

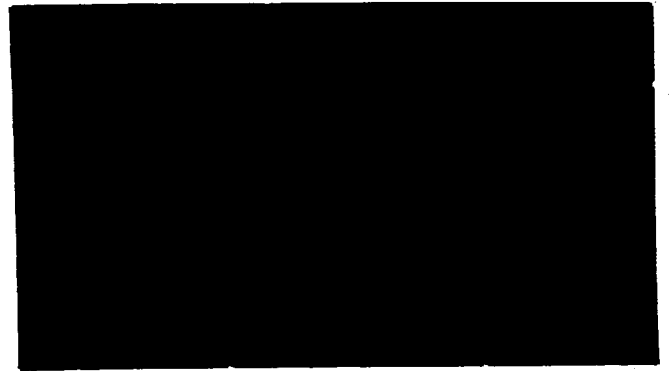


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LAWYERS AND INFORMAL JUSTICE:  
THE CASE OF A PUBLIC HOUSING  
EVICTED BOARD

by  
Richard Lempert and Karl Monsma

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LAWYERS AND INFORMAL JUSTICE:  
The Case of a Public Housing Eviction Board\*

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March 1989

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Lawyers and Informal Justice:  
The Case of a Public Housing Eviction Board\*

Richard Lempert and Karl Monsma

Introduction

When lawyers think of civil procedure they almost invariably think of the rules of civil procedure and the formality they entail. A course in Civil Procedure focusing almost exclusively on the Federal Rules of Civil Procedure is in most law schools part of the traditional first year curriculum. Indeed some would argue that it is at the core of that curriculum, for more than any other first year course it takes students away from familiar moral anchors and instructs them in a set of distinctively legal practices and values. The ability to manipulate the legal system's rules of procedure is the most general skill in which nascent lawyers are instructed.<sup>1</sup>

But the rules of civil procedure do not delimit the bounds of civil actions. Many contested civil actions are heard by tribunals or decision makers that ignore many if not all of the lawyer's rules of civil procedure as well as associated rules like rules of evidence. These tribunals typically hear the low stakes disputes that individuals have with each other or with businesses such as disputes brought to small claims courts or the disputes that individuals have with the government over their eligibility for various entitlements or their liability to particular penalties. The latter may involve stakes that are quite high for the individual involved, although perhaps petty from the point of view of the government.<sup>2</sup>

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<sup>1</sup> Substantive legal knowledge is essential, but substantive courses deal with particular problems, and lawyers who do not practice in an area are not expected to know much about it even if they took a relevant course in law school. Other lawyer skills like negotiation skills or drafting ability do cut across areas of practice, but they are thought to be inborn in the lawyer or not distinctively legal. Until recently courses designed to hone such skills were seldom taught in the nation's law schools, and even now they tend to be taught in small doses in connection with substantive courses or as limited enrollment electives.

<sup>2</sup> These types of disputes do not exhaust the list of civil actions that proceed even in theory with little attention to formal rules of procedure. For example, disputes between regulated industries and the government may be heard

Social scientists often call the procedures in such tribunals "informal" and speak of their decisions as "informal justice," meaning by informal a tendency to follow lay rather than professional-legal modes of introducing and arguing about evidence. Although the point has been cogently - many would say persuasively - disputed,<sup>3</sup> such informality is commonly thought to be not only a strength but a reason for creating tribunals that are not bound by the usual rules of legal procedure. One of the purported virtues of informal tribunals is that they are thought to allow litigants who cannot afford, or would be unwise to invest in, legal counsel<sup>4</sup> to comprehend what is occurring and to present meaningful arguments to the decision maker.<sup>5</sup>

Whether this rationale withstands scrutiny or not is a matter than need not concern us here. The important point is that the informality of informal tribunals is usually an all but inescapable consequence of their design and jurisdiction. Design features that promote informality include staffing by non-lawyer judges, rules that prevent or inhibit the use of attorneys, and procedures that promote conversational modes of presenting and discussion information while limiting or precluding the resort to specifically legal conceptions of what is proper. A tribunal's jurisdiction promotes informality when the matters it encompasses make it likely that litigants will proceed without lawyers or, if represented, proceed, in a non-legalistic way.

