home park that has five or more lots for rent is governed by the Mobile Home Landlord and Tenant Rights Act, 765 ILCS 745/1, *et seq.*

2. [4.11] Is a Written Notice Required To Terminate the Tenancy?

You must determine whether a written notice is required to terminate the tenancy. In two situations, no notice is required.

a. [4.12] No Notice Required When the Term of the Tenancy Is Fixed

735 ILCS 5/9-213 provides that "[w]hen the tenancy is for a certain period, and the term expires by the terms of the lease, the tenant is then bound to surrender possession, *and no notice to quit or demand of possession is necessary."* [Emphasis added.] However, if the tenant does not vacate the premises after the expiration of the lease and the landlord accepts another month's rent, the tenant can argue that (1) a new month-to-month tenancy has been created and (2) this tenancy cannot be terminated without written notice. *Bismarck Hotel Co. v. Sutherland,* 92 Ill.App.3d 167, 415 N.E.2d 517, 47 Ill.Dec. 512 (1st Dist. 1980).

Furthermore, 735 ILCS 5/9-213 may be superseded by a conflicting provision in a local landlord-tenant ordinance. For instance, it conflicts with and is superseded by §5-12-130(j) of the RLTO, which provides:

> **[**T**]he landlord shall notify the tenant in writing at least 30 days prior to the stated termination date of the rental agreement of the landlord's intent . . . not to renew [**the**] existing rental agreement. If the landlord fails to give the required written notice, the tenant may remain in the dwelling unit for up to 60 days after the date on which such required written notice is given to the tenant, regardless of the termination date specified in the existing rental agreement.**

b. [4.13] No Notice Required When the Tenant Has Waived Her Right to Written Notice

Form leases commonly contain a provision stating that the tenant agrees to waive her right to a written termination notice, and Illinois courts have upheld the validity of such provisions. *Avdich v. Kleinert,* 69 Ill.2d 1, 370 N.E.2d 504, 507, 12 Ill.Dec. 700 (1977); *Sandra Frocks, Inc. v. Ziff,* 397 Ill. 497, 74 N.E.2d 699 (1947). In the following two situations, however, the landlord may not rely on a lease provision purporting to waive the tenant's right to a written termination notice.

(1) [4.14] Waiver of notice may be invalid as a matter of law

Some municipal ordinances render unenforceable any lease provision that purports to waive the tenant's right to a written termination notice. See, *e.g.,* RLTO §5-12-140(d).

(2) [4.15] Waiver of notice invalid when landlord uses statutory notice

If the landlord chooses to use one of the statutory notices to terminate the tenancy although not otherwise required to do so, the notice must satisfy all statutory notice requirements. *Avdich v. Kleinert,* 69 Ill.2d 1, 370 N.E.2d 504, 507 – 508, 12 Ill.Dec. 700 (1977).

3. [4.16] Which Notice Is Required?

Examine all termination notices your client receives to determine whether they are sufficient to terminate the tenancy. Certain requirements apply to all termination notices; other requirements are specific to certain types of notices.

a. Requirements of All Termination Notices

(1) [4.17] Description of premises

All notices must adequately and accurately describe the premises at issue, including the apartment number, if any. *Brite-House Co. v. Cary,* 345 Ill.App. 509, 104 N.E.2d 125 (1st Dist.

(1952). However, if the notice describes the premises with reasonable certainty, it may be adequate. *Worley v. Ehret,* 36 Ill.App.3d 48, 343 N.E.2d 237 (5th Dist. 1976).

(2) [4.18] Notice must afford the statutorily required number of days

The notice must provide that the lease will terminate at some future date. For instance, a termination notice demanding payment of the rent due must state that the lease will terminate in not less than five days (assuming the rent is not paid during this period). 735 ILCS 5/9-209. A termination notice alleging some other lease violation must state that the lease will terminate in no less than ten days. 735 ILCS 5/9-210. A notice that does not afford the statutorily required number of days is invalid. *Hoefler v. Erickson,* 331 Ill.App. 577, 73 N.E.2d 448 (1st Dist. 1947). When counting the number of days the notice affords the tenant, exclude the date of service. 5 ILCS 70/1.11. The notice is not defective if it provides more time than the statute requires. Furthermore, the notice need not specify the calendar date on which the tenancy will terminate as long as the notice provides that the tenancy will terminate the appropriate number of days after the date of service.

(3) [4.19] Certificate of service

The copy of the notice actually served on the tenant need not bear a completed certificate of service. The only copy that must be notarized is the one the landlord tenders to the court.

b. Types of Notices

(1) [4.20] Five-day notice for nonpayment of rent

When rent is not paid on the date it is due, the landlord may serve a notice stating that unless rent is paid within five days, the tenancy will be terminated. 735 ILCS 5/9-209. The notice must include a "legal demand for a sum certain." *Weinberg v. Warren,* 340 Ill.App. 365, 92 N.E.2d 217, 218 (1st Dist. 1950). Furthermore, it must notify the tenant of her right to pay the rent claimed within the five-day period. *Elizondo v. Medina,* 100 Ill.App.3d 718, 427 N.E.2d 381, 56 Ill.Dec. 301 (1st Dist. 1981). Finally, it must notify the tenant that if she does not pay the rent due within five days, her tenancy will be terminated. *Bank of Belleville v. Stidimire,* 119 Ill.App.3d 73, 456 N.E.2d 175, 74 Ill.Dec. 673 (5th Dist. 1983).

If the amount of rent demanded in the notice exceeds the amount actually owed, instruct the tenant to tender just the amount due. Even if the landlord rejects this tender and files a forcible action against her, the tenant may assert a defense based on the fact that she tendered the amount owed in a timely manner. *Madison v. Rosser,* 3 Ill.App.3d 851, 279 N.E.2d 375 (1st Dist. 1972). You should consider making the tender on the client's behalf or delivering the tenant's check or money order with a cover letter explaining why the tenant owes less than the amount demanded in the notice. If this is not possible, the tenant should be advised to make the tender in person, if possible, with one or more impartial witnesses present.

It is not proper for the landlord to include amounts in the five-day notice for anything other than rent. Amounts claimed for damage to the unit, security deposits, costs, or attorneys' fees may not be included. *Payne v. Coates-Miller, Inc.,* 52 Ill.App.3d 288, 367 N.E.2d 406, 10 Ill.Dec. 18 (1st Dist. 1977). If improper amounts are included, the tenant should be advised of her right to tender only that amount representing the overdue rent. A tender of the proper amount should support a motion to dismiss if a suit is subsequently filed.

(2) [4.21] Five-day notice for committing a felony or a Class A misdemeanor on the subject premises

The Illinois legislature recently amended the forcible statute with P.A. 90-360 by enacting a new provision that states:

> **If any lessee or occupant . . .** *uses or permits the use* **of leased premises for the commission of any act that would constitute a felony or a Class A misdemeanor under the laws of this State, the lease or rental agreement shall, at the option of the lessor or the lessor's assignee become void, and the owner or lessor shall be entitled to recover possession of the leased premises as against a tenant holding over after the expiration of his or her term. [**Emphasis added.**]** 735 ILCS 5/9-120(a).

If the landlord voids the contract pursuant to this section, he may then serve the tenant with a written notice to vacate the premises. 735 ILCS 5/9-120(d). If the tenant does not move out of the apartment within five days of receiving this notice, the landlord may file a forcible action against her. *Id.*

This statutory provision may conflict with local landlord-tenant ordinances. For instance, it appears to conflict with §5-12-130(b) of the RLTO, which provides that when a tenant violates a material provision of her lease agreement, the landlord may serve her with a notice specifying that her lease will terminate in ten days unless she cures the breach within that period of time. Furthermore, the ordinance provision probably supersedes the statutory provision. See §4.6 above.

If the tenant did not know, and had no reason to know, that the illegal activity would occur, her attorney should argue that she did not engage in or "permit" the activity and may therefore not be held liable for it. *Cf. American Apartment Management Co. v. Phillips,* 274 Ill.App.3d 556, 653 N.E.2d 834, 840 – 841, 210 Ill.Dec. 639 (1st Dist. 1995); *Diversified Realty Group, Inc. v. Davis,* 257 Ill.App.3d 417, 628 N.E.2d 1081, 1084, 195 Ill.Dec. 617 (1st Dist. 1993); *Mid-Northern Management, Inc. v. Heinzeroth,* 234 Ill.App.3d 240, 599 N.E.2d 568, 572, 174 Ill.Dec. 784 (2d Dist. 1992); *Chicago Housing Authority v. Rose,* 203 Ill.App.3d 208, 560 N.E.2d 1131, 1136 – 1137, 148 Ill.Dec. 534 (1st Dist. 1990).

(3) [4.22] Seven-day notice to terminate week-to-week tenancy

The landlord may terminate a week-to-week tenancy with a written seven-day notice. 735 ILCS 5/9-207. The date of termination must coincide with the end of a rental period. For example, a landlord who collects rent on Wednesday for the period from Wednesday through the following Tuesday may terminate the tenancy only on Tuesday. The notice to terminate may be served on or before the Wednesday before the date of actual termination. A notice that purports to terminate the tenancy on any other day of the week is not valid.

A landlord who wishes to terminate a week-to-week tenancy need not state any reason for the termination and may accept rent for the final week of the tenancy without waiving his right to proceed on the notice. However, you should explore the possibility that the landlord's motive for terminating the tenancy is retaliatory or discriminatory in nature and therefore illegal.

(4) [4.23] Ten-day notice for violating lease provisions other than the one requiring timely payment of rent

The landlord may serve a ten-day notice when the tenant has violated a term or condition of her lease other than nonpayment of rent. 735 ILCS 5/9-210. In addition to the standard notice requirements outlined above, the landlord must include in the notice a description of the alleged

breach. The tenant may not be evicted for violating a contract other than the lease agreement. In *Knaus v. Beuck,* 331 Ill.App. 356, 73 N.E.2d 160 (1st Dist. 1947), the landlord and tenant executed both a lease and an employment contract providing that the tenant would do janitorial work. The court held that the tenant's refusal to do the janitorial work did not constitute a lease violation and could not, therefore, serve as the basis for an eviction action.

It is important to determine whether rent has been paid and accepted for a period subsequent to the date of the most recent alleged breach, since such an acceptance may constitute a waiver of the landlord's right to pursue an eviction action based on that breach. *See Midland Management Co. v. Helgason,* 158 Ill.2d 98, 630 N.E.2d 836, 839, 196 Ill.Dec. 671 (1994) (holding that "any act of a landlord which affirms the existence of a lease and recognizes a tenant as his lessee after the landlord has knowledge of a breach of lease results in the landlord's waiving his right to forfeiture of the lease").

Municipal ordinances may give the tenant the right to cure certain breaches after the landlord serves the ten-day notice. The RLTO requires the landlord to serve a ten-day notice that specifies the nature of the breach and states that the tenancy will be terminated *unless the tenant cures the breach.* If the breach is not cured within the ten days, the landlord may consider the tenancy terminated without further notice. RLTO §5-12-130(b). Section 5-12-130(d) of the RLTO sets forth special procedures for terminating a tenancy when the tenant disturbs her neighbors. It provides that the landlord may serve a ten-day notice informing the tenant that she has a right to cure this breach within ten days. If another disturbance occurs within the next 60 days, however, the landlord may serve a final ten-day notice — with no right to cure — and file a forcible action based on this second notice.

(5) [4.24] Thirty-day notice to terminate a month-to-month tenancy

A month-to-month tenancy may be terminated with a written 30-day notice. 735 ILCS 5/9-207. The notice must be served no later than 30 days before the date of termination and must state that the tenancy will terminate on the last day of the calendar month unless rent is due sometime other than the first of the month. *Hoefler v. Erickson,* 331 Ill.App. 577, 73 N.E.2d 448 (1st Dist. 1947). Thus, to terminate a month-to-month tenancy at the end of February, in a non-leap year, the landlord must serve the notice on or before January 29. In months of 30 days, the notice must be served on or before the last day of the preceding month; for a 31-day month, the notice must be served on or before the first day of the same month. The same principles apply if rent is due on some day other than the first of the month. When advising a client who has received a 30-day notice, you must count the days carefully to ensure that the full notice period is included in the notice.

The landlord need not state any reason for terminating a month-to-month tenancy. As with a seven-day notice, however, you should carefully explore the landlord's motive for terminating the tenancy to see whether any unlawful reason may have been involved in the decision.

(6) [4.25] Sixty-day notice

A year-to-year tenancy may be terminated only with a written 60-day notice. The tenancy must terminate at the end of a lease term and must be given at any time within the four months preceding the last 60 days of the term. 735 ILCS 5/9-205.

(7) [4.26] Four-month notice

A lease of farmland may be terminated only with a written notice served on the tenant not less than four months before the end of the lease term. 735 ILCS 5/9-206.

(8) [4.27] Thirty-day notice to condominium owner or contract buyer

735 ILCS 5/9-104.1 sets forth the procedure for terminating a condominium owner's or contract purchaser's right to possession. In *Nance v. Bell,* 210 Ill.App.3d 97, 568 N.E.2d 974, 154 Ill.Dec. 753 (2d Dist. 1991), the court held that the specific statutory language need not be included in the demand for possession as long as the purchaser is advised of (a) his right to cure the default within 30 days, (b) the means to cure, and (c) the landlord's intention to pursue a forcible action if the purchaser does not cure the default in a timely manner.

4. [4.28] Was the Notice Properly Served?

735 ILCS 9-211 provides:

> **Any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant, or by leaving the same with some person of the age of 13 years or upwards, residing on or in possession of the premises; or by sending a copy of the notice to the tenant by certified or registered mail, with a returned receipt from the addressee; and in case no one is in the actual possession of the premises, then by posting the same on the premises.**

In *Prairie Management Corp. v. Bell,* 289 Ill.App.3d 746, 682 N.E.2d 141, 144, 224 Ill.Dec. 580 (1st Dist. 1997), the court held that the methods of service specifically identified in this statute are not meant to be exhaustive. Nevertheless, said the court, a landlord's failure to serve his notice in accordance with one of these methods may serve as a defense to a forcible action. A tenant waives this defense, however, if she fails to raise it at or before trial. Furthermore, a tenant's acknowledged receipt of the notice cures any defect in the landlord's manner of service. *Id.*

The tenant may not receive the notice if the landlord attempts to serve it by placing it under or taping it to the tenant's apartment door or handing it to the tenant's neighbor or young child. If the tenant receives no termination notice and first discovers that her landlord is attempting to evict her when she receives the summons to appear in court, conduct discovery to determine how the notice was served. If it was not served in accordance with one of the methods specifically identified in the state statute, you should be able to prevail on a motion to dismiss.

NOTE: When the notice is served by mail, the time period mentioned in the notice does not begin to run until the day after the notice is actually received by the tenant. *Avdich v. Kleinert,* 69 Ill.2d 1, 370 N.E.2d 504, 508, 12 Ill.Dec. 700 (1977).

5. [4.29] Has the Tenant Been Served with a Demand for Immediate Possession?

Two provisions of the forcible statute provide that under very limited circumstances the landlord may terminate the tenancy by serving a written demand for immediate possession of the premises.

735 ILCS 5/9-118 sets forth the procedure for evicting a public housing resident pursuant to an emergency proceeding. This procedure may be used only when the tenant has been accused of (a) drug trafficking or (b) possessing, using, selling, or delivering illegal firearms. Pursuant to this statutory provision, the public housing authority may serve the tenant with a demand for immediate possession of the premises, but this notice must be served at least 14 days before a hearing on the complaint is held. The notice must be served in accordance with 735 ILCS 5/9-104, which provides:

> **The demand . . . may be made by delivering a copy thereof to the tenant, or by leaving such a copy with some person of the age of 13 years or upwards, residing on, or being in charge of, the premises; or in case no one is in the actual possession of the premises, then by posting the same on the premises.**

Public housing authorities in Illinois have not been relying on 735 ILCS 5/9-118 because the United States Department of Housing and Urban Development has not yet decided whether it complies with due process.

735 ILCS 5/9-119 sets forth the procedure for evicting a resident of federally subsidized housing pursuant to an emergency proceeding. This procedure may be used only when the tenant refuses to allow the landlord to inspect her apartment on two separate occasions within a 30-day period. Under these circumstances, the landlord may serve the tenant with a demand for immediate possession of the premises, but this notice must be served at least 14 days before a hearing on the complaint is held. It too must be served in accordance with 735 ILCS 5/9-104.

6. [4.30] Has the Landlord Waived His Right To Rely on a Termination Notice by Serving a Subsequent Notice?

A landlord risks waiving his right to pursue an eviction action based on the allegations contained in one termination notice if he serves the tenant with a subsequent notice. After all, the second notice presumes the existence of the very tenancy that the landlord purported to terminate with the first notice, and "any act of a landlord which affirms the existence of a lease and recognizes a tenant as his lessee after the landlord has knowledge of a breach of lease results in the landlord's waiving his right to forfeiture of the lease." *Midland Management Co. v. Helgason,* 158 Ill.2d 98, 630 N.E.2d 836, 839, 196 Ill.Dec. 671 (1994); *McGill v. Wire Sales Co.,* 175 Ill.App.3d 56, 529 N.E.2d 682, 684, 124 Ill.Dec. 701 (1st Dist. 1988). In *Hoefler v. Erickson,* 331 Ill.App. 577, 73 N.E.2d 448 (1st Dist. 1947), the landlord served the tenant with a notice stating that her tenancy would terminate on July 10, 1946. Several weeks later, the landlord served the tenant with a second notice stating that her tenancy would terminate on September 30, 1946. Under these circumstances, said the court, "the giving of the second notice constituted a waiver of the previous notice." 73 N.E.2d at 451.

Serving successive termination notices, however, does not always affect a landlord's right to pursue an eviction action based on the first notice. In *Shelby County Housing Authority v. Thornell,* 144 Ill.App.3d 71, 493 N.E.2d 1109, 98 Ill.Dec. 88 (5th Dist. 1986), the tenant received three termination notices demanding payment of the rent due. The court held that the second and third notices did not affect the landlord's right to pursue an eviction action based on the first notice because the subsequent notices (a) merely updated the initial notice and (b) could not have led the tenant to reasonably believe his landlord was recognizing the existence of his tenancy. 493 N.E.2d at 1111.

