

October 22, 2020

Hon. Ann I. Jones, Chair
Civil and Small Claims Advisory Committee
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

Re: Invitation to Comment on Unlawful Detainers: Revised Answer Form to
Implement Assembly Bill 3088

Dear Judge Jones:

The Access to Justice Advisory Committee of the California Lawyers Association (CLA) appreciates the opportunity to comment on the revised answer form, UD-105, for Unlawful Detainer actions in accordance with this Committee's Invitation to Comment set out in SP 20-07. The Committee commends the Civil and Small Claims Advisory Committee for issuing the form under what was an extremely tight deadline to implement legislation that had to balance the complex interests of landlords and tenants. We recognize that the form as it now stands attempted to reconcile, in commendable fashion, the complex issues addressed in Assembly Bill 3088 and comparable federal initiatives in a manner that best fits those measures in reconciling and protecting the interests of both tenants and landlords. Accordingly, the Access to Justice Committee of CLA supports the continued use of that form as proposed—with some important caveats:

- (1) Affirmative defenses available under Assembly Bill 3088, the comparable federal initiative of the Center for Disease Control, other federal laws, or local ordinances should be listed on the form as separate items with separate check-off boxes;
- (2) Contact information and hyperlinks should be provided on the form itself to self-help centers, navigator programs, and other resources maintained by local courts to assist pro per litigants in navigating through the form; and
- (3) Consideration should be given to drafting a cover sheet or other information sheet that would be served with UD-101 (approved by the Judicial Council on October 5, 2020) that will both inform renters that they may have rights under Assembly Bill 3088, the eviction moratorium order of the Center for Disease Control, and other federal laws and local ordinances, and provide them information both as to resources that can assist them as to next steps as well as the timeline for taking those steps.

As Professor Emeritus of Law Gary Blasi of UCLA observed in his letter to the Judicial Council on the subject of COVID-related evictions, dated September 16, 2020, the risk of eviction is dire: he estimated back in May of this year that there were approximately 365,000 households at risk of eviction and potential homelessness in L.A. County due to the economic effects of COVID-19. The same letter also cited to a study of the Aspen Institute that estimated that as of August of 2020, more than 1.8 million Californian renter households were at risk of eviction, which he viewed as signaling that more than 600,000 households would be at risk in L.A. County due to the economic effects of COVID-19. This threat of massive evictions and foreclosures also exacerbates the continued threat to public health as we enter what news reports have labelled as the third peak of COVID-19, with cases beginning to spike all over the country as we enter the Fall and Winter.

The Access to Justice Advisory Committee of CLA is equally mindful of the economic effects of COVID-19 on landlords who are deprived of the rent they need to pay mortgages and other debt. Assembly Bill 3088, however, balanced those interests against the interests of tenants, as witnessed by those provisions requiring high-income tenants to submit additional documentation. And the Judicial Council has closely adhered to its provisions, following the recommendations of the Civil and Small Claims Advisory Committee, both in its Plaintiff's Unlawful Detainer form and in its Defendant's Answer.

This Committee specifically requested input in SP 20-07 as to whether the Revised Answer Form should list and break out several affirmative defenses to non-payment of rent as separate items, including the following: (1) the Defendant's providing a declaration of financial distress covering all of the months between September 1 and January 31 that are at issue in the action and stating that they have paid at least 25% of rent or other financial obligations; (2) Defendant's providing the declaration required by the Center for Disease Control's temporary eviction moratorium order; (3) Plaintiff violated Assembly Bill 3088 (referred to in the form and in the bill as the COVID-19 Tenant Relief Act of 2020; and (4) Plaintiff violated a local COVID-19 related ordinance.

The Access to Justice Advisory Committee of CLA believes that the lumping these affirmative defenses as part of one item, 3m, with multiple check-off boxes all located within the one item will lead to confusion, especially on the part of pro per litigants, as to whether these affirmative defenses are all related to one another and must *all* be present in some fashion for Defendants to be able to invoke *any* of these defenses. We thus recommend that these affirmative defenses (and any others reasonably known to exist based on federal, state, and local provisions in this area) be broken out as separate items on the form, indicating that they are separate affirmative defenses any one of which may apply for a Defendant.