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initially in informal settings and civil action substitutes like arbitration and mediation may similarly dispense with the formal rules of court proceedings.

<sup>3</sup> See the essays collected in R. Abel (ed.) *THE POLITICS OF INFORMAL JUSTICE*, Vol. 1 & 2; New York: Academic Press (1982).

<sup>4</sup> Note that there is a social decision here. There is nothing "natural" about people lacking counsel when they cannot afford it or when the cost would be greater than the amount at stake. Society could, as it does for many misdemeanors, subsidize counsel for everyone facing informal hearings. Such a decision might soon transform the informal character of such tribunals while at the same time making informality less necessary. For a discussion of how such a transformation occurred in the workers compensation context, where large stakes relative to lawyer cost drove the transformation, see P. Nonet, *ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY*. New York: Russell Sage (1969).

<sup>5</sup> Conley and O'Barr point out that in the case of the small claims courts they studied, the latter may be an illusion. The failure of litigants to tell stories that touch the requisite legal bases may cost litigants verdicts even though the litigants feel that they have said everything they wish to say and that the decision maker has attended to them. O'Barr, William M. and John M. Conley, "Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives," 19 *Law & Society Review* 661-701 (1985).

Even when tribunals are designed to be informal the absence of lawyers is often not a design feature but a consequence of the tribunal's jurisdiction. In such tribunals lawyers are permitted - indeed litigants may have a right to proceed through counsel - but lawyers seldom appear either because the litigants see no need for attorneys or because they cannot acquire attorneys if they see a need. In these circumstances those lawyers who on occasion happen to represent litigants will find a tribunal that has been shaped without regard for their interests or usual modes of proceeding. The procedures they confront may seem not only unfamiliar but also inappropriate for adjudication. If lay judges preside, lawyers may find that they have to put their arguments in "client vernacular", although they are accustomed to putting clients' stories into legal language. Moreover, because legal representation in such tribunals is rare, many lawyers who do appear will be infrequent or one time participants and so will lack the knowledge and other advantages that accrue to repeat players.<sup>6</sup>

Yet even while retaining its informality, a tribunal may be affected by the sporadic appearance of attorneys. It will, for example, want to be certain that it touches any legal bases that apply in the situations it adjudicates, for the occasional appearance of lawyers will make threats to appeal to formal courts on questions of law credible.<sup>7</sup> Moreover, informal tribunals are not ruleless or without procedure.<sup>8</sup> Even the occasional presence of lawyers may lead an informal tribunal to restructure its proceedings, perhaps bringing them more in line with lawyer expectations.

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<sup>6</sup> See Galanter, Marc. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 Law & Society Review 95-160 (1974).

<sup>7</sup> The relationship of informal courts to formal courts varies by the type of tribunal and the problems it deals with. In some instances informality, which may extend to the denial of certain basic rights such as the right to counsel, is legally justified because the parties must consent to the tribunal's jurisdiction and/or a party dissatisfied with the tribunal's decision has a right to a de novo trial in a more formal court. In other instances review by more formal courts may be limited to questions of law including, perhaps, the issue of whether the factual findings of the informal tribunal were supported by substantial evidence.

<sup>8</sup> See Lempert, "The Dynamics of Informal Procedure: The Case of a Public Housing Eviction Board" (1989). Unpublished manuscript on file with the editors of Law & Contemporary Problems. Hereinafter cited as "Dynamics."

## A Public Housing Eviction Board

We propose to study how lawyers function before informal tribunals by looking at the performance of lawyers before a public housing eviction board. The board has processed all eviction actions brought by the Hawaii Housing Authority on the island of Oahu since December of 1957. We shall, however, look only at the twenty year period from 1966 through 1985.<sup>9</sup>

Throughout its history the board has had the power of an ordinary court in deciding whether to evict tenants and in issuing writs of possession enforceable by the sheriff.<sup>10</sup> However, the procedural rules of ordinary courts do not apply. Although tenants are given notice of the charges, neither side engages in formal discovery; rules of evidence do not structure hearings; testimony is ordinarily delivered in narrative rather than question and answer fashion, and board members feel free to question and on occasion even lecture tenants and other witnesses. Indeed, when in 1980 the Authority sought to regularize the status of the board by adopting formal administrative rules governing the board's powers and proceedings, the basic rule regulating hearing procedure was: "Hearings shall be conducted in an informal manner unless otherwise required by law."<sup>11</sup>