In *Chicago Housing Authority v. Taylor,* 207 Ill.App.3d 821, 566 N.E.2d 417, 152 Ill.Dec. 730 (1st Dist. 1990), the landlord served the tenant with a demand for rent, filed a forcible action against her, and obtained a default judgment for possession of the premises. The tenant, however, filed a motion to vacate this judgment, and the court granted this motion. The landlord then served the tenant with another demand for rent and filed a second forcible action but voluntarily dismissed this action at the initial trial call. The tenant then moved to dismiss the first action on the grounds that the landlord's service of the second notice constituted a waiver of its right to pursue its initial action. The trial court granted the tenant's motion to dismiss, and the landlord appealed. The appellate court stated:

The existence of a waiver is essentially a question of intent to be determined by the trier of fact . . . and where a disputed question of fact exists, judgment on the pleadings is improper. . . .

> **Evidence of acts which are inconsistent with a declaration of forfeiture may prove a waiver. . . .**
>
> **The question before this court is whether the [**landlord's**] service of the second notice . . . constituted a waiver of its right to pursue its initial action against [**the tenant**]. [**Citations omitted.**]** 566 N.E.2d at 419.

The court concluded that "the record before us presents a question of fact as to whether [the landlord] intended the second notice to operate as a waiver of its rights under the first notice." 566 N.E.2d at 421. Therefore, the court remanded the case for an evidentiary hearing.

It is important to note that in both *Shelby* and *Taylor,* the initial notice and the subsequent notice(s) all demanded payment of the rent due. Therefore, it was reasonable for the courts to assume that the subsequent notice(s) merely updated, and did not preclude the landlords from pursuing forcible actions based on, the initial notice. *Shelby* and *Taylor* should be distinguished from cases in which the initial and subsequent termination notice(s) are based on entirely different allegations. Assume, for instance, that a tenant receives a ten-day notice stating that her lease will be terminated because she allegedly created a disturbance. If she then receives a subsequent notice demanding payment of the rent due, she can argue that the second notice (a) did not merely update the initial notice and (b) led her to reasonably believe that her landlord was interested in collecting the rent due and was thereby waiving his right to pursue an eviction action based on the alleged disturbance. Similarly, if she receives the demand for rent first, she may argue that the ten-day notice (a) did not merely update the demand for rent and (b) led her to reasonably believe that her landlord was waiving his right to pursue an eviction action based on nonpayment of rent.

7. [4.31] Does the Tenant Want To Cure the Breach?

Some tenants know when they consult an attorney that they want to do whatever is necessary to protect their tenancy in the apartment in question. Those tenants must be advised carefully of the issues related to cure and of the risks inherent in the various options, depending on the facts of the individual case. You must determine whether the tenant has an absolute right to cure the breach or whether the landlord (though not legally required to let the tenant cure the breach) has permitted such a cure.

a. [4.32] Tenant May Have Absolute Right To Cure

The tenant has the right to cure the breach in two situations. First, if the landlord serves a five-day notice and the tenant offers the full rent due in the five-day period, the tenant's obligation under the notice is satisfied. The landlord cannot reject the offer and then evict the tenant. *Madison v. Rosser,* 3 Ill.App.3d 851, 279 N.E.2d 375 (1st Dist. 1972).

Second, in some ordinance jurisdictions, the tenant has the right to cure an alleged lease violation within ten days of the date of service of the notice. See, *e.g.,* RLTO, §5-12-130(b). If a tenant has the right to cure her lease violation and wants to enforce this right, she or her attorney should (within the cure period) send the landlord a letter explaining what action the tenant has taken to cure the breach. Send the letter via facsimile (so you can save the confirmation sheet showing the landlord received the letter) or by certified mail with a return receipt requested.

b. [4.33] Landlord May Permit Cure

The landlord may intentionally or unintentionally permit cure even when he is not required to do so. If the landlord accepts a partial tender within the five days, the landlord may not proceed to evict

the tenant based on a five-day notice unless the notice provides on its face that partial tender will not waive the notice. 735 ILCS 5/9-209. Probably the safest course of action for a tenant who is able to tender partial payment during the five days is for the tenant and landlord to make a specific written agreement regarding tender and acceptance of partial amounts, either during or after the five-day period. The agreement should specify whether the landlord may maintain an eviction action based on the prior notice in the event the partial tender is made and accepted.

Local ordinances may control the effect of the landlord's acceptance of rent outside the five-day period. Section 5-12-130(g) of the RLTO provides that the landlord's acceptance of the rent due after the five-day period precludes termination. NOTE: This section of the RLTO conflicts with a provision of the forcible statute. The last paragraph of 735 ILCS 5/9-209 provides that "[c]ollection by the landlord of past rent due after the filing of a suit for possession . . . pursuant to failure of the tenant to pay the rent demanded in the notice shall not invalidate the suit." The RLTO, however, supersedes the state statute. See §4.6.

8. [4.34] Has the Landlord Waived the Breach or Created a New Tenancy?

You must determine precisely what has happened between the parties during the period subsequent to service of the notice. In addition to the cure issues discussed above, the landlord's conduct may either waive the breach or create a new tenancy. To establish waiver of a breach, the tenant must be able to demonstrate that the landlord had notice of the breach (actual or constructive) and then accepted rent for a period subsequent to the period in which the breach occurred. *See Midland Management Co. v. Helgason,* 158 Ill.2d 98, 630 N.E.2d 836, 839, 196 Ill.Dec. 671 (1994).

Similarly, if the landlord accepts rent after terminating the tenancy with a 7- or 30-day notice or after the lease expires pursuant to its own terms, he creates a new tenancy and must serve a new notice to terminate this tenancy. If, for example, the landlord serves a 30-day notice on January 1 to terminate the tenancy on January 31, the landlord is entitled to collect January rent and to proceed to evict in February. However, if the landlord accepts rent for February, a new month-to-month tenancy is created.

The fact patterns are often more complicated. You must obtain a detailed chronology from the client to see whether the period covered by the payment actually is a period subsequent to the notice period. You should also verify the tenant's statements, if possible, with receipts or other documents.

9. [4.35] Explore Substantive Defenses

As part of the initial interview, you must evaluate whether the tenant may have substantive claims against the landlord that might preclude eviction, improve the tenant's negotiating posture, or give rise to substantive rights in forums other than eviction court. (The tenant may, for instance, be able to assert a housing discrimination claim before the Human Rights Commission or in federal court.)

10. [4.36] Develop Strategy with Tenant

You and your client should develop at least a tentative plan of action at the time of the initial interview. Several options are discussed below.

a. [4.37] Contact the Landlord or His Attorney in Attempt To Resolve Matter

The tenant may want you to contact the landlord in an attempt to resolve the problem. Especially when your client does not have a very strong defense to the eviction action, you should explore

settlement as soon as possible because the landlord may become less amenable to settling the case after he has spent a significant amount of money on court costs and attorneys' fees.

b. [4.38] Refer the Parties to Mediation

If the problems that provoked the notice seem amenable to resolution, the tenant may want to try an informal mediation process to reach an agreement with the landlord. Mediation is an attractive option when the landlord and tenant both have an incentive to continue the relationship. Large communities may have mediation panels like the Neighborhood Justice Center in Chicago.

c. [4.39] Assist the Client with Tender

You may wish to assist the client in tendering rent to the landlord either by making the actual tender for the client or by preparing a cover letter for the tender.

d. [4.40] Refer the Tenant Appropriately for Other Claims

You should advise the client about other claims she may have against the landlord, such as those based on discrimination.

e. [4.41] Gather Facts

In many cases, especially those in which the condition of the premises is or will be at issue, you should use the pre-litigation phase to perform extensive factual investigation. Such an investigation is limited only by the your imagination and the Rules of Professional Conduct and might include the following:

1. a personal visit to the client's building and apartment to evaluate the conditions;

2. individual or group meetings with other tenants in the building to determine whether they have similar problems;

3. a letter to the building inspector requesting an official inspection of the building;

4. a request to the building department to review records related to prior inspections of the building;

5. review of court files to determine whether the client's building has been the subject of litigation during the term of the client's tenancy;

6. photographs of conditions and/or problems;

7. documents related to payments, notices, leases, and extensions, etc., if not brought to initial interview;

8. informal discovery from opponent or employees of opponent;

9. discussions with tradespeople who have worked on premises or have given estimates for work;

10. title search to determine who has ownership interest in the property;

11. interviews with witnesses who have firsthand knowledge about material facts.

III. PLEADINGS PHASE

A. [4.42] Introduction

Your client may not contact you until she receives a summons to appear in court. If you have not had an opportunity to advise your client in the pre-litigation stage, you must gather the same facts and documents referred to in §4.3 to be able to determine what, if any, technical and/or substantive defenses you can raise. The following sections are designed to help you review standard defenses and prepare for trial.

B. [4.43] The Client Interview — Litigation Questions

If you have not already done so, conduct a detailed, thorough interview with your client, using the outline in §4.3 above and the questions set forth below. Tell your client to bring all her court papers to the interview, along with the documents mentioned in §4.41. Additional intems for the interview checklist follow:

Client Interview — Continued

IX. Details regarding service of summons

A. Date of service?

B. Time of service?

C. Age, race, sex, relationship of person served? Does person reside in same household as client?

D. Place of service?

E. Witnesses to service?

F. Any papers received in mail? What are they?

G. Any other tenants served at same time?

X. Party Identities

A. Identity of plaintiff (Does client recognize name?)

B. Identity of defendants

1. Other adults living with client named as parties?

2. Someone named as a defendant who is not a current tenant?

3. Client named as defendant?

XI. Information and client signature to complete the application to sue or defend as a poor person

C. [4.44] Analyze Case; Choose Strategy

The following sections set forth some technical and substantive defenses and discuss the strategic advantages and disadvantages of pursuing different courses of action.

1. [4.45] Is the Client Eligible To Proceed as a Poor Person?

Filing your client's appearance and jury demand costs money. If your client is poor, however, you may submit a completed application to sue or defend as a poor person (commonly referred to as a "pauper's petition"). S.Ct. Rule 298. If the application is granted, the filing fees will be waived.

2. [4.46] Does the Court Have Personal Jurisdiction over the Client?

A court acquires personal jurisdiction over the defendant only when she (a) makes a general appearance in court or (b) is served with process in the manner directed by statute. *State Bank of Lake Zurich v. Thill,* 113 Ill.2d 294, 497 N.E.2d 1156, 1161, 100 Ill.Dec. 794 (1986).

a. [4.47] Acceptable Methods of Serving Process

In a forcible action, the defendant may be served in accordance with any of the following three methods:

1. personal service — "by leaving a copy of the summons with the defendant personally" (735 ILCS 5/2-203(a)(1));

2. substitute service — "by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode" (735 ILCS 5/2-203(a)(2)); or

3. constructive service — by posting and mailing of notices (735 ILCS 5/9-107) or by publication and mailing of notices (735 ILCS 5/9-107, 5/2-206) (before taking advantage of the statutory provisions allowing for constructive service, the plaintiff or his attorney must file an affidavit stating that the defendant (a) does not reside in Illinois, (b) has left Illinois, (c) on "due inquiry cannot be found" or (d) is concealed within Illinois so that process cannot be served on her (735 ILCS 5/9-107)).

If the defendant is not served in the manner directed by statute and she does not submit herself to the jurisdiction of the court by making a general appearance, any judgment entered against her

> **is void regardless of whether [**she**] had actual knowledge of the proceedings . . . Moreover, a party attacking a judgment for lack of personal jurisdiction due to defective service of process is not restricted by either the time limitations or the "due diligence" requirements of [**735 ILCS 5/2-1401**]. . . . Accordingly, a judgment rendered by a court which fails to acquire [**personal jurisdiction over the defendant**] may be attacked and vacated at any time. [**Citations omitted.**]** *State Bank of Lake Zurich v. Thill,* 113 Ill.2d 294, 497 N.E.2d 1156, 1161 – 1162, 100 Ill.Dec. 794 (1986).

b. [4.48] Procedure for Contesting the Court's Personal Jurisdiction on the Grounds That the Defendant Was Not Properly Served with Summons

You may contest the court's personal jurisdiction by filing a motion to quash the service of summons. *Remember to file a special and limited appearance along with this motion.* The procedure for filing a special appearance is set forth in 735 ILCS 5/2-301:

> **Prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. . . . Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance.**

If the court denies your motion to quash, do not continue to participate in the case unless you are willing to waive your right to challenge the court's decision on appeal. See 735 ILCS 5/2-301(c).

A special appearance may be submitted on a preprinted form or typed on plain paper. It should be filed before the trial date whenever possible, and, if necessary, the arrangements to have the filing fee waived should also be made in advance. Then, on the trial date, the tenant's attorney can tender the special appearance to the court and present the motion to quash. The movant should be prepared to conduct an evidentiary hearing on the motion to quash if the basis to quash is not apparent from the court file.

Courts require strict compliance with the statutes governing the procedure for serving summons, and there are several ways to challenge improper service. (The grounds for objection are set forth below.) If there is a question about whether service was proper, examine the court file and photocopy the return of service.

(1) [4.49] Challenging personal service

The return of service must "(1) identify as to sex, race, and approximate age the defendant . . . and (2) state the place where . . . and the date and time of the day when the summons was left with the defendant." 735 ILCS 5/2-203(b). The contents of the return of service are presumed correct and "should not be set aside merely upon the uncorroborated testimony of the person on whom the process has been served, but only upon clear and satisfactory evidence." *Marnik v. Cusack,* 317 Ill. 362, 148 N.E. 42, 43 (1925). As the appellate court stated in *Paul v. Ware,* 258 Ill.App.3d 614, 630 N.E.2d 955, 958, 196 Ill.Dec. 790 (1st Dist. 1994):

> **[**T**]he affidavit of service is** *prima facie* **evidence that process was properly served. . . . To attack the underlying default judgment on the grounds that the court never obtained personal jurisdiction over the defendant, evidence must be presented to impeach the affidavit of service. . . . An uncorroborated defendant's affidavit merely stating that he had not been personally served with summons is insufficient to overcome the presumption favoring the affidavit of service. . . . The default judgment will not be set aside unless the return of service is impeached by clear and convincing evidence. [**Citations omitted.**]**

In *Robinwoods West, Inc. v. Kramer,* 128 Ill.App.2d 49, 262 N.E.2d 332, 333 (1st Dist. 1970), the defendant satisfied the "clear and convincing evidence" standard by submitting, in support of his motion to quash the service of summons, both (a) an affidavit stating that he was in California on the date he was allegedly served and (b) a paid out-of-state motel bill that corroborated his statement.

(2) [4.50] Challenging substitute service

> **[**T**]he return of the officer or other authorized person making service of a summons on a defendant by delivering a copy to another person, that is, by substituted service, must show strict compliance with every requirement of the statute authorizing such substituted service, since** *the same presumption of validity that attaches to a return reciting personal service does not apply to substituted service.* **[**Emphasis added.**]** *State Bank of Lake Zurich v. Thill,* 113 Ill.2d 294, 497 N.E.2d 1156, 1162, 100 Ill.Dec. 794 (1986).

When the return of service is "challenged by affidavit and there are no counteraffidavits, the return itself is not even evidence, and, absent testimony by the deputy, the affidavits must be taken as true and the purported service of summons quashed." *Clinton Co. v. Eggleston,* 78 Ill.App.3d 552, 397 N.E.2d 183, 187, 33 Ill.Dec. 850 (1st Dist. 1979), quoting *Harris v. American Legion John T. Shelton Post No. 838,* 12 Ill.App.3d 235, 297 N.E.2d 795, 796 – 797 (1st Dist. 1973).

If service is made on someone who is present only temporarily in the apartment and is not a member of the defendant's household, the service is improper. However, in *Fredman Bros. Furniture Co. v. Stambaugh,* 50 Ill.App.3d 595, 367 N.E.2d 135, 137 – 138, 9 Ill.Dec. 701 (3d Dist. 1977), the court upheld service on a "live-in-companion" of the defendant, relying on the apparent intention of the person served to continue to reside there permanently. If substitute service is made on the wrong person, the person actually served should submit an affidavit along with the defendant's affidavit.

(3) [4.51] Challenging constructive service

735 ILCS 5/9-107 provides, in pertinent part:

> **If the plaintiff . . . files a forcible detainer action . . . and is unable to obtain personal service on the defendant and a summons duly issued in such action is returned without service stating that service cannot be obtained, then the plaintiff . . . may file an affidavit stating that the defendant is not a resident of this State, or has departed from this State, or on due inquiry cannot be found, or is concealed within this State so that process cannot be served upon him or her . . .** [and] **. . . the defendant may be notified by posting and mailing of notices.**

Sometimes, the plaintiff in a forcible action takes advantage of this statute before a diligent effort has been made to locate the defendant. If your client receives a posting notice in the mail sufficiently in advance of the trial date, you should examine both the sheriff's return (to determine what efforts were made by the sheriff to serve the defendant) and the affidavit filed by the plaintiff or the plaintiff's attorney. If the defendant contests the factual basis for posting and files an affidavit to that effect, the defendant is entitled to an evidentiary hearing on the basis for the posting. *Bank of Ravenswood v. King,* 70 Ill.App.3d 908, 388 N.E.2d 998, 27 Ill.Dec. 35 (1st Dist. 1979). Furthermore, "[a] perfunctory inquiry does not comply with the provisions of the statute. An honest and well-directed effort must be made. . . . The inquiry must be as full as the circumstances of the particular situation will permit." 388 N.E.2d at 1001, quoting *Graham v. O'Connor,* 350 Ill. 36, 182 N.E. 764, 766 (1932). When the landlord or his attorney abuses the provision allowing for constructive service, the tenant's attorney should consider filing a motion for sanctions pursuant to S.Ct. Rule 137.