The Access to Justice Advisory Committee of CLA understands that arguments exist as to whether some of these defenses are in fact contingent on others (e.g., it has been argued that Assembly Bill 3088 has trumped the effectiveness of the Center for Disease Control's

temporary moratorium in this state) or may be otherwise limited. We take no position on the validity, or lack thereof, of those arguments. However, the courts can determine whether, and to what extent, those arguments are valid in the course of litigation. These arguments do not require the lumping together of disparate affirmative defenses and thereby risking confusion for defendants. The Access to Justice Advisory Committee notes that the Judicial Council deemed providing a checklist for Defendants (Tenants) to be as important a goal as providing a checklist for Plaintiffs (Landlords) at page 16 of the memorandum to the Judicial Council accompanying Circulating Order Number CO-20-15; the Access to Justice Advisory Committee of CLA agrees but believes this goal can best be effectuated by providing a separate check-off box and line item for each affirmative defense rather than lumping them all in under one item 3m.¹

This Committee also specifically requested input in SP 20-07 as to whether its “proposal adequately address[es] the stated purpose.” In that regard, the Access to Justice Advisory Committee of CLA further recommends that contact information and hyperlinks should be provided on the form to self-help centers, navigator programs, and other resources maintained by local courts to assist pro per litigants in navigating through the form.

Given the magnitude of the impending wave of evictions, and the complexity of the form, assistance for pro per defendants is crucial to enable them to understand their rights and respond accordingly. As was noted at pages 14 to 15 of the memorandum to the Judicial Council accompanying Circulating Order Number CO-20-15, the form must be filed as a responsive pleading, whether or not the declaration of financial hardship allowed by Assembly Bill 3088 or a similar declaration allowed by the eviction moratorium of the Center for Disease Control is also filed. This form thus is a critical part of ensuring that tenants may, as defendants, invoke the defenses provided for by these state and federal initiatives (as well as any local ordinances)—and as such pro per defendants need to know upfront where they may find assistance. In this way, the important economic and public health objectives of these initiatives in protecting tenants may be met without denying landlords their day in court.

The Access to Justice Advisory Committee of CLA is aware that the Access Commission (on which members of the Access to Justice Advisory Committee of CLA also serve) previously recommended that information about the new rights for tenants conferred by such initiatives as Assembly Bill 3088 be provided on court websites, by self-help centers, etc. And we are aware that this Committee responded by pointing out at page 13 of the

¹ The Access to Justice Advisory Committee of CLA also recommends that this Committee consider whether these affirmative defenses need be listed as far down as they are on the current version of the Revised Answer. Given the accelerating economic and public health dislocations arising from COVID-19 over the next few months, it is worth considering what defenses will most likely need to be asserted by tenants over the next few months and into next year. In any consideration, the Access to Justice Committee agrees that long-existing, important defenses should not be overlooked by being placed in a disadvantageous position, such as those listed in 3j of the form.

memorandum to the Judicial Council accompanying Circulating Order Number CO-20-15 that it had notified council staff working with self-help centers or the courts' self-help web site—a response that we applaud. However, more can and should be done, consistent with the urgent nature of the issues that motivated the passage of Assembly Bill 3088 and the federal eviction moratoriums, by ensuring that tenants up front are notified of resources to which they can turn to understand and avail themselves of these important rights. Commentators in the CO-20-15 proceeding of this Committee, such as the Asian-Americans Advancing Justice – Asian Law Caucus at page 6 of its comments, stressed the complex nature of these new laws protecting tenants and expressed concern about the inability of tenants to access legal aid; we agree.²

Finally, the Access to Justice Advisory Committee of CLA proposes that this Committee consider drafting a cover sheet or information sheet that would be served with the UD-101 complaint form. That cover sheet would fully apprise Defendants of defenses that they could assert in response, the time frame for them to respond, and direct them to appropriate resources to aid them in so responding. This recommendation would address this Committee's call in SP 20-07 for comments as a whole on the proposal as a whole as well as its impact on self-help center staff and judicial officers. We note that there is precedent for requiring civil plaintiffs to serve information sheets with other papers. (See, e.g., Rule 3.221, Rules of Court (2020).)

This Committee laudably drafted—see discussion at page 13 of the memorandum to the Judicial Council accompanying Circulating Order Number CO-20-15, and the Judicial Council laudably approved, a cover sheet that tenants could use to declare financially related distress pursuant to the provisions of Assembly Bill 3088. We are aware that this Committee declined to recommend that a similar form be provided to mirror the declaration allowed for under the federal eviction moratorium order of the Center for Disease Control—see discussion at page 15, and we do not advocate here that this Committee reconsider that recommendation.