Appeal from the board's decision is to the Commissioners of the HHA and beyond them to the Circuit Court for the First Circuit of Hawaii. Until 1980 the Commissioners heard appeals de novo and for some time after that they would hold hearings to determine if "new facts and evidence" sufficient to trigger an appeal were present.<sup>12</sup> In 1984 the task of determining whether an appeal meets the new facts and evidence standard was delegated to the Executive Director, and since then appellate hearings have been pro forma ratifications of stipulated agreements that the

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<sup>9</sup> Our current data set only covers this period. At one time, however, the first author examined data from 1957 through June 1969. During the period from 1957 to 1966 lawyers were almost never present.

<sup>10</sup> Hawaii Revised Statutes, Chapter 360 360-5 (1980) as amended.

<sup>11</sup> Chapter 501 17-501-2(c), Title 17, Hawaii Administrative Rules (effective Jan. 1, 1981).

<sup>12</sup> An Amendment to Article 360 in 1980 provided that an appeal to the Commissioners was available only when the tenant could offer new facts and evidence that were not, and could not have been presented at the hearing.

tenant has made with the executive staff.<sup>13</sup> For this reason we shall focus primarily on the activity of lawyers at the hearing stage, although we shall also present evidence about lawyers and appeals.

The HHA's eviction board (now called the "hearing board") is entirely composed of lay people. From 1966 through 1969 the board consisted of five citizen volunteers. In 1970 two tenants were added to the board, and in October 1979 a second seven-member panel was added so that cases could be heard every week rather than every other week without unduly burdening the board members. During the late 1960s and throughout most of the 1970s the non-tenant members of the board, with the exception of a retired project manager, included mostly people whose professional or other volunteer activities were characterized by a special concern for the poor. In the late 1970s, however, the Authority began to look for people with business backgrounds when vacancies arose.<sup>14</sup> Today more board members spend their working lives in real estate sales and management than in any other profession.

The board's docket is dominated by cases involving non-payment of rent; over the years non-payment has been the only charge in about three-quarters of all board actions. Until the board split into two panels the most common, and for a long time the almost universal, board verdict in non-payment cases was the conditional deferment. When the board conditionally defers, it issues an eviction order but withholds service of the order on the condition that the tenant repay her past debt according to some fixed schedule and pay current rent when due. Both tenants and managers regard conditional deferments as tenant victories. In recent years this pattern of

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<sup>13</sup> The usual new fact or evidence is that since the hearing a tenant evicted for non-payment of rent has paid everything that was owing at the hearing and has paid all rent that has become due between the hearing and the appeal. In these circumstances the HHA enters into a stipulated agreement whereby the tenant waives all rights to hearings or appeals should she violate any lease provision within the next year and the Authority agrees to withhold service of the eviction order that the board has issued and to cancel it if the tenant complies fully with her lease obligations over the succeeding twelve months.

<sup>14</sup> When the second panel was created in 1979, the original board was split in two, creating seven vacancies, two of which were filled by tenants.



preferring conditions to outright evictions has been reversed, and tenants who appear before the board owing rent are invariably evicted without conditions, subject only to a right to appeal.<sup>15</sup>

Other tenants are brought before the board for violating basic rules of neighborliness and project life, such as hiding income, keeping pets, sheltering unauthorized guests, violent behavior, parking inoperative vehicles and the like. For many years tenants were more likely to be evicted for such offenses than for failing to pay their rent. Now this situation too is reversed, not because the board has become more lenient in such cases, but because it has become stricter when rent is due. The absolute likelihood of eviction for tenants charged with behavioral violations has been greater in recent years than in the more distant past.