Note that a landlord who uses constructive service may not obtain a money judgment against the tenant. 735 ILCS 5/9-107 provides that

in cases where the defendant is notified by posting and mailing of notices or by publication and mailing, and the defendant does not appear generally, the court may rule only on the portion of the complaint which seeks judgment for possession, and the court shall not enter judgment as to any rent claim joined in the complaint.

c. [4.52] Filing a Motion To Quash

Proper service of summons is a fundamental element of personal jurisdiction. If the summons is served improperly, or if the landlord makes false statements in the affidavit for constructive service, the tenant may be deprived of an opportunity to appear in court and contest the case. Occasionally, the tenant discovers she is the defendant in an eviction action only when (1) she receives a letter from the sheriff indicating that an order of possession will be executed within 24 hours or (2) the sheriff arrives on her doorstep ready to enforce the order of possession. Challenging improper service of summons helps (1) discourage sheriff's deputies, landlords, and landlords' attorneys from attempting to shortcut the statutory procedure and (2) encourage the courts to examine carefully the jurisdictional basis for each judgment that is sought.

Strategically, attorneys who represent tenants may decide to advise their clients not to pursue the jurisdictional issues. If the tenant has received notice of the proceeding even though the method of service was improper, it may be more efficient to defend on the merits since several court appearances may be required to prevail on the motion to quash, and even then the landlord need only re-serve the defendant. However, a successful motion to quash will delay trial for some time and may therefore enhance the tenant's settlement position.

3. Should a Jury Demand Be Filed?

a. [4.53] Right to a Jury Trial

735 ILCS 5/9-108 provides that in a forcible detainer action "either party may demand trial by jury, notwithstanding any waiver of jury trial contained in any lease or contract." Filing a jury demand often delays the trial for a period of several weeks, which may strengthen the defendant's settlement posture. Furthermore, juries are often sympathetic to defenses based on both (1) the landlord's failure to rely on good cause for evicting a resident of public or other federally subsidized housing and (2) the landlord's breach of the implied warranty of habitability.

b. [4.54] Time for Making Jury Demand

A timely jury demand must be filed "not later than the filing of [the] answer." 735 ILCS 5/2-1105. In *First Bank of Oak Park v. Carswell,* 111 Ill.App.3d 71, 443 N.E.2d 755, 66 Ill.Dec. 829 (1st Dist. 1982), the court noted that S.Ct. Rule 181(b)(2) provides that no answer need be filed in a forcible action. Therefore, the court reasoned, the relevant inquiry for timeliness of the jury demand was not the date of filing an answer but, rather, the date that the defendant originally was required to appear.

The safest strategy is to file the jury demand with the defendant's appearance. However, since the court has discretion to accept a late jury demand, the attorney may decide to demand a jury if, for instance, a pro se defendant failed to file a formal jury demand on the first appearance date. In *Pecoraro v. Kesner,* 217 Ill.App.3d 1039, 578 N.E.2d 53, 160 Ill.Dec. 874 (1st Dist. 1991), the appellate court reversed the trial court's decision to strike a jury demand the defendant filed 11 days after he was first required to appear in an eviction action. In support of its decision, the appellate court noted that "[s]tatutes regulating the right to a jury trial should be liberally construed in favor of allowing this right and the inclination of the court should be to protect and to enforce this right." 578 N.E.2d at 56.

4. Is the Case Filed in the Proper Venue?

a. [4.55] Proper County?

735 ILCS 5/9-106 provides that venue in a forcible action lies "in the circuit court for the county where such premises are situated." If the case is filed improperly, the proper procedure is to move for a transfer of the action. 735 ILCS 5/2-104. The motion must be supported by an affidavit. An objection to venue is waived unless it is made on or before the date on which the defendant is first required to appear in court. A form lease provision that permits the landlord to sue in any circuit court in Illinois is unenforceable. *Martin-Trigona v. Roderick,* 29 Ill.App.3d 553, 331 N.E.2d 100 (1st Dist. 1975).

b. [4.56] Proper District?

In multi-district counties, such as Cook County, the defendant may object to venue if the forcible action is filed in the wrong district. The General Orders of the Circuit Court of Cook County provide that a forcible action must be filed in the district where (1) the defendant lives or (2) the transaction or some part thereof occurred out of which the cause of action arose. "Actions of . . . forcible entry and detainer . . . may be filed in the district where the property is located." General Order 1.2.3(d). If a forcible action is filed in the wrong district, the defendant can seek to transfer the action as of right or at the discretion of the trial judge. General Orders 1.3(c), 1.3(d).

Filing a motion to transfer a case to the proper venue can be strategically valuable, as the following example demonstrates. Assume a tenant who resides in Chicago is sued in Skokie (where her landlord resides). At trial, she may need to rely on the RLTO, which provides tenants with significant additional rights and protections. A judge in Skokie, however, may be unfamiliar with the RLTO and, as a result, misconstrue it. Transferring the eviction action to Chicago, therefore, will in all likelihood help the client because her case will be heard by a judge who is more familiar with the RLTO and the protections it offers. Furthermore, the landlord may be less willing to pursue the eviction action if he has to travel to Chicago for every court date.

5. [4.57] Is the Plaintiff a Proper Party?

735 ILCS 5/9-106 provides that only a party entitled to the possession of the premises may maintain a forcible action. Make sure the plaintiff owns the premises, or is an agent for the owner, and has capacity to sue.

a. [4.58] Unincorporated Associations

735 ILCS 5/2-209.1 provides that "[a] voluntary unincorporated association may sue and be sued in its own name, and may complain and defend in all actions." A voluntary association is defined as "any organization of 2 or more individuals formed for a common purpose, excluding a partnership or corporation." *Id.*

b. [4.59] Corporations and Partnerships

Incorporated entities and partnerships are sometimes represented in court by an employee or an officer of the corporation or a partner. These entities, however, must be represented by counsel. *Johnson v. Pistakee Highlands Community Association,* 72 Ill.App.3d 402, 390 N.E.2d 640, 642, 28 Ill.Dec. 473 (2d Dist. 1979). If they are not represented by a licensed attorney, their case must be

dismissed. The defect cannot be cured by amendment as the proceedings are a "nullity." *Marken Real Estate & Management Corp. v. Adams,* 56 Ill.App.3d 426, 371 N.E.2d 1192, 1195, 14 Ill.Dec. 139 (1st Dist. 1977). This rule also applies to municipal corporations. *Housing Authority of Cook County v. Tonsul,* 115 Ill.App.3d 739, 450 N.E.2d 1248, 71 Ill.Dec. 369 (1st Dist. 1983).

c. [4.60] Land Trusts

When property is held in a land trust, the forcible action may be instituted by the trustee or the beneficiary. *Mamolella v. Mamolella,* 73 Ill.App.3d 398, 392 N.E.2d 99, 29 Ill.Dec. 542 (1st Dist. 1979). If, however, a beneficiary signs a lease as the agent of the trustee, contrary to the provisions of the trust agreement, the lease is unenforceable. *Feinberg v. Great Atlantic & Pacific Tea Co.,* 131 Ill.App.2d 1087, 266 N.E.2d 401, 403 (1st Dist. 1970).

d. [4.61] Complaints Filed by Non-Attorneys or Attorneys Not Licensed in Illinois

Occasionally a building manager or employee of a management company will file a complaint in the name of another person or entity. However, a complaint filed by a non-attorney seeking to represent another should be dismissed as void ab initio. *Blue v. People of the State of Illinois,* 223 Ill.App.3d 594, 585 N.E.2d 625, 165 Ill.Dec. 894 (2d Dist.), *appeal denied,* 145 Ill.2d 637 (1992). Courts have reached different conclusions when asked to decide whether a complaint filed by an attorney not licensed to practice in Illinois should be dismissed. *Compare Fruin v. Northwestern Medical Faculty Foundation, Inc.,* 194 Ill.App.3d 1061, 551 N.E.2d 1010, 141 Ill.Dec. 667 (1st Dist.), *appeal denied,* 133 Ill.2d 555 (1990) *with McEvers v. Stout,* 218 Ill.App.3d 469, 578 N.E.2d 321, 161 Ill.Dec. 194 (4th Dist.), *appeal denied,* 142 Ill.2d 655 (1991).

6. [4.62] Have All the Proper Defendants Been Sued?

In general it is the duty of the plaintiff to ensure that each adult who has a possessory interest in the apartment is named as a defendant, since individuals over whom the court lacks any jurisdiction are not bound by its orders.

Sometimes a person residing in the subject premises who was not named as a defendant in the eviction action may wish to intervene. This situation is most likely to occur when an apartment is rented in the name of one person, but another person (such as a relative or subtenant) actually occupies it. An occupant who pays rent has a possessory interest sufficient to allow intervention under 735 ILCS 5/2-408 if the landlord files an eviction action but names only the original tenant as a defendant. *See Mills v. Reiger,* 328 Ill.App. 230, 65 N.E.2d 628 (1st Dist. 1946); *Robinson v. Robinson,* 329 Ill.App. 515, 69 N.E.2d 904 (1st Dist. 1946).

7. [4.63] Should Similar Cases Be Consolidated?

735 ILCS 5/2-1006 provides that "actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right." In Cook County, motions to consolidate cases pending in different departments of the circuit court must be presented to the assignment judge of the Law Division. Cook County Circuit Court General Order 12-1. Motions to consolidate municipal cases are brought before the "motion judge" of the district in which the cases are pending. General Order 12-2. For a discussion of the difference between consolidation for trial and consolidation for disposition, *see Vitale v. Dorgan,* 25 Ill.App.3d 941, 323 N.E.2d 616 (2d Dist. 1975). The following sections explain when consolidation may benefit the defendant.

a. [4.64] Consolidation of Eviction Suit into Pending Code Enforcement Suit Filed by Tenant

In *Clore v. Fredman,* 59 Ill.2d 20, 319 N.E.2d 18 (1974), tenants filed a suit against their landlord seeking damages and an injunction (1) compelling the landlord to make repairs and (2) enjoining him from evicting them. When the landlord later filed an eviction action, the tenants raised the defense that the eviction was brought in retaliation for the tenants' complaints of building code violations to a city agency. The tenants then moved to consolidate the eviction action into their prior lawsuit. The trial court denied the motion to consolidate, but the Illinois Supreme Court reversed, holding: "The cases contain common questions of law and fact, which could and should have readily been determined at the same time." 319 N.E.2d at 22.

b. [4.65] Consolidation of Eviction Suit into Pending Code Enforcement Suit Filed by Municipality

If your client is the defendant in an eviction action and you are planning to assert a defense based on the condition of her apartment, check to see whether the city is currently pursuing a code violation suit against the landlord in building court. If so, you can file a motion to consolidate the eviction action with the city's case. If your motion is granted, the eviction action will be transferred to the building court. Transferring the tenant's case from the eviction court (where forcible actions are handled in a summary manner and the judges are sometimes reluctant to hear evidence of code violations) to the building court (where the judges are generally more receptive to such evidence and the tenant can benefit from the housing inspector's expert testimony) may be a wise strategic move. On the other hand, building court judges may be unfamiliar with the technical defenses to eviction and, if persuaded that the violations are serious, may order the tenants evicted summarily to protect them from dangerous conditions.

Sometimes a landlord who is the defendant in a code enforcement suit files eviction actions against tenants who are withholding rent. If the tenants then file jury demands and assert defenses based on a breach of the implied warranty of habitability, the landlord may move to consolidate the eviction cases with the building court case and ask the building court to enter orders of assistance against the tenants. Tenants should oppose the motion to consolidate on the grounds that (1) it will prejudice their right to a jury trial and (2) if the building court contemplates entering an order of assistance against them without allowing them to present defenses, they will be deprived of their right to defend themselves against the eviction actions.

c. [4.66] Multiple Eviction Cases Against Tenants in One Building

Occasionally, a landlord will file eviction actions against several tenants who live in the same building. If you are representing one or all of the tenants, consider moving to consolidate the cases if there are common questions of fact. Consolidation is particularly useful when the condition of the entire building, including the common areas, is at issue or when several apartments have all been inspected by one witness. If the cases are consolidated, you will have to elicit testimony about the common areas only once, and witnesses familiar with the entire building will not have to be recalled repeatedly. On the other hand, you may decide against filing or opposing such a motion if you think you have the time and resources to defend numerous evictions and the landlord does not have the time and resources to prosecute them separately.

8. [4.67] Is There a Need for Emergency Relief?

Occasionally a tenant will report that her landlord, in addition to filing a forcible action against her, is interfering in some way with her right to possession. This interference may range from the mild (for example, not replacing light bulbs in the common areas near the client's apartment) to the severe

(interfering with the tenant's access to utilities). If you are representing such a tenant, you should immediately contact the landlord's attorney, or the landlord if he is pro se, to discuss and attempt to resolve the problem. If the interference does not stop, you should seek a temporary restraining order pursuant to 735 ILCS 5/11-101. You may seek this emergency relief in the eviction proceeding.

D. [4.68] Draft Pleadings

The defendant in a forcible action need not file any responsive pleadings unless ordered to do so by the court, and all allegations in the complaint will be deemed denied if no answer is filed. S.Ct. Rule 181(b)(2). Furthermore, any defense may be proved as if it were specifically pled. *Id.* In many cases, however, it will be to your advantage to file a motion to dismiss or affirmative defenses and/or counterclaims that are germane to the action. NOTE: You may not file an affirmative defense or counterclaim after the appearance date unless you receive permission from the court. *See Sawyier v. Young,* 198 Ill.App.3d 1047, 556 N.E.2d 759, 145 Ill.Dec. 141 (1st Dist. 1990).

1. [4.69] Motions To Dismiss Complaint

You may have grounds to file a motion to dismiss the forcible action pursuant to 735 ILCS 5/2-615 or 5/2-619. There are good reasons to present routine defenses through a motion to dismiss. Depending on local practice, the motion may be scheduled at a time when an otherwise busy trial judge has time to hear it. Also, the landlord may be more willing to discuss settlement when confronted with a written motion, or he may even agree to dismiss the case. Finally, you can avoid preparing and litigating complex defenses if the case can be dismissed on the basis of a routine motion.

Of course, filing a motion to dismiss provides the landlord with advance notice of your defense and gives him an opportunity to consider and respond to it. Therefore, you may prefer to surprise the landlord by presenting the defense for the first time at trial. See S.Ct. Rule 181(b)(2) (providing that the defendant in a forcible action need not file an answer unless ordered to do so by the court and may prove any defense *as if it were specifically pled.* See also 735 ILCS 5/9-106; *Samek v. Newman,* 164 Ill.App.3d 967, 518 N.E.2d 422, 424, 115 Ill.Dec. 897 (1st Dist. 1987) (holding that defendant in forcible action may present any germane defenses at trial, even if she never raised them in proper pleading).

a. [4.70] Failure To State a Cause of Action

Motions under 735 ILCS 5/2-615 attack the legal sufficiency of the complaint. However, since the use of form complaints is common in forcible actions — 735 ILCS 5/9-106 provides that the complaint need allege only that the plaintiff is entitled to possession of the premises and the defendant unlawfully withholds possession of same — most practitioners don't seriously consider §2-615 motions. Furthermore, the party defending the motion routinely is granted time to amend the complaint in the event it is found deficient.

However, a §2-615 motion may be appropriate if the complaint fails to describe premises correctly. In *Worley v. Ehret,* 36 Ill.App.3d 48, 343 N.E.2d 237, 242 (5th Dist. 1976), the court ruled that the complaint must describe the premises with "reasonable certainty" and noted that "[t]he normal test of the certainty of the description is whether an officer executing a summons would be able to locate the premises from the description." If the tenant proceeds to trial without objecting to the description in the complaint, she waives her right to raise the issue on appeal.

b. [4.71] Affirmative Matter Defeats Cause of Action

A motion filed pursuant to 735 ILCS 5/2-619 asserts an affirmative matter that defeats the cause of action. These motions presume the legal sufficiency of the complaint and must be supported by affidavits. Failing to present a defense through a §2-619 motion does not preclude the tenant from raising that defense at trial. 735 ILCS 5/2-619(d); S.Ct. Rule 181(b)(2). You should file your jury demand before filing a motion to dismiss. Then, if the court denies the motion, you will have preserved your right to a jury trial.

If you win a motion based on a technical defense, the landlord's case will be dismissed *without prejudice.* Prevailing on a technical defense, therefore, may serve only to delay an ultimate decision on the merits. Nevertheless, it may significantly improve your client's bargaining position. The following sections describe some of the defenses that can be raised by means of a §2-619 motion.

(1) [4.72] Notice defects

You must first determine whether service of a notice of termination was a procedural prerequisite to commencement of the suit and, if so, whether the notice was properly served. Remember, however, that a tenant's receipt of the termination notice cures any defect in the manner of service. *Prairie Management Corp. v. Bell,* 289 Ill.App.3d 746, 682 N.E.2d 141, 145, 224 Ill.Dec. 580 (1st Dist. 1997). If the tenant did not receive the notice, the landlord's failure to serve it properly should support a §2-619 motion to dismiss. The motion should set forth relevant facts about the tenancy and be accompanied by the tenant's affidavit to support the factual allegations.

(2) [4.73] Premature filing of lawsuit

An eviction cannot be commenced until the day after the expiration of the statutory notice period. If the suit is commenced on the last day of the period or earlier, the suit must be dismissed. *Avdich v. Kleinert,* 69 Ill.2d 1, 370 N.E.2d 504, 12 Ill.Dec. 700 (1977).

(3) [4.74] Cure and waiver

If the tenant has paid the full amount of rent demanded in the notice within the notice period and has a receipt to prove it, she can file a §2-619 motion to dismiss the complaint. *See Madison v. Rosser,* 3 Ill.App.3d 851, 279 N.E.2d 375 (1st Dist. 1972). Similarly, if excess rent or amounts other than rent are claimed in the notice but the proper amount is paid or tendered within the notice period, a motion to dismiss should be sustained. *See Payne v. Coates-Miller, Inc.,* 52 Ill.App.3d 288, 367 N.E.2d 406, 10 Ill.Dec. 18 (1st Dist. 1977).