However, nothing prevents this Committee from recommending that an expanded cover sheet, or information sheet, be served on Defendants with Plaintiffs' UD-101 complaint form that advises Defendants, in careful language, about the rights they may have and the defenses they may wish to assert. That same sheet could also direct them to appropriate resources to aid them in so responding, such as the courts' self-help web site, local

² Because of the inequities that exist in terms of Internet access among underserved and discriminated against populations, the Access to Justice Advisory Committee of CLA recommends that telephonic contact information also be provided to enable tenants to reach self-help centers and/or local legal aid organizations designated by local courts to serve as pro bono resources for tenants seeking advice on the complexities of these rights. CLA, for example, has set up a pro bono service, in conjunction with the Alameda County Bar Association and the American Bar Association, by which it provides legal advice on COVID-related issues to Northern California (and soon all of California): <https://calawyers.org/covid-19-public-resources/#Collaborative>.

navigator programs, or local legal aid organizations designated to provide assistance in this area. In this manner, such a sheet could work in tandem with the recommended changes to the form itself to ensure tenants invoke, in what has become a complex area of federal, state, and local initiatives, their rights without raising those concerns about titling the playing field in favor of those defenses—see, for example, the discussion at page 13 of the memorandum to the Judicial Council accompanying Circulating Order Number CO 20-15.

And no provision of law prevents the Judicial Council from adopting a more general statement to inform tenants that they may have other rights under state law, federal law and order, and local ordinances that they should consider seeking advice on and invoking—even as it carefully explains that the determination of whether any such rights in fact exist and apply to the tenant in question is up to the courts. In this regard, such a general statement would be no different in concept than the information provided by courts on the self-help website, see, e.g., <https://www.courts.ca.gov/selfhelp-eviction.htm>. And as with the contents of that self-help website, such a statement would here assist tenants in understanding those issues that they should raise with self-help centers, navigators, legal aid organizations, and pro bono programs in availing themselves of these rights.

Taken together, our suggestions fit within the mission of CLA to promote fairness in the administration of justice and the rule of law by ensuring that tenants have every reasonable opportunity to be apprised of their rights. In an era in which we are all more conscious of systematic discrimination, it is important to keep in mind that lower income communities, and people of color, are particularly at risk of eviction due to COVID-19,³ and because of that discrimination, are also more susceptible to suffering from COVID-19 itself.⁴

By implementing these suggestions, this Committee can assist the Legislature, the Federal Government, and local governments in addressing the magnitude of the economic and public health crisis caused by COVID-19. At the same time, they do not tilt the balance struck between the interests of landlords and tenants in these various state, federal, and local initiatives.⁵

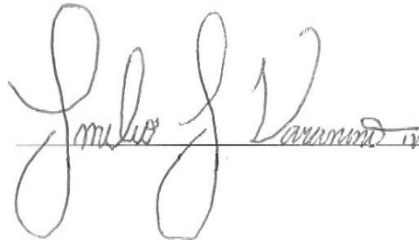
³ See, e.g., Letter from Professor Emeritus of Law Gary Blasi to Judicial Council at page 2, dated Sept, 16 2020, attached to the memorandum to the Judicial Council accompanying Circulating Order Number CO-20-15; see also, e.g., Kim Parker, Rachel Minkin, and Jesse Bennet, Economic Fallout from Covid-19 Continues to Hit Lower-Income Americans the Hardest, Pew Research Center (Sept. 24, 2020), <https://www.pewsocialtrends.org/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/>.

⁴ See, e.g., Alan Gomez et al., An Unbelievable Chain of Oppression: America's History of Racism Was a Preexisting Condition for Covid-19, USA TODAY (Oct. 15, 2020), *available at* <https://www.usatoday.com/in-depth/news/nation/2020/10/12/coronavirus-deaths-reveal-systemic-racism-united-states/5770952002/>.

⁵ The Access to Justice Advisory Committee of CLA notes that some commentators to the recommendations of this Committee, as set out in the memorandum to the Judicial Council accompanying Circulating Order Number CO-20-15, remarked on the asymmetry of legal representation between landlords and tenants. (See, e.g., Letter from Professor Emeritus of Law Gary Blasi to Judicial Council at page 2, dated Sept, 16 2020, attached to the memorandum to the Judicial Council

We appreciate the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Emilio Varanini". The signature is written in a cursive style with a horizontal line drawn through the middle of the letters.

Emilio Varanini, President and Co-Chair of the
Access to Justice Advisory Committee, California
Lawyers Association

A handwritten signature in black ink, appearing to read "Ellen Miller". The signature is written in a cursive style with a long horizontal line extending to the right.

Ellen Miller, Associate Executive Director,
Initiatives and External Relations, and Co-Chair
of the Access to Justice Advisory Committee,
California Lawyers Association

accompanying Circulating Order Number CO-20-15.) This reported disparity exacerbates the need for our recommendations to try to ensure symmetry between tenants and landlords in effectuating the goals of the Legislature, the federal government, and local governments.