#### Data Sources

The information on which this paper is based was collected by the first author during the summer of 1987. He was allowed to code information from the HHA's files on cases docketed before the eviction board from January 1966 through December 1985 and to observe eviction board hearings in the summer of 1987, as he had during the summer of 1969. These data were complemented by interviews with a number of lawyers and paralegals who had represented tenants before the eviction board from 1969 on, with two attorneys and two non-attorneys who had served as the Authority's "prosecutor" before the board during that same period, and with most of those who had served as eviction board members, project managers and supervisory staff during this time. The dockets of a few cases that had been appealed to the HHA's Commissioners or to the Circuit Court contained hearing transcripts that were read. Finally, Authority

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<sup>15</sup> Tenants evicted in these circumstances are told that if they can clear their entire debt before the time for appeal has lapsed, they will most likely be allowed to remain in housing. Conditional deferments are now reserved for tenants who have paid their rent debt between the time they were subpoenaed to appear before the board and the time of their hearing. They are evicted, but the service of the order is deferred for six months on the condition that they make future rent payments on time. If they do, the order is cancelled. The change from a policy presuming deferral to one presuming eviction began in the mid-1970s when some tenants with very large debts (6 months or more) were evicted outright at the initial hearing. It accelerated markedly in the early 1980s, but it was not until 1986, after the period for which we have quantitative data, that tenants who owed money at the time of the hearing had virtually no hope of receiving a deferral from the board.

documents relating to the eviction process and the docket records of most cases involving lawyers were perused for information that could not be captured by simple coding.

### Questions of Interest

This paper focuses on lawyers<sup>16</sup> who represented or otherwise acted on behalf of tenants. Although the Authority has had a lawyer as its "hearing officer" (prosecutor) since 1982, he or she ordinarily proceeds informally if we may judge by what the first author observed in 1987, and it appears that the fact that the hearing officer is a lawyer has few implications for board action.<sup>17</sup>

Tenants' attorneys represented their clients in different ways. These different styles of representation and some of their consequences are a central focus of this paper. We are interested in them in part for what they tell us about how lawyers serve clients in informal tribunals but even more because of what they tell us about the different ways lawyers can react when confronted with institutions of informal justice.<sup>18</sup> We shall examine both the portrait that quantitative data paint about lawyer involvement in the eviction process and the more textured picture of lawyers' reactions to the eviction process that interviews, transcripts and Authority records allow us to draw.

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<sup>16</sup> Ordinarily where we use the word "lawyer" or "attorney," we mean to include legal aid paralegals as well. Where we mean to distinguish legal aid lawyers from paralegals we will use the term "supervising attorney" or the context will make this clear.

<sup>17</sup> The fact that the hearing officer works full time managing evictions appears very important, however. (See "Dynamics", supra note 8.) When a non-lawyer fulfilled this role, except for factors idiosyncratic to him as a person, he did not act very differently from the two lawyers who succeeded him. The two lawyers seem as different from each other as they do from their non-lawyer predecessor. Moreover, the pattern of board decisions under the first lawyer is more like the pattern under her non-lawyer predecessor than it is like the pattern that her lawyer successor established.

<sup>18</sup> One may also find these styles of lawyering in formal courts, although the mix of styles and the stage of the proceedings at which they are used may differ. We simply do not address the issue of how lawyers perform in formal tribunals.

We are aware of no other work that focuses on lawyers and informal justice and seeks to trace the style and consequences of legal representation before informal tribunals. However, we expect that these characteristics of legal representation reflect substantial interaction between the type of informal forum, the issues the tribunal must resolve, the client population, caseloads, the factors that link attorneys to clients and the opportunity to force formal court hearings. Thus, we do not claim to be able to derive a general theory of lawyers and informal justice from our study of the HHA's eviction board. We do think, however, that we shall learn something more about lawyering, about the representation of impoverished clients and about informal justice from observing lawyers in one setting where they are adrift without their usual procedural anchors. If others are stimulated to do similar work in different settings, a more general theory may emerge.

#### Lawyers at Hearings

Lawyers were almost never involved in eviction hearings in the 1960s. The reasons were simple. Few tenants could afford lawyers and most did not need lawyers to succeed before the eviction board. Non-payment of rent has always been the most common reason why tenants face the board; accounting over the years for about three-fourths<sup>19</sup> of the board's docket. In only 8 of the 160 non-payment only cases brought between June, 1960 and June, 1969 was the tenant evicted at the first board hearing. The other tenants either had their cases dismissed or, in the overwhelming majority of cases, were granted conditional deferments. When other Authority rules had been violated, such as rules regarding pets, parking, guests, violent behavior, and income reporting, tenants during this period did not do as well as when non-payment alone was charged, but even in these cases tenants won a dismissal or a conditional deferment more than half of the time.