Some waiver defenses can also be asserted by means of a §2-619 motion. For example, a tenant who has receipts consistently showing rental periods from the 15th to the 15th, or showing rent accepted on the 10th of every month, may attach copies of these receipts to an affidavit to show that the landlord has waived the right to insist that rent be paid on the first. The burden should then shift to the landlord to show that he provided the tenant with proper notice of his intent to insist on other payment arrangements.

2. [4.75] Motion for Continuance

735 ILCS 5/2-1007, S.Ct. Rule 231, and Cook County Circuit Court Rule 5.2 all provide that continuances should generally not be granted on the day of trial. In practice, however, eviction judges in Cook County routinely grant either party one continuance on the first date. As a matter of courtesy,

of course, the tenant's attorney should always notify opposing counsel of the tenant's intention to seek a continuance on the first court date so the landlord and his witnesses, if any, do not make an unnecessary trip to court.

A more difficult problem may occur when both sides answer ready for trial and in the middle of its case in chief the landlord or landlord's attorney realizes that evidence or witnesses not immediately available are necessary in order to prevail. Trial judges routinely permit the landlord a continuance to obtain the necessary information or evidence, even over the objection of the defendant, especially if the tenant has been granted a continuance previously. The party requesting a continuance during trial must show that it exercised due diligence to ensure the attendance of the witness or the availability of the evidence. S.Ct. Rule 231(a); *Buckley v. Cronkhite,* 74 Ill.App.3d 487, 393 N.E.2d 60, 64 – 65, 30 Ill.Dec. 405 (2d Dist. 1979). The courts have strictly construed the requirement that the motion for continuance be written and supported by affidavit. *Parker v. Newman,* 10 Ill.App.3d 1019, 295 N.E.2d 503, 506 (3d Dist. 1973). *But see Jack v. Pugeda,* 184 Ill.App.3d 66, 539 N.E.2d 1328, 132 Ill.Dec. 522 (5th Dist.), *appeal denied,* 127 Ill.2d 617 (1989) (affirming grant of continuance when no affidavit filed). It is important to note that a tenant or attorney who requests a continuance prior to filing a jury demand, and without reserving the right to file this demand, may be held to have waived the right to a jury trial. *But see Pecoraro v. Kesner,* 217 Ill.App.3d 1039, 578 N.E.2d 53, 56, 160 Ill.Dec. 874 (1st Dist. 1991) (holding that "[s]tatutes regulating the right to a jury trial should be liberally construed in favor of allowing this right and the inclination of the court should be to protect and to enforce this right.").

When the plaintiff is unable to adduce evidence at trial to establish his case in chief and needs a continuance, a persuasive argument can be made based on 735 ILCS 5/2-1007 and S.Ct. Rule 231 that a judgment should be entered in the defendant's favor.

3. [4.76] Answers, Affirmative Defenses, and Counterclaims

Each affirmative defense and counterclaim must be pled separately. 735 ILCS 5/2-613. The following sections set forth several defenses and counterclaims that have been held germane in eviction cases.

a. Defense Based on Retaliatory Eviction

(1) [4.77] Under state law

765 ILCS 720/1 provides as follows:

> **It is declared to be against the public policy of the State for a landlord to terminate or refuse to renew a lease or tenancy of property used as a residence on the ground that the tenant has complained to any governmental authority of a bona fide violation of any applicable building code, health ordinance, or similar regulation. Any provision in any lease, or any agreement or understanding, purporting to permit the landlord to terminate or refuse to renew a lease or tenancy for such reason is void.**

In *Clore v. Fredman,* 59 Ill.2d 20, 319 N.E.2d 18 (1974), the Illinois Supreme Court held this statute to be germane as an affirmative defense to an eviction action. The court stated: "The public policy of this State as evidenced by its statutory law forbids a landlord to terminate or refuse to renew a lease because a tenant complained to a governmental authority of a *bona fide* violation of any applicable building code, health ordinance or similar regulation." 319 N.E.2d at 21. In *Wood v. Wood,* 284 Ill.App.3d 718, 672 N.E.2d 385, 390, 219 Ill.Dec. 877 (4th Dist. 1996), the court held that the retaliatory eviction defense should not be limited to cases involving complaints about code violations:

> **Illinois has never decided the defense is limited to that recognized in the [**Retaliatory**] Eviction Act. . . . "[**C**]ircumstances may arise, in future cases, where a landlord's action in seeking to evict a tenant would be so invidiously motivated and would so contravene the public policy of our State that we would not permit our courts to implement the eviction in a forcible entry and detainer proceeding." [**Citations omitted.**]**

After the tenant establishes a prima facie case of retaliation, the landlord bears the burden of showing that the termination was not retaliatory. The leading case on this issue, *Robinson v. Diamond Housing Corp.,* 463 F.2d 853, 865 (D.C.Cir. 1972), states: "Once the presumption is established, it is then up to the landlord to rebut it by demonstrating that he is motivated by some legitimate business purpose rather than by the illicit motive which would otherwise be presumed." The court held that the "landlord's mere allegation that he is removing the unit from the market because he cannot afford to make repairs" after it was found that the building violated the housing code was not enough to prevent the case from going to the jury. 463 F.2d at 867 The court added:

> **We must remember that we are dealing with a question of subjective motive, and that objective factors are relevant only as indicia of motive. Thus the mere existence of a legitimate reason for the landlord's actions will not help him if the jury finds that he was in fact motivated by some illegitimate reason. . . . In cases of mixed motives, the jury will have the difficult task of weighing one against the other and determining which was the causative factor. [**Citations omitted.**]** *Id.*

In *Clore,* the Illinois Supreme Court held that the landlord's affidavit, which stated that his notice to quit was motivated by sound commercial reasons in preparation of upgrading the physical condition and improving the rental prospects of the premises, was insufficient to support summary judgment and that a hearing was necessary to resolve the issue of whether the eviction was retaliatory.

(2) [4.78] Under the RLTO

Section 5-12-150 of the RLTO prohibits landlords from terminating or threatening to terminate a tenancy, increase rent, decrease services, bring or threaten to bring a lawsuit, or refuse to renew a tenancy merely because the tenant has (a) complained to any agency or official responsible for the enforcement of a building, housing, health, or similar code; (b) complained to or sought the assistance of a community organization or the news media in an attempt to remedy a code violation or an illegal landlord practice; (c) asked the landlord to make repairs; (d) joined a tenant union; (e) testified in court about the condition of the premises; or (f) exercised any right or remedy provided by law. Tenants may raise any violation of this provision as a germane defense in an eviction action. *Id.*

If there is evidence that the tenant engaged in any of the protected activities described in the preceding paragraph during the one-year period immediately preceding the alleged retaliation, there arises a rebuttable presumption that the landlord's conduct was retaliatory. *Id. See generally McElroy v. Force,* 38 Ill.2d 528, 232 N.E.2d 708, 710 – 711 (1967) (explaining operation of rebuttable presumptions); *Clore v. Fredman,* 59 Ill.2d 20, 319 N.E.2d 18, 21 – 22 (1974) (approving rebuttable presumption in retaliatory eviction case).

A tenant who establishes that the landlord engaged in retaliatory conduct is entitled either to (a) recover possession of the premises or (b) terminate the rental agreement. In either case, she may recover an amount equal to not more than two months' rent or twice her actual damages, whichever is greater, plus reasonable attorneys' fees. RLTO §5-12-150.

b. Defense Based on Breach of the Implied Warranty of Habitability

(1) [4.79] Nature of warranty

Illinois case law provides that tenants may raise, as a defense to an eviction action, the landlord's breach of the implied warranty of habitability. This defense was first enunciated by the Illinois Supreme Court in *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972), and was expanded on in subsequent decisions. *See Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981) (expanding warranty to rental of single-family homes); *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985) (expanding warranty to jurisdictions without building codes).

These decisions establish that there is an implied warranty of habitability in all residential leases (both oral and written) in Illinois. This warranty requires generally that a lessor maintain a residential unit in substantial compliance with applicable building codes or in a fit and habitable condition. In an eviction action based on nonpayment of rent, the defendant may plead a defense alleging that the landlord's failure to maintain the premises in a fit and habitable condition reduced the value of the premises by an amount that exceeds the amount of rent owed.

In jurisdictions with local building codes, the implied warranty of habitability is fulfilled by substantial compliance with these codes. Whether the landlord has complied with applicable building codes is therefore relevant to the question of whether the tenant owes the rent the landlord is claiming, and this is a question of fact.

(2) [4.80] Burden of proof

The tenant bears the burden of proof when trying to establish a defense based on an alleged breach of the warranty of habitability. Generally, the tenant must establish by a preponderance of the evidence that (a) conditions exist that violate applicable building code provisions and render the apartment unfit for its intended use and (b) as a result of such conditions, the tenant has suffered damages.

Whether there has been a breach of warranty is a question of fact to be determined on a case-by-case basis. *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 920, 88 Ill.Dec. 895 (1985). In making this determination the court should consider various factors, including the nature of the defect, its effect on habitability, the length of time it persisted, the age of the structure, and/or whether the defects resulted from abnormal or unusual use by the tenant. *Id.* In addition, the court should consider whether the landlord knew or reasonably should have known of such conditions and whether the landlord corrected the conditions within a reasonable time thereafter. *Abram v. Litman,* 150 Ill.App.3d 174, 501 N.E.2d 370, 103 Ill.Dec. 349 (4th Dist. 1986).

The fact that the tenant has continued to live in the premises does not mean that the premises comply with the warranty of habitability. A tenant may live in an apartment that is not in compliance with the code without waiving the right to seek damages from the landlord for breach of the implied warranty. *Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981).

(3) [4.81] Measure of damages

The Illinois Supreme Court has declined to establish rigid standards for determining whether the warranty has been breached. However, once the court determines that a breach exists, the basic contract remedies of damages, rescission, and reformation are available. *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 920, 88 Ill.Dec. 895 (1985).

The court has acknowledged that several methods for measuring damages are available. The court should adopt a measure that best suits the facts of the particular case. Damages may be calculated by using the "difference in value" or "percentage reduction in use" approach. 479 N.E.2d at 921.

There are two ways to measure damages using the "difference in value" approach. First, one can measure the tenant's damages by calculating the difference between the fair rental value of the premises had they been as warranted and the value of the apartment given the existence of the defects. Second, one can measure the tenant's damages by calculating the difference between the agreed rent and the value of the apartment given the existence of the defects.

The "percentage reduction in use" approach reduces the tenant's rent by a percentage that reflects the reduction in the value of the premises by reason of the existence of the defects that gave rise to the breach of the implied warranty of habitability.

While any of these approaches may be used in a particular case, the "'difference in value' approach presents less difficulty in application and in most cases will lend itself to a more precise determination of the tenant's damages." *Id.* If the "difference in value" approach is used, the court should find that the difference in value is the difference between the fair rental value of the premises if they had been as warranted and the fair value of the premises in the defective condition. The agreed rent may be considered by the court as evidence of the fair rental value. As noted by the Illinois Supreme Court: "Since both sides will ordinarily be intimately familiar with the conditions of the premises both before and after the breach, they are competent to give their opinion as to the diminution in value occasioned by the breach." [Citation omitted.] 479 N.E.2d at 922.

(4) [4.82] Procedural and practice issues

The implied warranty of habitability defense raises a number of procedural and trial practice issues. The following summary highlights and answers some of the common questions.

a. The implied warranty may be raised as a defense or counterclaim. *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972); *Fisher v. Holt,* 52 Ill.App.3d 164, 367 N.E.2d 370, 9 Ill.Dec. 936 (1st Dist. 1977).

b. The implied warranty applies to defects in the common areas and is not limited to the defendant's individual apartment. *Jarrell v. Hartman,* 48 Ill.App.3d 985, 363 N.E.2d 626, 6 Ill.Dec. 812 (4th Dist. 1977).

c. The implied warranty may be raised by a counterclaim for damages, and the counterclaim survives even if the complaint is dismissed. *Fisher v. Holt, supra.*

d. The warranty may be raised by an equitable counterclaim seeking repair and/or abatement of the defective conditions. *South Austin Realty Association v. Sombright,* 47 Ill.App.3d 89, 361 N.E.2d 795, 5 Ill.Dec. 472 (1st Dist. 1977).

e. The implied warranty may not be waived by a lease clause stating that the premises are in a fit and habitable condition. *Id.*

f. The tenant is liable only for the fair rental value of the premises during the entire period of the breach of the implied warranty. The tenant is entitled to an abatement of rent in excess of that amount. If the full rent has been paid for a period for which the tenant is entitled to an abatement, damages

may be awarded in her favor. *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 922, 88 Ill.Dec. 895 (1985). If rent is still due after abatement, then the landlord is entitled to a judgment for possession and the amount of rent due.

g. The warranty of habitability may not serve as a basis for recovery of property damage. *Abram v. Litman,* 150 Ill.App.3d 174, 501 N.E.2d 370, 103 Ill.Dec. 349 (4th Dist. 1986). However, see Chapter 9 for an extended discussion of the use of the implied warranty of habitability as a basis for recovering tort damages.

c. [4.83] Counterclaim Seeking Injunctive Relief

You may file a counterclaim seeking to require the landlord to repair his property and bring it into compliance with the minimum requirements of the local building code. *See South Austin Realty Association v. Sombright,* 47 Ill.App.3d 89, 361 N.E.2d 795, 5 Ill.Dec. 472 (1st Dist. 1977).

d. [4.84] Defense Based on Breach of an Express Covenant To Repair

Illinois case law has long recognized that in a forcible action based on nonpayment of rent, the defendant may recoup or counterclaim for damages suffered as a result of the plaintiff's breach of an express covenant to repair. *See Rubens v. Hill,* 213 Ill. 523, 72 N.E. 1127 (1904). In *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972), the Illinois Supreme Court held that a breach of an express covenant to repair is a germane defense to a suit for possession based on nonpayment of rent. The tenant may also deduct the cost of repairs from the rent when the landlord has breached an express agreement to maintain the premises. *Book Production Industries, Inc. v. Blue Star Auto Stores, Inc.,* 33 Ill.App.2d 22, 178 N.E.2d 881 (2d Dist. 1961).

e. [4.85] Defense Based on Discrimination

In *Marine Park Associates v. Johnson,* 1 Ill.App.3d 464, 274 N.E.2d 645 (1st Dist. 1971), the defendant in an eviction action claimed by way of both a defense and a counterclaim that the landlord's action was racially motivated. These claims were dismissed by the trial judge as "not germane" to the proceeding. The appellate court reversed, holding that a defense alleging illegal discrimination is germane if the plaintiff terminated or refused to renew the lease because of the defendant's race. 274 N.E.2d at 648. The fact that the tenant could have brought a separate action against her landlord based on the discriminatory eviction, the court noted, did not preclude her from raising her allegations of unlawful discrimination as a defense to the eviction proceedings.

E. Other Bases for Asserting That the Tenant Does Not Owe the Amount of Rent the Landlord Is Claiming

1. [4.86] Tenant Exercised Her Statutory Right To Deduct from Her Rent the Cost of Utility Service (Assuming the Landlord Was Responsible for Providing This Service)

765 ILCS 735/1 provides that when a landlord fails to pay a utility bill for which he is responsible and the utility company then threatens to disconnect the service, the tenants in the building may pay the bill and deduct from their rent the money they sent to the utility company.

2. [4.87] Tenant Exercised Her Rights Under the RLTO

Section 5-12-070 of the RLTO imposes on the landlord a duty to maintain the premises in compliance with all applicable codes and promptly make any and all repairs necessary to fulfil this

obligation. If the landlord fails to materially comply with this provision or the rental agreement, the tenant may use the remedies set forth below. Twenty-seven examples of conduct constituting material noncompliance by the landlord are set forth in RLTO §5-12-110.

a. [4.88] After Providing the Landlord with Written Notice, the Tenant Repaired Minor Defects and Deducted the Cost of These Repairs from Her Rent

If the reasonable cost does not exceed the greater of $500 or one half of the monthly rent, the tenant may repair the conditions constituting the breach and deduct from the rent the cost of making these repairs. The tenant must first give the landlord written notice of the breach and of the tenant's intention to correct it at the landlord's expense unless the landlord makes the necessary repairs within 14 days. If the landlord fails to correct the breach within 14 days of receiving the notice, the tenant may have the condition repaired in a professional manner and in compliance with building regulations and, after submitting paid receipts to the landlord, deduct the cost of the repairs (not to exceed the customary charge) from the rent. The tenant may not repair at the landlord's expense any condition caused by the deliberate or negligent act of the tenant or by guests on the premises with the tenant's consent. RLTO §5-12-110(c).

b. [4.89] After Providing the Landlord with Written Notice, the Tenant Withheld from Her Rent an Amount That Reasonably Reflected the Reduced Value of the Premises

The tenant may give written notice to the landlord of her intention to withhold from the rent an amount that reasonably reflects the reduction in value of the premises due to the material noncompliance. After allowing the landlord 14 days from the receipt of notice to correct the material noncompliance, the tenant may deduct the stated amount from the rent. RLTO §5-12-110(d).

c. [4.90] Even if the Tenant Did Not Provide the Landlord with Written Notice, She May Plead an Affirmative Defense Based on the Landlord's Breach of the Warranty of Habitability

The RLTO authorizes tenants to "obtain injunctive relief, and/or recover damages by claim *or defense*" for any material noncompliance with the rental agreement or §5-12-070. [Emphasis added.] RLTO §5-12-110(e). This provision authorizes a tenant to raise the landlord's noncompliance as an affirmative defense in an eviction action and to seek damages by counterclaim *even if she has not complied with the notice requirements contained in §§5-12-110(c) and 5-12-110(d).* Therefore, if the landlord argues that the tenant was not entitled to withhold rent or "repair and deduct" because she failed to give the requisite 14-day advance notice, RLTO §5-12-110(e) may be used to defeat this argument.

d. [4.91] The Tenant Withheld Rent Because the Landlord Failed To Provide Her with Essential Services

A tenant may rely on the remedies set forth in §5-12-110(f) of the RLTO if (1) her landlord fails to supply her with an essential service (such as heat, hot water, electricity, gas service, etc.) or (2) her landlord's failure to comply with the rental agreement or §5-12-070 of the RLTO constitutes an immediate threat to her health or safety.

In either situation, the tenant must give the landlord a written notice identifying the problem. The written notice must be mailed or delivered to the address specified by the landlord. If the landlord has not informed the tenant of an address to which notices to the landlord are to be sent, the written notice may then be mailed to the landlord's last known address or by other reasonable means designed in good faith to provide written notice to the landlord. This may include delivery to the building janitor or maintenance personnel. RLTO §5-12-110(f).

After giving notice, the tenant may (1) procure reasonable services and deduct the cost from the rent upon submission of paid receipts, (2) recover damages based on the reduction in fair rental value of the dwelling unit during the period of the breach plus reasonable attorneys' fees, or (3) procure substitute housing during the period of noncompliance. If the tenant procures substitute housing, the tenant is excused from paying rent during the period of the landlord's noncompliance and may also recover the cost of the reasonable value of the substitute housing up to an amount equal to the monthly rent for each month of residence in the substitute housing plus reasonable attorneys' fees. RLTO §§5-12-110(f)(1) through 5-12-110(f)(3). In addition to these remedies the tenant may withhold rent or terminate the tenancy unless the failure to provide essential services is due to the utility provider's inability to provide service. If the landlord fails to correct the conditions within 24 hours after being notified by the tenant, the tenant may withhold from the monthly rent an amount that reasonably reflects the reduced value of the premises. RLTO §5-12-110(f)(4). If the material noncompliance or failure persists for more than 72 hours after the tenant has notified the landlord, the tenant may terminate the rental agreement and vacate the premises within 30 days after expiration of the 72-hour time period specified in the notice. RLTO §5-12-110(f)(5). If the tenant does not vacate within 30 days, the notice is deemed withdrawn and the lease remains in full force and effect.

If the tenant proceeds under any of the provisions of §5-12-110(f), she may not proceed under subsections (c) (repair and deduct) or (d) (rent withholding). In addition, the tenant may not proceed under subsection (f) if she, her family, or her guest created the problem. *Id.*

F. [4.92] Landlord's Pretrial Motions

The landlord's attorney may file a motion (1) to strike the tenant's counterclaims or affirmative defenses on the grounds that they are not "germane" to the eviction or (2) for use and occupancy.

1. [4.93] Motion To Strike or Dismiss Affirmative Defenses or Counterclaims as Not Germane

735 ILCS 5/9-106 provides: "No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise. However, a claim for rent may be joined in the complaint." This language limits the types of affirmative defenses or counterclaims that a tenant may file. However, as set forth below, the courts have found many defenses and counterclaims to be germane.

Illegal contract. In *Rosewood Corp. v. Fisher,* 46 Ill.2d 249, 263 N.E.2d 833 (1970), the Illinois Supreme Court held that a buyer who defaults on an installment contract for the purchase of real estate may challenge the validity of the contract as a defense. The contract buyer may also counterclaim for reformation or rescission of the contract. See further discussion in Chapter 11.

Breach of warranty of habitability. In *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972), the Supreme Court held that a tenant could defend an eviction action based on nonpayment of rent by proving that damages resulting from the landlord's breach of an express covenant to repair or the implied warranty of habitability equaled or exceeded the rent demanded in the plaintiff's termination notice. *See also Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981). In addition, the tenant may file a counterclaim seeking an order requiring the landlord to bring the premises into compliance with the building code. *South Austin Realty Association v. Sombright,* 47 Ill.App.3d 89, 361 N.E.2d 795, 5 Ill.Dec. 472 (1st Dist. 1977).

Rent in excess of legal limits. In *Peoria Housing Authority v. Sanders,* 54 Ill.2d 478, 298 N.E.2d 173 (1973), the Supreme Court held that when a public housing authority files an eviction

action based on nonpayment of rent, a counterclaim alleging that the housing authority has improperly calculated the tenant's share of the rent and is charging her too much was germane. See Chapter 10 for a further discussion.

Retaliatory eviction. In *Clore v. Fredman,* 59 Ill.2d 20, 319 N.E.2d 18 (1974), the Supreme Court held that an answer alleging that an eviction action was brought in retaliation for the tenant's complaints to government authorities of building code violations is germane to the action and states a defense. *See also Wood v. Wood,* 284 Ill.App.3d 718, 672 N.E.2d 385, 219 Ill.Dec. 877 (4th Dist. 1996).

Race discrimination. In *Marine Park Associates v. Johnson,* 1 Ill.App.3d 464, 274 N.E.2d 645 (1st Dist. 1971), the Appellate Court for the First District held that a defense alleging that the landlord terminated or refused to renew the lease because of the tenant's race was germane.

Quiet title. In *Allensworth v. First Galesburg National Bank & Trust Co.,* 7 Ill.App.2d 1, 128 N.E.2d 600 (2d Dist. 1955), the plaintiff had filed against the defendant several lawsuits seeking to claim title to or possession of property in spite of a prior adverse decree in a partition suit. When he later filed an eviction, the defendant filed a counterclaim seeking to enjoin the plaintiff from attempting to claim any right or interest in the property and seeking to quiet title thereto. The court held the counterclaim was germane.

2. [4.94] Motion To Compel the Tenant to Pay Use and Occupancy While the Forcible Action Is Pending

Plaintiffs confronted with a delay before trial occasionally ask the judge to order the tenant to pay rent during the pendency of the litigation without prejudice to the plaintiff's right to proceed with the eviction. Such a request is often made by filing what is known as a "motion for use and occupancy." In some cases, particularly when the condition of the apartment is not at issue and the tenant wants to continue to live in the apartment after the litigation is resolved, it may not prejudice the tenant to pay rent to the court during this period. Suppose, however, the tenant has pled an affirmative defense and counterclaim alleging that (a) the landlord's failure to properly maintain the premises reduced its value by an amount that exceeds the rent due and (b) the landlord actually owes her rent. Under these circumstances, the tenant may argue that she should not be forced to pay rent she may not actually owe.

A recent decision, however, has made it more difficult for tenants to prevail on this argument. In *People ex rel. Department of Transportation (IDOT) v. Cook Development Co. (CDC),* 274 Ill.App.3d 175, 653 N.E.2d 843, 847, 210 Ill.Dec. 648 (1st Dist. 1995), the appellate court affirmed the trial court's imposition of a use and occupancy award against a commercial tenant:

> **Under [**735 ILCS 5/9-201(2)**], a court may award use and occupancy "[w]hen lands are held and occupied by any person without any special agreement for rent." . . . Here, the lease provided that IDOT could cancel or terminate the lease without notice and that IDOT could enter and repossess the premises following a default by CDC of any of the covenants or agreements of the lease. Because one of the incidents of default was failure to pay rent, IDOT declared the lease terminated and filed an action for forcible eviction to regain possession. As the lease was no longer valid, CDC occupied the land without any special agreement for rent and the requirements of section 9-201(2) were satisfied. [**Citations omitted.**]**

Furthermore, the court held, use and occupancy may be awarded both prospectively and retroactively. 653 N.E.2d at 848. Note that *IDOT v. CDC* involved a commercial tenancy, and "a commercial

occupant cannot raise a landlord's failure to repair as a defense in a forcible entry and detainer action for the nonpayment of rent." *Poulos v. Reda,* 165 Ill.App.3d 793, 520 N.E.2d 816, 821, 117 Ill.Dec. 465 (1st Dist. 1987). A residential tenant's right to plead this defense, however, is well established. *See Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985); *Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981); *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972). Therefore, *IDOT v. CDC* may be distinguished from eviction actions in which a residential tenant who has asserted a defense based on the warranty of habitability is opposing a motion for use and occupancy.

The Illinois Appellate Court for the First District is now considering a case entitled *Morgan v. Burley,* No. 96-3932, which involves a residential tenant's appeal from a trial court's decision to award use and occupancy.

IV. TRIAL PREPARATION

A. [4.95] Introduction

Eviction actions are summary proceedings, so attorneys often do not have much time to prepare for trial. The following sections provide suggestions on how to prepare within the limited amount of time provided.

B. [4.96] Conduct Discovery

Supreme Court Rules 201 – 219 govern the procedures for conducting discovery in eviction actions. The rules permit discovery in eviction actions as of right, similar to other civil actions. Because an eviction case is a statutory civil proceeding in derogation of the common law (*Avdich v. Kleinert,* 69 Ill.2d 1, 370 N.E.2d 504, 12 Ill.Dec. 700 (1977)), a forcible action is not a "small claim" as that term is defined in S.Ct. Rule 281. Accordingly, the "leave of court" limitation on discovery in S.Ct. Rule 287 does not apply to eviction actions. Nevertheless, the court may impose reasonable limitations on the timing of discovery so as not to interfere with the orderly trial of the case. S.Ct. Rule 201(c).

1. [4.97] Interrogatories

S.Ct. Rule 213 governs the procedures for preparing, serving, and responding to written interrogatories. Rule 213(c) provides that "a party shall not serve more than 30 interrogatories, including sub-parts, on any other party except upon agreement of the parties or leave of court granted upon a showing of good cause." Rule 213(f) provides: "Upon written interrogatory, a party must furnish the identity and location of witnesses who will testify at trial, together with the subject of their testimony," and Rule 213(i) states that "[a] party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party." Keep these rules in mind when preparing and responding to interrogatories.

Here is a sample set of interrogatories you can serve in a forcible action based on nonpayment of rent if you believe your client may have a defense based on the landlord's breach of the warranty of habitability:

Now comes the defendant and, pursuant to Rule 213 of the Illinois Supreme Court, requests that the plaintiff answer the following interrogatories in writing and under oath within 28 days or within 5 days before trial, whichever is sooner:

1. What is the full name and present address of the person answering these interrogatories?

2. During the past five years has the plaintiff ever been notified by any of the following agencies that the building in which the defendant resides contains conditions that violate the Municipal Code of the City of Chicago?

a. Department of Inspectional Services;

b. Department of Streets and Sanitation;

c. Fire Department;

d. Board of Health.

3. If the answer to any part of interrogatory 2 is "yes," then for each agency that sent a notice, state the date on which the plaintiff received the notice.

4. For each of the following agencies, state the date on which the agency conducted its last inspection of the building and the date on which the plaintiff first learned of this inspection:

a. Department of Inspectional Services;

b. Department of Streets and Sanitation;

c. Fire Department;

d. Board of Health.

5. Has the defendant ever complained to the plaintiff, either orally or in writing, about any conditions in her apartment or the common areas of the building?

6. If the answer to interrogatory 5 is "yes," then for each condition about which the defendant complained, please

a. identify the condition;

b. describe the nature of the complaint;

c. state whether the defendant made the complaint orally or in writing; and

d. state the date on which the complaint was made.

7. Since [date**], has the plaintiff made any repairs to the building and/or the defendant's apartment?**

8. If the answer to interrogatory 7 is "yes," then for each repair, please

a. describe the nature of the repair;

b. state where the repair was made; and

c. state the date on which the repair was completed.

9. When did the plaintiff last inspect the defendant's apartment and the common areas of the building with the defendant?

10. Is the building now or has it ever been the subject of one or more lawsuits in the Cook County Circuit Court alleging violations of the Municipal Code of Chicago?

11. If the answer to interrogatory 10 is "yes," state the name and case number of each lawsuit.

12. Identify who is responsible for paying for the defendant's

a. electric service and

b. gas service.

13. Did the plaintiff serve the defendant with a written notice of termination of tenancy?

14. If the answer to interrogatory 13 is "yes," did this notice demand some amount of rent?

15. If the answer to interrogatory 14 is "yes," explain why the defendant owed this much rent when the notice was served.

16. Furnish the identity and location of each and every witness who will testify at trial on the plaintiff's behalf, and describe the subject of each witness' testimony.

2. [4.98] Request To Produce

Pursuant to S.Ct. Rule 214, you should file a request to produce copies of all relevant documents. What you request will depend on the individual circumstances of your client's case, but you should consider asking for copies of (a) the defendant's lease agreements, together with all addenda; (b) every termination notice on which the plaintiff will rely at trial; (c) any and all correspondence between the parties; (d) any and all documents regarding the physical condition of the defendant's apartment and the common areas of the building in which she lives; (e) all documents (including rent receipts) regarding the defendant's history of paying rent; (f) any and all notices the plaintiff received from municipal departments regarding the physical condition of the premises; (g) complaints from other tenants regarding conditions; and (h) copies of all documents (including receipts) regarding any and all repairs that the plaintiff made to the premises during the course of the defendant's tenancy.

3. [4.99] Requests To Admit

Carefully drafted requests to admit the truth of facts or the genuineness of documents (leases, receipts, notices of violations, etc.) can limit evidentiary issues at trial. Furthermore, the landlord's failure to respond to the requests within 28 days constitutes an admission. S.Ct. Rule 216.

4. [4.100] Depositions

Supreme Court Rules 202 – 212 govern the procedures for taking and using depositions. It may be helpful to depose the owner or manager of the building, or anyone else who plans on testifying on the landlord's behalf, about facts in dispute.

C. [4.101] Gather Public Records

Public records can be an excellent source of evidence to corroborate the tenant's testimony regarding the condition of the premises. You can send subpoenas for depositions to the building department and health department to determine whether they have received complaints about the subject premises and to obtain (1) results of their investigations, (2) copies of the complaints, and (3) copies of the notices they sent to the landlord. Subpoenas should also be sent to the appropriate utility companies if the landlord has violated the Rental Property Utility Service Act, 765 ILCS 735/0.01, *et seq.*

If the premises have been the subject of litigation in the municipal building court, you should obtain certified copies of any orders or findings that the building is not in compliance with the code. You should also serve a notice to admit the accuracy of such records pursuant to S.Ct. Rule 216(d).

D. Identify Witnesses and Arrange for Their Appearance at Trial

1. [4.102] Contact Objective Witnesses

You should speak with witnesses who can corroborate the tenant's testimony. Contact and take statements from any community groups that have met with or organized the tenants and have personal knowledge of the conditions. If there has been a building department inspection during the time of the tenancy, determine whether the inspector remembers the building, has seen the client's apartment, and has any notes on the inspection. Ask the inspector about any testimony in housing court about the premises. If it appears that the inspector's testimony would be helpful at the eviction trial, serve the inspector with a subpoena for trial and include instructions to bring to the trial any notes about the building.

2. [4.103] Secure Expert Witnesses if Possible

It may be valuable to have an architect, contractor, or engineer inspect the building and testify about conditions and code compliance. See S.Ct. Rules 213 and 218 regarding the testimony of expert witnesses.

3. [4.104] Prepare and Serve Subpoenas

If the tenant's case will be strengthened by the testimony of witnesses who will attend only pursuant to subpoena, prepare and serve trial subpoenas sufficiently in advance of the trial. If the trial does not proceed on the date set forth on the subpoena, the subpoena can be entered and continued to compel the witnesses' attendance at the new trial date.

You will need a subpoena to get an official building inspector to testify. First, get the inspector's name by calling the local building inspection department or by examining official inspection records on the building. Before serving a subpoena, discuss the building with the inspector to make sure the testimony will be helpful. The subpoena should include a request for all records of inspections, pictures, and notices of violations issued by the city.

4. [4.105] Serve Notice To Appear and Produce

If you want any of the landlord's employees to appear at trial, serve them with a notice requiring their appearance in accordance with S.Ct. Rule 237(b). This notice may also be used to require the production at trial of the originals of those documents or tangible things *previously produced during*

discovery. Rule 237(b) is not a discovery option to be used on the eve of trial in lieu of a timely request for the production of documents or other tangible things. Therefore, if you base a motion to postpone the trial on the landlord's failure or refusal to produce the originals of certain documents, you cannot show due diligence if you first attempted to discover those documents by serving a request under Rule 237(b). See Committee Comments, Rule 237 (S.H.A.).

E. Take Photographs of the Premises

1. [4.106] Introduction

Pictures of the premises showing existing defects are admissible in a conditions case. At trial you must establish that each photograph is an accurate representation of the subject that it purports to portray. *See Miller v. Pillsbury Co.,* 33 Ill.2d 514, 211 N.E.2d 733 (1965). The accuracy of the representation may be established by any witness who is familiar with the subject portrayed. *Brownlie v. Brownlie,* 357 Ill. 117, 191 N.E. 268 (1934). Persons other than the photographer may authenticate a photograph. *People v. Herbert,* 361 Ill. 64, 196 N.E. 821 (1935).

On the other hand, photographs depicting a scene in which conditions have materially changed may not be admitted unless the jury is told about the changes. *Goertz v. Chicago & Northwestern Ry.,* 19 Ill.App.2d 261, 153 N.E.2d 486 (1st Dist. 1958). Moreover, photographs in which the objects had been posed in a self-serving manner are inadmissible. *Grant v. Chicago & Northwestern Ry.,* 176 Ill.App. 292 (1st Dist. 1913).

PRACTICE NOTE: Make sure that the person who takes the pictures dates them on the back. This is especially important if the landlord claims to have made repairs on a certain date.

2. [4.107] Sample Foundation Questions

The following questions lay the foundation for the admission of a photograph by a tenant who took the photograph.

COUNSEL: I am going to show you what has been marked as defendant's Exhibit Number 1 for identification and ask if you recognize it.

Q: What is it?

Q: Is the scene in this photograph a true and accurate representation of the scene in your apartment as you actually saw it?

Q: Does it fairly and correctly picture your apartment as you saw it on September 26, ____?

COUNSEL: Your Honor, I move for the admission of defendant's Exhibit Number 1 for identification into evidence.