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<sup>19</sup> Of the 1261 cases subpoenaed between 1966 and 1985 for which we know the cause of action, about 74% involve only the charge of non-payment of rent while an additional 6% involve a charge of non-payment along with one or more other charges. In the data we present, the latter cases will be coded in the category of the other charge, for if non-payment alone were sufficient to guarantee an eviction the Authority would not need to go to the greater trouble of proving some other charge.

The reasons why tenants did so well before the board during a period when lawyers were almost never seen is not a central concern of this paper. It is sufficient to say that they had to do with the composition of the board, precedents the board had developed and the stance that the HHA's Central Office Staff took toward the board and its cases.<sup>20</sup> These factors all changed over time as did the presence of attorneys. We are concerned here with that presence: with its magnitude, with its manifestations and, ultimately, with its consequences for the eviction process.

### The Magnitude of Lawyer Involvement

The story of lawyer involvement in the eviction process is in large measure the story of Legal Aid's willingness to represent tenants, for about 80% of those tenants who have had legal representation over the years have been represented by either a legal aid attorney or paralegal. For this reason both the amount and quality of tenant representation has in large measure reflected the policies and priorities of LASH, the Legal Aid Society of Honolulu.

Table One reports the proportion of docketed cases in which lawyers were in some way involved for six time periods. The periods in Table One are defined substantively.<sup>21</sup> During the first period the operation and decisions of the board were much like they were before LASH arrived in Hawaii as part of the Johnson Administration's War on Poverty. The second period, 1975-77, was a period when LASH brought several class actions on behalf of HHA tenants and for a time brought the eviction process to a halt. The third period was a bridge period as the Authority, which had undergone sweeping administrative changes, sought to deal with the backlog of cases that were a legacy of the earlier litigation and pondered ways to make its eviction process more rational and efficient.

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<sup>20</sup> See generally "Dynamics," *supra* note 8.

<sup>21</sup> Cases that had hearings are classified in the period during which the hearing occurred. Cases that did not have hearings are classified in the period of subpoena.

The last three periods are labeled with letters that represent the Authority's hearing officers. A was the first person the Authority hired with full time responsibility for managing the eviction process and prosecuting cases before the eviction board. A was not a lawyer, but he enjoyed negotiating with attorneys and acting like one. The period labeled A runs from mid-October 1979 to January 1982. In fact A arrived somewhat before October 1979, but we commence the period at this point because it marks the establishment of a second eviction panel, which resulted in an infusion of new blood on the eviction board and a marked increase in the rate of hearings.<sup>22</sup> There was also a marked increase in the proportion of non-payment tenants evicted at the initial hearing after A took over, particularly when less than three month's rent was owing.<sup>23</sup> Period B begins when B took over the position of hearing officer in mid-January of 1982.<sup>24</sup> B was the first lawyer to serve as hearing officer. She was officially a deputy attorney general and not in the HHA's chain of command, but for all practical purposes she answered to the head of housing with respect to general eviction policies. The same is true of C, a deputy attorney general who replaced B in late February 1984. By the time C quit his post in September 1987 the board was far more likely to evict in non-payment cases than it had been under either A or B.<sup>25</sup>

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<sup>22</sup> The HHA's primary purpose in appointing a second panel was to be able to have a board meeting each week, thus increasing the pace at which eviction actions could be heard and diminishing the delay between the subpoena and the hearing in the case of individual tenants. The Authority used the institution of a second panel to divide the existing board and appoint additional members, like private real estate managers, who were expected to have a more "business-like" attitude toward evictions. The Authority also gave all board members a training session at which the Authority's rent collection difficulties and its need for board cooperation were stressed.

<sup>23</sup> From 1966 through 1977 no non-payment tenant whose rent debt was three months or less was evicted at the first hearing. In 1978-79 only one of fourteen tenants with a rent debt of three months or less were evicted at the first hearing. Under A 32 of the 88 tenants with such debts were evicted at the first hearing. These figures exclude tenants who paid off their entire debt before the hearing. Before A took over, cases where prehearing payment occurred were almost invariably cancelled.