V. THE EVICTION TRIAL

A. [4.108] Introduction

In *Eckel v. MacNeal,* 256 Ill.App.3d 292, 628 N.E.2d 741, 745, 195 Ill.Dec. 277 (1st Dist. 1993), the court stated:

> **To maintain an action of forcible entry and detainer, the plaintiff has the burden to prove his or her right to possession. . . . Moreover, under constitutional norms of due process, an eviction trial, like any other civil trial, should be an orderly procedure wherein the plaintiff presents evidence of possession and compliance with the necessary procedural steps for notice of termination, filing suit and summons.** **[**Citation omitted.**]**

As in all other actions, the plaintiff must present a prima facie case before the defendant is called on to assert a defense. To establish a prima facie case, the plaintiff must present at least some evidence in support of the following essential elements of his cause of action:

1. The landlord has a possessory interest in the premises.

2. The tenant (a) violated the lease in some manner, (b) held over after expiration of the lease, or (c) has been notified of the termination of her week-to-week or month-to-month tenancy.

3. The landlord properly terminated the tenancy by service of a written notice. There are, of course, two exceptions to this rule. First, the lease may contain a provision that waives the tenant's right to be served with notice. (Remember, however, that some local ordinances render such a provision unenforceable.) Second, the lease may have expired by its own terms.

4. The tenant owes a certain amount of rent (assuming the landlord has filed a joint action in which he is seeking a money judgment as well as possession).

5. The landlord has filed suit in a proper and timely manner, and the court has jurisdiction over the defendant by proper service of summons or by posting.

When no answer is ordered by the court, the allegations of the complaint will be deemed denied by the tenant. S.Ct. Rule 181(b)(2). Therefore, to obtain a judgment for possession, the landlord must establish every element of his prima facie case even if the tenant does not present a defense. If the landlord cannot make out a prima facie case, the defendant is entitled to judgment as a matter of law. *Kokinis v. Kotrich,* 81 Ill.2d 151, 407 N.E.2d 43, 40 Ill.Dec. 812 (1980). If the plaintiff establishes a prima facie case, the defendant may assert any defense that is germane to the forcible action and present any evidence in support of this defense. 735 ILCS 5/9-106.

PRACTICE NOTE: If the plaintiff-landlord is not present in court but his attorney presents the judge with a termination notice, the affidavit of service on the notice is prima facie evidence of service. 735 ILCS 5/9-212. If your client disputes the information contained in the affidavit of service, the court should continue the matter so the plaintiff can come to court. The attorney may not testify to the validity of the notice unless he was the person who served it.

B. Tenant's Proof — Conditions Case and Typical Proof Problems

1. [4.109] Testimony of Tenant or Other Nonexpert Witness

Your client or another person who has seen the apartment may testify about its condition. Although expert testimony may be useful, it is not required. *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985). See also Anthony J., Fusco, Jr., et al., *Damages for Breach of the Implied Warranty of Habitability in Illinois — A Realistic Approach,* 55 Chi.-Kent L.Rev. 337 (1979). However, a lay witness is not permitted to state a conclusion about the ultimate issue, such as whether a fire has rendered the premises uninhabitable. *LaSalle National Bank v. First City Corp.,* 58 Ill.App.3d 575, 374 N.E.2d 913, 16 Ill.Dec. 138 (1st Dist. 1978).

PRACTICE NOTE: If your client is inarticulate, call another witness first. Don't rely on your client's testimony alone to prove your case.

2. [4.110] Building Inspector's Testimony

As a strategic matter, it is better to have a building inspector testify about code violations from his own recollection (refreshed if necessary) than to have him (or a custodian) simply identify his building inspection records.

a. [4.111] Qualifying the Inspector as an Expert

An inspector may be qualified as an expert even though he is not an architect. In Illinois, there is no requirement that an expert witness have formal education or training in the field of his expertise. *See Nowakowski v. Hoppe Tire Co.,* 39 Ill.App.3d 155, 349 N.E.2d 578 (1st Dist. 1976); *Danielson v. Elgin Salvage & Supply Co.,* 4 Ill.App.3d 445, 280 N.E.2d 778 (2d Dist. 1972). If the inspector does have formal training, however, have him testify about it. Let him explain how long he has been on the job and whether he has any special duties. Have him explain that he routinely testifies as an expert witness in city code prosecution lawsuits. Once qualified as an expert, the inspector may offer his opinion as to whether the conditions he observed violated the relevant building code.

b. [4.112] Testifying from Memory

If the inspector can recall his inspection, he should testify to it directly. If he cannot, you should ask him if there is a document that will refresh his recollection. If so, show it to him, and then ask him to testify from memory.

c. [4.113] Using Past Recollection Recorded

If the inspector cannot recall his inspection, you can ask that his inspection report be admitted as past recollection recorded or as an official record.

The requirements for past recollection recorded were first enunciated in *Diamond Glue Co. v. Wietzychowski,* 227 Ill. 338, 81 N.E. 392 (1907), which is the leading case on this subject. *Diamond Glue* states that after inspecting the writing the witness must continue to have no independent recollection of the facts contained in the memorandum. Furthermore, the witness must be able to state that the facts were correctly reduced to writing at the time of the occurrence or so soon thereafter that he was able to create an accurate report.

The following questions lay the foundation for the admission of an inspection report into evidence.

Q: Sir, do you now recall inspecting the building at _____?

A: I recall making an inspection, but not what I saw.

Q: Is there anything that might refresh your recollection of what you saw?

A: Perhaps my inspection report.

Q: Showing you what has been marked as defendant's Exhibit Number 2, would you examine it please? (Show it to opposing counsel.) Do you now have any present recollection of what you saw?

A: No, I'm afraid not.

Q: Who prepared defendant's Exhibit Number 2?

A: I did.

Q: When was it prepared?

A: On the date of my inspection report, August 15, _____.

Q: Is it your practice to make such records at the time of your inspections?

A: Yes, I always do.

Q: And do the records accurately record your then current recollection of what you observed?

A: Yes sir, my recollections at the time I made them.

Q: Does defendant's Exhibit Number 2 accurately set forth your recollection of what you saw on August 15, _____?

A: Yes sir.

COUNSEL: I offer defendants Exhibit number 2 for identification into evidence.

C. [4.114] Building Inspection Records as Official Records and Sample Foundation Questions

Building inspection records may also be introduced as official records by the inspector or the custodian of such records. In *People v. Lacey,* 93 Ill.App.2d 430, 235 N.E.2d 649, 652 (3d Dist. 1968), the court stated:

> **As an exception to the hearsay rule, it has been repeatedly held that the records kept by a public officer, dealing with his official activities . . . or reasonably necessary for the performance of the duties of the office, are admissible to prove the matters recorded. [**Citations omitted.**]**

The following two sections of the Illinois Code of Civil Procedure also discuss public records:

> **Municipal records. The papers, entries, records and ordinances, or parts thereof, of any city . . . may be proved by a copy thereof, certified under the signature of the clerk or the keeper thereof, and the corporate seal.** 735 ILCS 5/8-1203.

> **Sworn copies. Any such papers, entries, records and ordinances may be proved by copies examined and sworn to by credible witnesses.** 735 ILCS 5/8-1206.

Although it may be strategically wise to have the inspector authenticate his inspection records, you can also have the custodian authenticate them. In *People ex rel. Wenzel v. Chicago & North Western Ry.,* 28 Ill.2d 205, 190 N.E.2d 780 (1963), the court found that ratio studies compiled by the Department of Revenue could be admitted into evidence as official records. The court stated that people who participated in the studies did not have to testify because public records are admissible

based on the assumption that (1) public officers will perform their duties and have no reason to falsify records and (2) the public inspections to which such records are subject will disclose inaccuracy. *Bell v. Bankers Life & Casualty Co.,* 327 Ill.App. 321, 64 N.E.2d 204 (1st Dist. 1945), also held that public records are sufficiently authenticated if produced in court and identified by the custodian, and no proof of handwriting or other authentication is required.

Building inspection records may also be admitted into evidence pursuant to the procedure outlined in S.Ct. Rule 216(d) without the testimony of the custodian or inspector to authenticate them. That rule provides:

> **If any public records are to be used as evidence, the party intending to use them may prepare a copy of them insofar as they are to be used, and may seasonably present the copy to the adverse party by notice in writing, and the copy shall thereupon be admissible in evidence as admitted facts in the case if otherwise admissible, except insofar as its inaccuracy is pointed out under oath by the adverse party in an affidavit filled and served within 14 days after service of the notice.**

It should be noted that an inspection report would be admitted for the purpose of establishing that code violations existed on the date of inspection. If the landlord wished to show that defects were later repaired, he could do so without filing a counter-affidavit under Rule 216(d). Also note that it is a "generally recognized rule of evidence that 'when the existence of a . . . state of things is once established by proof, the law presumes that [it] continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question.' " [Citations omitted.] *Old Salem Chautauqua Association v. Illinois District Council of Assembly of God,* 16 Ill.2d 470, 158 N.E.2d 38, 41, *cert. denied,* 80 S.Ct. 123 (1959). Thus, once public records have been admitted to establish the existence of code violations on a particular date, the burden shifts to the landlord to come forward with evidence of subsequent repairs.

The following example shows how to examine a building inspector to lay the foundation for the admission of his inspection records.

Q: Calling your attention now to what has been marked as defendant's Exhibit Number 2, would you examine it please? Do you recognize it?

A: Yes.

Q: How do you recognize it?

A: I filled this out and signed it.

Q: Could you tell us what it is?

A: It's a Department of Inspectional Services inspection report.

Q: For any particular building?

A: Yes, the building at _____.

Q: Is it made and kept in furtherance of the official responsibilities of the Chicago Department of Inspectional Services?

A: Yes. (He may go into a little detail here.)

COUNSEL: Your Honor, I'd ask that judicial notice be taken of the Chicago Municipal Code §13-14-080, which provides: "The building inspector's signed violation notice and report form shall be prima facie evidence of the existence of the code violations described therein."

Q: Would you describe the events or observations contained in defendant's Exhibit Number 2?

OBJECTION: The document speaks for itself.

COUNSEL: Your Honor, I am simply laying a foundation for the official record. The question goes to whether the document contains the personal observations of the person who created it.

JUDGE: Overruled; you may proceed.

COUNSEL: You may answer the question.

A: Well, while I was inspecting the building at _____, I just stopped now and then and recorded what I saw.

Q: What are your duties with regard to defendant's Exhibit Number 2 and similar records?

A: I am responsible for seeing that my inspections are accurate and that I file a report on each inspection I make.

COUNSEL: Your Honor, I offer defendant's Exhibit Number 2 for identification into evidence.

Note that if inspection records are sought to be admitted pursuant to the business records provisions of S.Ct. Rule 236, a foundation consistent with the rule must be laid.

D. [4.115] Building Court Records

735 ILCS 5/8-1202 provides:

> **The papers, entries and records of courts may be proved by a copy thereof certified under the signature of the clerk having the custody thereof, and the seal of the court, or by the judge of the court if there is no clerk.**

Orders entered by the court in a building code enforcement lawsuit filed by the municipality against the landlord should be admissible as public records. See discussion in §4.114 above. These could include findings of violations, orders to repair, findings of contempt, and entries of fines.

If the tenant has intervened as a plaintiff in a building code enforcement lawsuit against the landlord, the landlord is bound by judgments entered in that case. As stated in *General Parking Corp. v. Kimmel,* 79 Ill.App.3d 883, 398 N.E.2d 1104, 1108, 35 Ill.Dec. 154 (1st Dist. 1979), "a judgment on the merits of a prior action is conclusive as to issues in a subsequent action between the parties if those issues were actually litigated and determined in the prior action." The tenant has the burden of presenting evidence of the prior judgment. *See City of Chicago v. Mendelson,* 14 Ill.App.3d 950, 304 N.E.2d 16, 21 (1st Dist. 1973); *City of Chicago v. Westphalen,* 93 Ill.App.3d 1110, 418 N.E.2d 63, 72, 49 Ill.Dec. 419 (1st Dist. 1981), *cert. denied,* 102 S.Ct. 1625 (1982).

E. [4.116] Other Expert Witnesses

In addition to municipal building inspectors, you may also call as your witness an architect or contractor who can examine the premises and testify as to the presence of code violations and the cost of repair. See Chapter 3 for a discussion about expert testimony and when it is needed to establish the amount by which the existence of certain defects has reduced the value of the premises.

F. [4.117] Judicial Notice of Building Code

If the existence of building code violations is in issue, the court must take judicial note of the relevant building code. See 735 ILCS 5/8-1001; *Liberty National Bank of Chicago v. Vance,* 3 Ill.App.2d 1, 120 N.E.2d 349 (1st Dist. 1954).

G. [4.118] Suggested Voir Dire Questions in Jury Case

Questions To Be Asked of Present and Past Renters

Q: Did you ever have complaints about the conditions of the apartment or house?

Q: To whom did you speak about these complaints?

Q: What, if anything, happened as a result of your complaints?

Q: Have you ever had any disputes with your landlord? About what? What was the result?

Q: Have you ever paid less than the full amount of rent due because of the condition of the apartment?

Q: Have you ever been threatened with an eviction suit or had one filed against you? What was the result?

Questions To Be Asked of Present and Past Landlords

Q: Have you ever evicted a tenant? For what reason?

Q: Have you ever threatened a tenant with eviction?

Q: Have you ever had a tenant complain of conditions in the apartment? What were the results of these complaints?

Q: Have you ever had a tenant withhold rent because of claims that the apartment was in such bad shape that rent wasn't owing?

Q: Have you ever had a tenant make complaints to the building department? What were the results of these complaints?

Questions To Be Asked of All Owners of Real Estate

Q: Have you ever been cited for noncompliance with the building code or other health or safety codes?

Questions To Be Asked of All Jurors

Q: Have you ever made a major purchase such as a car or a home appliance and it did not work the way it was supposed to?

Q: What did you do?

Q: Did you ask for your money back? Did you get it back?

COUNSEL: The judge will instruct you that under the law of Illinois, in connection with every rental of an apartment, such as the one involved in this case, there is what is called a "warranty of habitability." That is the landlord's promise to maintain the apartment in a fit and habitable condition. If that promise or warranty is broken, the tenant is entitled to set off against any rent claimed by the landlord the damages she has suffered because of the breach of that warranty. Those damages include the amount by which the value of the apartment is reduced by the breach. The tenant in this case is raising a "breach of warranty" defense to this action. Do you have any feelings regarding this defense that would prevent you from returning a fair and just verdict according to the law?

H. Jury Instructions

1. [4.119] Introduction

The following jury instructions may be used when the defendant in a forcible action has pled a defense based on the plaintiff's alleged violation of the implied warranty of habitability. These instructions follow the guidelines set forth in *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972), and *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985). There are no pattern jury instructions for such a case.

2. Sample Jury Instructions

a. [4.120] Explanatory Instruction

The following instruction explains the implied warranty of habitability along with the relevant building code provisions:

Included in all leases (both written and oral) that govern residential tenancies is an implied warranty of habitability. In order to establish that the landlord breached the implied warranty of habitability, the tenant has the burden of proving each of the following propositions:

1. **that the premises contained one or more conditions that violated provisions of the Chicago building code and that individually or taken together substantially affected the habitability of the premises at any time from the date the tenant moved into the premises to [**insert date of five-day notice. If there is no five-day notice, insert date complaint was filed.**]**

[NOTE: If the jurisdiction in which the apartment is located has no applicable building code, the instruction should read ". . . conditions that individually or taken together rendered the premises unsafe or unsanitary at any time. . . ."**]**

2. **that the landlord knew or reasonably should have known of such conditions;**

3. that the landlord did not correct such conditions within a reasonable time after the landlord knew or should have known of the conditions.

If you find from your consideration of all of the evidence that any one of the propositions required of the tenant has not been proved, then you must find that the landlord did not breach the implied warranty of habitability.

If, on the other hand, you find from your consideration of all of the evidence that each of the propositions required of the tenant has been proved, then you must find that the landlord breached the implied warranty of habitability. In determining the extent to which the implied warranty of habitability has been breached you may consider evidence concerning the number of violations of the building code, how long each violation lasted, the seriousness of each violation, and the landlord's opportunity to correct any violations.

b. [4.121] Issues Instruction

This is a sample issues instruction. It sets out the landlord's claims and the tenant's affirmative defense and counterclaim.

Each party claims to be entitled to possession of the rental unit. In addition, each party claims the other owes damages. The landlord claims his damages in the complaint; the tenant claims her damages in the counterclaim.

1. The landlord claims that he is entitled to possession of the premises at [address**] and that the tenant is unlawfully withholding possession of the premises from him.**

2. The landlord further claims that there is due to him [amount claimed**] in rent that the tenant has refused to pay.**

3. The tenant denies that the landlord is entitled to possession of the premises and denies that she is unlawfully withholding possession of the premises from the landlord.

4. The tenant further denies that she owes [amount claimed**] to the landlord for past due rent.**

5. The tenant claims as a defense that as a result of the landlord's breach of the implied warranty of habitability the fair market value of the premises has been reduced so that there is no rent due and owing to the landlord.

6. The tenant further claims that the landlord owes her [whatever amount**] as a result of the tenant's having paid more than the fair market rent for the premises.**

c. [4.122] Burden of Proof Instruction

The following is a sample burden of proof instruction:

In this case, you must consider not only the landlord's complaint for possession of the premises, but also the tenant's counterclaim for damages suffered as a result of the landlord's alleged breach of the implied warranty of habitability. Since there is a counterclaim in this case, you may reach one of two results. First, you may find for the landlord on his complaint and against the tenant on her counterclaim and award the landlord possession and rent due. Second, you may find for the tenant on her counterclaim and against the landlord on his complaint and award the tenant possession and damages.

In order for the landlord to recover on his complaint, he has the burden of proving each of the following propositions:

1. **that the landlord served a five-day notice to the tenant on [**date**];**

2. **that on the date the notice was served, the tenant owed a certain amount of rent to the landlord;**

3. **that the tenant did not attempt to pay the rent due to the landlord on or before the expiration of the five-day period set forth in the notice.**

However, in this case the tenant has asserted an affirmative defense alleging that the landlord's breach of the implied warranty of habitability reduced the value of the premises by an amount that exceeds the rent demanded in the termination notice. The tenant bears the burden of proving this defense.

If you find from your consideration of all of the evidence that each of the propositions required of the landlord has been proved and that the tenant's affirmative defense has not been proved, then your verdict should be in favor of the landlord on his complaint for possession of the premises. If you find in favor of the landlord on his complaint for possession of the premises, then you must determine the amount of back rent to be awarded to the landlord in accordance with these instructions. If, on the other hand, you find from your consideration of all of the evidence that any one of the propositions the landlord is required to prove has not been proved or that the tenant's affirmative defense has been proved, then your verdict should be for the tenant on the issue of the possession of the premises.

In order for the tenant to recover on her counterclaim, she has the burden of proving each of the following propositions:

1. **that the landlord has breached the implied warranty of habitability; and**

2. **that as a result of the breach of the implied warranty of habitability, the tenant has suffered damages the amount of which exceeds the amount of rent due the landlord.**

If you find from your consideration of all of the evidence that both propositions required of the tenant have been proved, then your verdict should be for the tenant on her counterclaim. If, on the other hand, you find from your consideration of all of the evidence that either of the propositions the tenant is required to prove has not been proved, then your verdict should be for the landlord on the tenant's counterclaim.

d. [4.123] Measure of Damages Instruction

A sample measure of damages instruction follows:

If you find from your consideration of all of the evidence that the landlord did not breach the implied warranty of habitability, you must determine whether there was rent due and owing to the landlord in the following manner:

1. Determine the total warranted fair market rent for the period from [date**] to [**date**]. When I use the term "warranted fair market rent," I mean the rental agreed on between the landlord and tenant for each month of the tenant's tenancy.**

2. Determine the total amount of rent paid by the tenant during that period.

3. Subtract the amount the tenant paid from the total warranted fair market rent. This figure is the amount due and owing the landlord. You should enter that amount on the verdict form as your judgment for the landlord.

If, on the other hand, you find from your consideration of all of the evidence that the landlord did breach the implied warranty of habitability, you must determine whether the tenant owed the landlord any rent when she received the notice and whether she is entitled to damages in the following manner:

1. Determine the total actual fair market rent for the period from [date**] to [**date**]. When I use the term "actual fair market rent," I mean the value of the premises in its defective condition. To determine the actual fair market rent, you may consider evidence concerning the landlord's breach of the implied warranty of habitability and how any such violation affected the tenant's use and enjoyment of the premises.**

2. Determine the amount of rent paid by the tenant during this period.

3. If the amount paid by the tenant is less than the total actual fair market rent, then subtract the amount paid from the total actual fair market rent. This figure is the amount due and owing the landlord. You should enter that figure on the verdict form as your judgment for the landlord.

4. If the amount paid by the tenant is greater than the total actual fair market rent, then there is no rent due and owing the landlord, and you must subtract the total actual fair market rent from the amount paid. This is the amount due and owing to the tenant. You should enter that amount on the verdict form as your judgment for the tenant on her counterclaim.

This measure of damages instruction provides a formula for the jury to use in determining whether the landlord has met his burden of proving that rent was due and owing. This instruction may be used in all cases in which the landlord has sued for past due rent and the tenant has filed a counterclaim based on an alleged breach of the implied warranty of habitability. This instruction uses the "difference in value" approach. If the court objects to the tender of this instruction, arguments supporting its use, citing *Glasoe v. Trinkle,* 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985), should be made on the record.

e. [4.124] Instruction Explaining Verdict Forms

The following is a sample instruction explaining verdict forms:

Verdict forms are supplied with these instructions. After you reach your verdict, complete and sign the appropriate form and return it to the judge. The verdict should be signed by each of you. You should not write on or mark this or any of the other instructions given you by the court.

If you find for the plaintiff on his complaint, you should use the verdict form that states:

> **We, the Jury, find for the Plaintiff on his complaint for possession and on his complaint for past due rent and against the Defendants' affirmative defense. We award the Plaintiff possession of premises at [**address**], Chicago, Illinois, and assess the past due rent in the amount of $_____.**

If you find for the Defendants, then you should use the form that states:

We, the Jury, find for the Defendants on their affirmative defense for possession and against the Plaintiff on her complaint for possession. We award the Defendants possession of the premises at [address**], Chicago, Illinois, and damages in the amount of $_____.**

VI. EVICTION JUDGMENTS

A. [4.125] No Confession of Judgment for Possession

Any residential lease provision stating that the tenant will confess a judgment for possession is void on its face. *French v. Willer,* 126 Ill. 611, 18 N.E. 811 (1888).

B. [4.126] Stay of Judgment

Normally, when a judgment for possession is entered against a tenant, the court will stay the enforcement of the judgment for a brief period of time, typically 14 days.

C. [4.127] Agreed Orders

Sometimes landlords are willing to settle a case against a tenant who is behind in rent by taking a judgment for possession but agreeing to let the tenant continue to live in the apartment if the tenant pays all past due rent (and sometimes costs) by a certain date. Here is a sample agreed order for such a case:

This cause coming before the court on the trial call, and both parties being present and in agreement, and the Court being fully advised in the premises, IT IS HEREBY ORDERED THAT:

1. Plaintiff is awarded possession of the premises located at _____. Enforcement of this judgment is stayed until _____.

2. If defendant tenders to plaintiff $_____ by _____, _____, plaintiff will not enforce the judgment and will consent to defendant's motion to vacate said judgment.

3. If defendant fails to tender said amount by said date, plaintiff may then enforce said judgment.

D. [4.128] Costs

735 ILCS 5/9-110 provides, in pertinent part:

If it appears on the trial that the plaintiff is entitled to the possession of the whole of the premises claimed, judgment for the possession thereof and for costs shall be entered in favor of the plaintiff.

735 ILCS 5/9-114 provides:

If the plaintiff voluntarily dismisses the action, or fails to prove the plaintiff's right to the possession, judgment for costs shall be entered in favor of the defendant.

E. [4.129] Attorneys' Fees

In Chicago, a successful litigant may not recover attorneys' fees unless the RLTO provides for recovery. In other jurisdictions, a successful litigant can only be awarded attorneys' fees if the lease so provides. Unless the lease specifically provides otherwise, costs and attorneys' fees can be awarded only if a judgment is entered in the landlord's favor. *Payne v. Coates-Miller, Inc.,* 52 Ill.App.3d 288, 367 N.E.2d 406, 10 Ill.Dec. 18 (1st Dist. 1977).

A provision obligating the tenant to pay the landlord's attorneys' fees authorizes only payment of reasonable fees. *Schipper & Block, Inc. v. Carson Pirie Scott & Co.,* 5 Ill.App.3d 209, 283 N.E.2d 81, 85 (3d Dist. 1972). The attorney's bill, standing alone, is not proof of the reasonableness of the amount claimed. As stated in *64 East Walton, Inc. v. Chicago Title & Trust Co.,* 69 Ill.App.3d 635, 387 N.E.2d 751, 760, 25 Ill.Dec. 875 (1st Dist. 1979):

> **As between a lawyer and his client the matter of the fee is one of contract between the two, but a fee to be allowed by the court is something else and must be proved as any other fact, and determined and allowed by the court in its judicial discretion. The Reasonableness [sic] of the attorney's fees is not the subject of judicial notice, neither is it to be left to local custom, conjecture or guesswork. Each award must be made on its own merits and should be justified by the circumstances in each particular case. [**Citation omitted.**]**

The circumstances to be considered include "'the time expended, the complexity of the issues presented, the work involved and the expertise of the lawyer.' Moreover, the amount of time expended as shown by detailed time records is a factor of great importance in determining reasonable attorneys' fees." [Citation omitted.] *Id.*

F. [4.130] Enforcement of Judgment Against Persons Not Parties to the Lawsuit

Normally the sheriff will enforce the judgment for possession against anyone occupying the premises whether or not that person was named as a defendant to the lawsuit. Family members, subtenants, and persons otherwise entering into possession under the tenant are thus subject to eviction. If any adult occupant who has not been named as a defendant learns of such an order, that person should consider intervening as a party defendant and filing a motion to vacate the judgment.

In the alternative, the tenant who has not been named as a defendant may try to persuade the sheriff not to evict or may file a lawsuit against the sheriff. In *Arrieta v. Mahon,* 31 Cal.3d 381, 644 P.2d 1249, 182 Cal.Rptr. 770 (1982), the California Supreme Court held that due process of law prohibits a sheriff from evicting an adult occupant of an apartment not named in the eviction lawsuit if the tenant had been in occupancy on or prior to the date of the filing of the lawsuit. Instead, the sheriff was directed to advise the landlord of the claim of such occupant, and no eviction order could be enforced against such occupant until the landlord had obtained a supplementary court order to that effect.

VII. POST-JUDGMENT MOTIONS IN EVICTION CASES

A. [4.131] Motion To Vacate a Judgment Entered in a Bench Trial

735 ILCS 5/2-1203 provides that in cases tried without a jury, any party may, within 30 days after the entry of the judgment, file a motion for a retrial or a modification of the judgment or to vacate the judgment. Section 2-1203 also provides that a timely filed motion stays enforcement of the judgment.

Filing a §2-1203 motion is useful if the judge has made a clearly erroneous ruling and a post-trial legal brief or a copy of the trial transcript attached to the motion will persuade the judge to grant the relief sought. Moreover, if the judge denies the motion, you will have a more complete record for purposes of appeal. Such a motion should also be considered when a tenant first comes to your office after losing a trial in which she appeared pro se and failed to present available evidence or make an appropriate legal argument or when the judge simply ignored a defense. In support of such a motion, you should remind the court that laypersons "cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 12 L.Ed.2d 89, 84 S.Ct. 1113, 1117 (1964). Moreover, as stated in *Simmons v. Columbus Venetian Stevens Buildings, Inc.,* 20 Ill.App.2d 1, 155 N.E.2d 372, 376 (1st Dist. 1958):

> **It is certainly the tendency of justice in our age that causes should not be determined by the technicalities of procedure but the court should attempt to do substantial justice when all the facts are completely disclosed.**

B. [4.132] Vacating a Default Judgment

If the tenant has not been served with summons or has been served but failed to appear in court for a legitimate reason (such as hospitalization), she may file a motion to vacate the default judgment. Such a motion should be filed, pursuant to 735 ILCS 5/2-1301(e), within 30 days after entry of the default judgment. To prevent an eviction while the motion is pending, deliver a copy of the motion to the eviction desk in the sheriff's office. This motion should be filed and heard as soon as possible after the entry of the judgment.

If the tenant has not been served with summons, she should file a special appearance and ask that the default judgment be vacated and that service be quashed. If the judge grants the motion to vacate the default judgment, you should take a copy of the order vacating the default to the sheriff so that the sheriff will know not to enforce the judgment.

When reviewing the motion to vacate a default judgment, the court must consider whether granting the motion would serve "substantial justice" and whether it is reasonable under the circumstances to compel the other party to go to trial on the merits. *People ex rel. Reid v. Adkins,* 48 Ill.2d 402, 270 N.E.2d 841, 843 (1971). Courts should also consider the harm the defendant will suffer if her motion to vacate is denied. *See City of Chicago Heights v. Furrer,* 99 Ill.App.3d 414, 425 N.E.2d 1125, 1128, 54 Ill.Dec. 908 (1st Dist. 1981). The statute allowing defendants to vacate a default judgment should be liberally construed, and a "party wishing to vacate a default judgment under this section need not allege a meritorious defense." *Stotlar Drug Co. v. Marlow,* 239 Ill.App.3d, 607 N.E.2d 346, 348, 180 Ill.Dec. 452 (5th Dist. 1993).

If the tenant first learns of the existence of a default judgment more than 30 days after its entry, relief must be sought under 735 ILCS 5/2-1401 or on a motion to quash service. The filing of a motion more than 30 days after entry of the judgment does not stay enforcement of the judgment. Thus, the safest way to proceed is to present the petition on an emergency basis and ask the court to immediately stay enforcement while the petition is pending. A copy of the order staying enforcement must be taken to the sheriff.

C. [4.133] Motion To Vacate a Judgment the Landlord Has Waived His Right To Enforce

As a general rule, acceptance of rent for a period of time subsequent to the entry of judgment for the landlord operates to restore the landlord-tenant relationship and prevents the judgment from being enforced against the tenant. *Bolman v. Hardy,* 345 Ill.App. 609, 104 N.E.2d 324 (1st Dist. 1952)

(vacating judgment for possession and enjoining plaintiff from procuring another writ in same proceeding because, after entry of judgment, plaintiff accepted defendant's rent and thereby created new tenancy). There are, however, exceptions to this rule. If the landlord obtained a judgment for past due rent and court costs along with the judgment for possession, he does not waive his right to enforce the judgment for possession unless he accepts from the tenant an amount that exceeds the money judgment. Furthermore, a landlord does not waive his right to enforce a judgment for possession if the trial court stayed enforcement of the judgment for possession and granted the landlord leave to accept, without prejudice, rent during the period of the stay.

The landlord may also waive his right to enforce the judgment for possession by letting the tenant sign a new lease agreement. *See Janusz v. Kaleta,* 57 Ill.App.2d 127, 207 N.E.2d 142 (1st Dist. 1965) (vacating judgment for possession because, after writ of restitution was issued, plaintiff entered into new lease agreement with defendant).

Tenants seeking to vacate a judgment on the grounds that the landlord has waived his right to enforce this judgment should file a petition under 735 ILCS 5/12-183(g): "The petition shall be filed in the same proceeding in which the order or judgment was entered and shall be supported by affidavit or other appropriate showing as to matters not of record."

D. [4.134] Motion To Vacate a Judgment When the Period for Enforcing the Judgment Has Expired

If the plaintiff in a forcible action obtains a judgment for possession, he may not enforce it more than 90 days after entry of the judgment unless (1) he brings a motion for an extension of time within which to enforce the judgment and (2) the court grants this motion. 735 ILCS 5/9-117. The plaintiff's notice of motion must contain the precise language set forth in this statute. The court must grant the motion "unless the defendant establishes that the tenancy has been reinstated, that the breach upon which the judgment was issued has been cured or waived, that the plaintiff and defendant entered into a post-judgment agreement whose terms the defendant has performed, or that other legal or equitable grounds exist that bar enforcement of the judgment." *Id.*

A tenant who remains in possession of the leased premises more than 90 days after judgment is faced with a dilemma. She can file a motion to vacate the judgment for possession on the grounds that it has expired. However, the filing of the motion could simply motivate the landlord to file a motion to extend the period of enforcement. Alternatively, the tenant might notify the sheriff that the judgment has expired. (The Cook County Sheriff has a policy against enforcing judgments more than 90 days old.) Probably, the most prudent course of action would be to file the motion to vacate only if the tenant has a defense to the landlord's motion to extend the period of enforcement.

VIII. [4.135] EVICTION APPEALS

Eviction appeals, like other civil appeals, are governed by the rules set forth in Illinois S.Ct. Rule 301, *et seq.* These rules govern all the procedural aspects of filing an appeal. The following sections summarize the most important rules, with an emphasis on practical considerations and common problems you may encounter when handling an appeal.

A. Notice of Appeal

1. [4.136] Timing

A notice of appeal must be filed with the clerk of the circuit court within 30 days after entry of a final judgment or, if a timely post-trial motion is filed (see §4.131), within 30 days after entry of the

order disposing of the motion. S.Ct. Rule 303(a). Filing the notice of appeal in a timely manner is a jurisdictional prerequisite to maintaining the appeal. *Bean v. Norfolk & Western Ry.,* 84 Ill.App.3d 395, 405 N.E.2d 418, 39 Ill.Dec. 665 (5th Dist. 1980).

2. [4.137] Form and Content

The form and content of the notice of appeal are prescribed by S.Ct. Rule 303(b). This notice should specify the judgment appealed from and the relief sought. However, as long as the notice sets forth fairly and adequately the judgment appealed from and the relief sought so as to inform the successful party of the nature of the appeal, the absence of strict compliance with the form of the notice is not fatal. *Mooring v. Village of Glen Ellyn,* 57 Ill.App.3d 329, 373 N.E.2d 35, 14 Ill.Dec. 904 (2d Dist. 1978).

3. [4.138] Extension of Time

S.Ct. Rule 303(d) provides:

> **On motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time, accompanied by the proposed notice of appeal and the filing fee, filed in the reviewing court within 30 days after expiration of the time for filing a notice of appeal, the reviewing court may grant leave to appeal.**

B. [4.139] Docketing Statement

Within 14 days after filing of the notice of appeal, the appellant is required to file a docketing statement with the clerk of the appellate court.

C. Staying Enforcement of Judgment Pending Appeal

1. [4.140] Application in the Trial Court

You will need to file a motion to stay enforcement of the judgment for possession pending appeal. To be safe, file this motion during the initial stay entered by the trial court. Motions for a stay of enforcement are governed by Illinois S.Ct. Rule 305. The power to grant the stay is discretionary. The motion must first be made in the trial court. S.Ct. Rule 305(d). If the motion is denied, it may be presented to the reviewing court. The stay shall be "conditioned upon such terms as are just." S.Ct. Rule 305(b). Because eviction actions involve interests in property, a bond is required as a condition of issuance of a stay of execution pending appeal. See §4.143 below.

2. [4.141] Application in the Reviewing Court

A motion for a stay of execution may be made in the reviewing court, but only after a showing that (a) the trial court denied the motion, (b) the trial court failed to afford the relief requested, or (c) application to the trial court is not practical. S.Ct. Rule 305(d). The motion should contain a supporting record (see S.Ct. Rule 328) if the record on appeal has not been filed.

D. [4.142] Appeal Bonds

Illinois S.Ct. Rule 305(b) requires that a bond be posted as a condition for granting a stay of judgment in any appeal involving an interest in property. In eviction actions, this requirement can be satisfied by payment of a lump-sum amount fixed by the court or a "use and occupancy" bond.

1. [4.143] Lump-Sum Bond

The amount of any appeal bond is discretionary with the trial court. In eviction actions a lump-sum appeal bond may be required by the trial court as a condition of staying the judgment in addition to payment of rentals for the duration of the appeal. *See Pole Realty Co. v. Sorrells,* 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981). However, if a requirement of a lump-sum bond would effectively deny an indigent party the right to appeal, the bond requirement is unconstitutional. *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972).

2. [4.144] Use and Occupancy Bond and Sample Order

The Illinois Supreme Court has recognized that the right to an appeal and the right to supersedeas pending appeal are separate matters. In *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972), the court affirmed that an appellant could be required to furnish a bond as a condition of staying the judgment. The court stated, however, that the payment of rental installments as they become due satisfied the requirement of a bond under S.Ct. Rule 305.

Therefore, persons moving for stay of judgment pending appeal in a forcible detainer action should file with the motion for a stay of enforcement a motion for issuance of a use and occupancy bond pending appeal. This motion should be filed in the trial court. Under this form of bond, the tenant simply pays the monthly rent directly to the landlord during the pendency of the appeal. The appellate court has generally approved of this procedure. *See South Austin Realty Association v. Sombright,* 47 Ill.App.3d 89, 361 N.E.2d 795, 5 Ill.Dec. 472 (1st Dist. 1977).

The following is a sample use and occupancy bond order:

This cause coming on to be heard after notice to all parties on the motion of defendant pursuant to Supreme Court Rule 305(b) to stay execution of the possession order entered herein on [date**], and to grant a use and occupancy bond pending appeal of said judgment, IT IS HEREBY ORDERED THAT:**

a. execution of the possession order entered herein on [date**] is stayed pending appeal of that order; and**

b. this stay is conditioned on defendant's payment to plaintiff herein of the full amount of all rent due and accruing during the pendency of this appeal. Said bond shall consist of payment in the amount of $260 monthly, directly to the landlord herein as use and occupancy, and said bond shall commence as of the rental due for the month of [month**]. This stay shall remain in full force and effect on condition that defendant shall prosecute her appeal diligently and comply with the obligations of her tenancy pending disposition of the appeal.**

IX. [4.145] EVICTION OF TENANTS IN OTHER PROCEEDINGS

Occasionally, a party will seek and a court will enter a judgment for possession as collateral relief in a foreclosure proceeding or a building court case.

A. [4.146] Foreclosure proceedings

Any party wishing to foreclose on a mortgage in Illinois may obtain possession of the mortgaged property by following the procedures set forth in the Mortgage Foreclosure Law, which is codified as Article XV of the Code of Civil Procedure. *Tenants residing in the mortgaged property, however, cannot be evicted without prior notice and an opportunity to be heard.*

The foreclosure complaint must state the "[n]ame or names of defendants whose right to possess the mortgaged real estate, after the confirmation of a foreclosure sale, is sought to be terminated and, if not elsewhere stated, the facts in support thereof." 735 ILCS 5/15-1504(a)(3)(T). An order for possession authorizing the removal of a tenant residing in mortgaged real estate may be entered against individuals personally named in the foreclosure complaint but may not be entered or enforced against "any person who is only generically described as an unknown owner or nonrecord claimant or by another generic designation in the complaint." 735 ILCS 5/15-1508(g).

735 ILCS 5/15-1508(g) provides that a party seeking the foreclosure who has failed to personally name a certain tenant as a party to the foreclosure action may obtain a judgment for possession against that tenant only by filing (1) a forcible entry and detainer action or (2) a supplementary petition pursuant to 735 ILCS 5/15-1701(h).

735 ILCS 5/15-1701(h) sets forth the procedure for filing a supplementary petition for possession against an individual who was not personally named as a party to the foreclosure. The petition may be filed at any time during the foreclosure or up to 90 days after the date of the order confirming the sale.

> **The petitioner shall serve upon each named occupant the petition, a notice of hearing on the petition and, if any, a copy of the certificate of sale or deed. The proceeding for the termination of such occupant's interest, including service of the notice of the hearing and the petition, shall in all respects comport with the requirements of [**the forcible entry and detainer statute**]. . . .**
>
> **An order for possession obtained under this Section shall name each occupant whose interest has been terminated, shall recite that it is only effective as to the occupant so named and those holding under them, and shall be enforceable for no more than 90 days after its entry, except that the 90-day period may be extended [**pursuant to the method set forth in 735 ILCS 5/9-117**].**

To summarize, then, the party seeking to foreclose on a mortgage may obtain a judgment for possession against a tenant residing in the mortgaged property only by (1) personally naming that tenant as a party to the foreclosure action, (2) filing a supplementary petition for possession against the tenant, or (3) filing a forcible action. Therefore, the tenant may not be evicted without prior notice and an opportunity to be heard.

B. [4.147] Building Court Cases

The building court often appoints a receiver when a landlord has failed to maintain a building in compliance with the applicable codes. A receiver who wants to evict a tenant may file a forcible entry and detainer action against the tenant. *Bleck v. Cosgrove,* 32 Ill.App.2d 267, 177 N.E.2d 647 (2d Dist. 1961). Sometimes, however, the receiver may file a motion for a vacate order. Such a procedure is clearly inappropriate if the tenant is not a party to the lawsuit before the filing of such lawsuit. In such a case the tenant should be joined as a defendant under either 735 ILCS 5/2-405 or 735 ILCS 5/2-406(c), which provides:

> **An action is commenced against a new party by the filing of an appropriate pleading or the entry of an order naming him or her a party. Service of process shall be had upon a new party in like manner as is provided for service on a defendant.**

In situations of extreme emergency, the building court may have the authority to order that all tenants be removed from a dwelling. *Lanski v. American National Bank & Trust Co.,* 122 Ill.App.3d 729, 462 N.E.2d 607, 78 Ill.Dec. 488 (1st Dist. 1984). *See also City of Chicago v. Westphalen,* 93

Ill.App.3d 1110, 418 N.E.2d 63, 74, 49 Ill.Dec. 419 (1st Dist. 1981), *cert. denied,* 102 S.Ct. 1625 (1982) (vacate order entered against building that had many code violations and was imminently dangerous to public health and safety due to carbon monoxide leaks).

In Chicago, vacate orders are typically requested by the city attorneys prosecuting the lawsuit. In response to such a request, the judge may enter a "vacate order" against the landlord directing him to vacate the premises. To comply with such an order the landlord could file a forcible entry action against the tenant after the expiration of the lease by its own terms or, in the case of a week-to-week or month-to-month tenancy, after serving a 7-day or 30-day termination of tenancy notice. Occasionally, the landlord will ask the housing court to issue a vacate order directly against the tenant. In some cases a landlord may request the entry of a vacate order on a building he is planning to convert to higher income rental units instead of going through the more time-consuming and expensive process of having to file forcible entry and detainer lawsuits.

If tenants have not received adequate notice of an order to vacate, they should consider filing special appearances in building court and arguing that the court lacks personal jurisdiction over them because they have not been impleaded as defendants and served with a summons and a complaint. In the alternative, tenants could file general appearances and argue that the defects are not serious enough to warrant the entry of a vacate order. They should be prepared to cross-examine the building inspector as to the danger and hazard of building conditions and to offer testimony to contradict the inspectors. It is especially helpful to present evidence from an architect, engineer, or contractor who has inspected the building. Tenants should also argue that the landlord has an adequate remedy at law, namely the filing of a forcible entry and detainer action.

X. RENT CLAIM DEFENSES AND COUNTERCLAIMS

A. [4.148] Introduction

Tenants are sometimes sued after they have vacated the premises. The landlord may claim (1) rent for the period the tenant remained in possession of the apartment, (2) rent for the period the apartment remained vacant after the tenant vacated the premises (assuming the tenant vacated the unit before the expiration of her lease agreement), (3) the cost of repairing damage to the unit, (4) court costs, and/or (5) attorneys' fees. The tenant may have defenses to some or all of the amount claimed by the landlord and can assert these as affirmative defenses in the litigation. Tenants may also have valid claims against the landlord for damages and may wish to assert these claims as counterclaims.

It is easier to defend post-possession actions since they are not summary proceedings, and the landlord cannot move to strike defenses or counterclaims on the ground that they are not germane. Tenants should consider the strategic value of filing a jury demand and of filing pretrial motions.

B. [4.149] Client Interview

The following is a list of questions you should ask you client if your are defending her in a post-possession lawsuit:

1. Date on which client vacated apartment? Key returned to landlord?

2. Reason client vacated apartment?

3. Written lease in effect?

4. Any notice given to landlord of tenant's intention to vacate? If so, details.

5. Amount of current rent? Compared to rent in premises at issue?

6. Any moving expenses attributable to landlord?

7. Anyone moved into former apartment? If so, when and what amount of rent are new tenants paying?

8. Any agreements between landlord and tenant with regard to moving out? If so, details.

9. Security deposit refunded?

10. Any property damage or personal injury suffered by tenant as a result of the tenancy?

11. Subtenant sought by tenant? How? What result? Any subtenant tendered to landlord? Details? What result?

12. Did the landlord interfere with utility service or was utility service disconnected?

13. Did the tenant pay for utility service to common areas of building or apartment other than her own?

14. What happened as result of lack of utility service? Out-of-pocket expenses?

15. Personal injuries or property damage?

16. Did client make any repairs to apartment? Did landlord agree to make reimbursement for repairs?

The information elicited by questions 12 – 15 is important to determine whether the client has counterclaims based on violations of the Rental Property Utility Service Act, 765 ILCS 735/0.01, *et seq.,* or breach of contract.

C. [4.150] Subleases and the Landlord's Duty To Mitigate Damages Under the RLTO

The RLTO provides important rights to tenants who move out of the leased premises before the expiration of a lease. The landlord is required to make a "good faith effort to re-rent the tenant's dwelling unit at a fair rental" and also must accept a "reasonable sublease" without requiring additional fees. RLTO §5-12-120. If the landlord succeeds in re-renting the unit, the tenant is liable only for the shortfall in rent received during the remainder of the lease term. If the landlord cannot re-rent the unit, the tenant is liable for the full amount of rent due for the remaining lease period together with reasonable advertising costs. *Id.*

Given the tight rental market in Chicago, it should not be difficult to show that a landlord could have rented the apartment, especially when the tenant has given 30 days' notice of her intention to move. The RLTO does not explicitly state where the burden of proof on the issue lies, but the language of §5-12-120 supports an argument that the burden of proof is on the landlord. Also, under general principles, it is fair to place the burden of proof on the party that has superior knowledge of the relevant facts, which, in this case, is the landlord.

D. [4.151] Defense That Rent Was Paid

The most obvious defense available to a tenant to a landlord's claim for rent is that the rent has been paid. Of course, it is often difficult for a tenant to establish payment of rent. All of the tenant's rent documents should be examined closely, and discovery should be filed to determine the basis for the landlord's claim. If the landlord has not refunded the security deposit, it should be credited against the landlord's claim.

E. [4.152] Res Judicata and Collateral Estoppel

Occasionally a tenant is sued for rent and/or damages after being sued for possession. If the eviction was based on nonpayment of rent for a specific period and a judgment on the merits was entered in the eviction case, the issue arises as to whether the landlord may later sue for the same rent that he claimed was unpaid in the eviction action. According to the doctrine of res judicata:

> **When a former adjudication is relied upon as an absolute bar to a subsequent action, the only questions to be determined are whether the cause of action is the same in both proceedings, whether the two actions are between the same parties or their privies, whether the former adjudication was a final judgment or decree upon the merits, and whether it was within the jurisdiction of the court rendering it.** *People v. Kidd,* 398 Ill. 405, 75 N.E.2d 851, 854 (1947).

If the eviction suit was a joint action in which a claim for rent was added to the possession claim, a subsequent rent claim is probably barred because, as stated in *Mendelson v. Lillard,* 83 Ill.App.3d 1088, 404 N.E.2d 964, 970, 39 Ill.Dec. 373 (1st Dist. 1980): "Causes of action are considered the same if the same evidence would sustain both." However, when the eviction action was dismissed on procedural grounds without reaching the merits of whether rent was actually due and unpaid, it could be argued that res judicata should not apply because the causes of action in the two lawsuits were not the same.

If, however, the trial judge in the eviction action actually ruled that no rent was due for a particular period of time, the collateral estoppel doctrine would clearly bar a subsequent claim for the same rent because under the collateral estoppel doctrine "a judgment on the merits of a prior action is conclusive as to issues in a subsequent action between the parties if those issues were actually litigated and determined in the prior action." *General Parking Corp. v. Kimmel,* 79 Ill.App.3d 883, 398 N.E.2d 1104, 1108, 35 Ill.Dec. 154 (1st Dist. 1979).

Note also that if the eviction action was based on nonpayment of rent for a particular period of time, the landlord may later sue for rent for a subsequent period of time without being barred by res judicata. *Mendelson, supra,* 404 N.E.2d at 970.

F. [4.153] Failure To Accept Subtenant; Mitigation of Damages

A tenant who moves out during the lease term is often sued for the balance of rent due under the lease term after the premises are vacated. 735 ILCS 5/9-213.1 provides that "a landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee." Under traditional contract law, the defaulting party bears the burden of proving that the aggrieved party could have mitigated damages. Illinois courts have held that the tenant has the burden of proof on the issue of whether a subtenant is suitable. However, it can be argued that the statute was intended to change the common law and place the burden of proof on the landlord. Also, the landlord has superior access to evidence of what measures have been taken and, for that reason, should assume the

burden of proof. Given the absence of a definition of "reasonable measures" in the statute, it should be argued that the landlord must meet the local standard for rental practices for similar property. In urban areas the standard may require (1) placing "for rent" signs on the building, (2) advertising in local newspapers, and (3) showing the apartment to prospective tenants.

G. [4.154] Landlord Agreed to the Release; Surrender and Acceptance

The landlord and tenant may agree to terminate a tenancy and thereby terminate the obligations of each. The terms of the agreement may be oral or written. In one frequently cited case, the landlord told the tenant to move if he did not like the condition of the premises. The tenant replied that he would, and this oral agreement was found to support a defense to a rent claim. *Alschuler v. Schiff,* 164 Ill. 298, 45 N.E. 424 (1896).

The doctrine of surrender and acceptance has been explained as follows:

> **As between landlord and tenant, it is a set of circumstances under which a court may come to the conclusion that an agreement had been reached whereby the lessee surrendered the premises and the lessor accepted the premises back, both intending thereby to terminate the lease and cancel all the covenants and obligations thereunder.** *Solomon v. Geller,* 48 Ill.App.2d 15, 198 N.E.2d 210, 214 (1st Dist. 1964).

H. Defenses Based on Condition of Apartment

1. [4.155] In General

If the premises at issue were not in a fit and habitable condition during the term of the tenancy, the tenant may be able to plead a breach of an express covenant to repair or the implied warranty of habitability as a setoff to the rent claim for the time she was in possession. If the tenant is constructively evicted by a landlord, the tenant is not liable for rent accruing after the date of the eviction. If the tenant moved out because the landlord breached his express covenant to repair or the implied warranty of habitability, she may be able to argue that the lease has been rescinded and that she is not liable for rent that accrued after she vacated the apartment.

2. [4.156] Lease Unenforceable Because Code Violations Existed When Lease Was First Executed

A lease executed in violation of an ordinance or statute is invalid and cannot serve as the basis for an action for the recovery of rent. In *Longenecker v. Hardin,* 130 Ill.App.2d 468, 264 N.E.2d 878 (1st Dist. 1970), the landlord filed a rent claim lawsuit based on a written lease. The court held that the tenant could defend on the ground that the premises were in violation of the Chicago Housing Code at the time of the execution of the lease, and that the lease was therefore invalid and could not serve as the basis for the rent claim. A subsequent case, however, held that a "tenant holding under an invalid lease is still liable for the reasonable value of his possession." *South Austin Realty Association v. Sombright,* 47 Ill.App.3d 89, 361 N.E.2d 795, 798, 5 Ill.Dec. 472 (1st Dist. 1977). Thus, although the landlord cannot base his lawsuit on the illegal lease, he can sue for the reasonable value of the possession.

If the landlord sues for the value of the possession, he probably bears the burden of establishing the value of the premises. If he sues on the lease, however, the tenant would bear the burden of establishing the amount by which the building code violations reduced the value of the premises. *Jack Spring, Inc. v. Little,* 50 Ill.2d 351, 280 N.E.2d 208 (1972).

I. [4.157] Landlord Has Previously Evicted the Tenant

In the absence of a lease clause to the contrary, a tenant is not liable for rent accruing after the landlord has actually evicted her. *Grommes v. St. Paul Trust Co.,* 147 Ill. 634, 35 N.E. 820 (1893). Thus, if the landlord sues for rent for the remainder of the lease term after having evicted the tenant, the eviction is a defense to subsequently accruing rent. It should be noted, however, that many form leases have clauses that provide that the landlord's right to collect rent will not be waived by the service of a termination notice or the prosecution of an eviction action, and courts have upheld the validity of such clauses. *Lake Shore Management Co. v. Blum,* 92 Ill.App.2d 47, 235 N.E.2d 366 (1st Dist. 1968).

J. [4.158] Partial Eviction

A landlord may, without right, retake possession of part of the premises (for instance, by moving into some of the rooms that were rented). If the tenant later fails to pay rent and the landlord sues to evict based on nonpayment of rent, the tenant has a defense. As stated in *Goldberg v. Cosmopolitan National Bank,* 33 Ill.App.2d 83, 178 N.E.2d 647, 649 (1st Dist. 1961), "Under the prevailing law, a lessee upon eviction from a portion of the premises may continue in possession of the remainder, and payment of rent is suspended even though he does so continue in possession."

K. [4.159] Other Counterclaims

735 ILCS 5/2-614(a) provides that

> **[**t**]he defendant may set up in his or her answer any and all cross claims whatever, whether in the nature of recoupment, setoff or otherwise, which shall be designated counterclaims.**

Tenants who are sued for rent should be interviewed to determine whether they have any claims against the landlord, including those based on (1) the landlord's failure to return the security deposit, (2) damages suffered as a result of an illegal lockout, (3) violations of the Rental Property Utility Service Act (765 ILCS 735/0.01, *et seq.*), or (4) the landlord's failure to reimburse the tenant for the cost of making certain repairs.