<sup>24</sup> This was some months after A had left the Authority. We count these months in period A in the expectation that the tone he set is likely to have endured until a permanent replacement was in office. We employ a similar convention in coding the interim between B and C.

<sup>25</sup> This conclusion is based on interviews and observation. Our quantitative data only run through 1985. To this point they show the board under C distinctly more prone to evict than it was in period B whenever any rent was owing, but more prone to evict than in period A only when more than three months rent was due.

Turning now to Table One, we see that while lawyers are not regularly involved in the eviction process their involvement is by no means rare as 108 of the 1268 cases for which we have data contain some indication of lawyer (or paralegal) involvement.

Table One

Percentage of Cases With Lawyers, By Period\*

	1966-74	1975-77	1978-79	PERIOD			Total
				A	B	C	
Percentage of Cases With Lawyers	9.2% (18)	6.4% (9)	4.3% (5)	10.5% (33)	8.7% (30)	8.2% (13)	8.5% (108)
Total Cases Commenced by Subpoena	195	140	115	315	345	158	1268

\* Number of cases with lawyers in parentheses.

We see that the rate of lawyer involvement averaged more than 8% but was markedly lower during the years 1975-1979. This is somewhat strange since we know that the period 1975 to 1977 was when the HHA's eviction board was under severe legal attack by LASH attorneys. In fact, the picture is misleading in that, because of the ongoing litigation and its aftermath, only 25% of the cases commenced by subpoena in the 1975-1977 period had a hearing, which is less than one-third of the percentage of cases going to hearing in the next lowest period.

Table Two gives the proportion of hearings in which tenants had attorneys by period and Table Three gives the proportion of tenants evicted at the hearing who had a lawyer on appeal.

We gain from these tables a somewhat different picture of lawyer involvement with the eviction board and changes over time.<sup>26</sup> Looking only at cases that went to hearing, the 1975-77

<sup>26</sup> One cannot derive Table One by combining Tables Two and Three because a lawyer might be involved in the same case at both the hearing and on appeal and lawyers were involved in some cases that did not reach a hearing and in other cases only after the appeal.

Table Two

Percentage of Cases Going to Hearing  
With Attorneys At or Before Hearing, By Period\*

	1966-74	1975-77	1978-79	PERIOD			Total
				A	B	C	
Percentage of Cases With Attorneys	7.5% (12)	8.8% (3)	1.2% (1)	6.8% (18)	3.2% (10)	4.1% (6)	5.0% (50)
Total # of Cases Going to Hearing	159	34	85	266	315	146	1005

\* Number of cases with attorneys at or before hearing in parentheses.

Table Three

Percentage of Appealed Cases  
With Attorneys Aiding on Appeal, By Period\*

	1966-74	1975-77	1978-79	PERIOD			Total
				A	B	C	
Percentage of Cases With Attorneys	38.9% (7)	50% (2)	11.8% (2)	23.2% (16)	16.7% (15)	5.9% (3)	18.1% (45)
Total # of Appeals	18	4	17	69	90	51	249

\* Number of cases with attorneys in parentheses.

period represents in percentage terms the peak of lawyer involvement in the eviction process both at hearings and on appeal.<sup>27</sup> Moreover, except for the period 1978-79, when legal representation dips markedly at both stages, there has been a general diminution over time in the probability that a tenant will have legal help at either the hearing or on appeal.<sup>28</sup> Had data been available

<sup>27</sup> The small number of hearings and appeals during this period means that we cannot make too much of these percentages. But it is safe to conclude that the 1975-77 period does not represent a drop-off in rates of lawyer involvement when the major occasions for lawyer involvement (hearing and appeal) are controlled.

<sup>28</sup> The pattern is smoother for appealed cases than for those going to hearing. Controlling for cause of action, the probability of attorney involvement in non-payment cases going to hearing is similar in periods A and C and lower

for 1986 and 1987, the drop-off of legal representation in period C, according to both LASH informants and C, would have been greater still.

We also note that lawyers often became involved in the eviction process only after the board had voted to evict the tenant. Over the period of the study attorneys represented tenants at hearings only 50 times. Thus the actual involvement of attorneys in informal board hearings is substantially less than their apparent involvement in the eviction process; 5% of cases going to hearing had a lawyer at or before the hearings, although 9.8% of these cases used a lawyer's services at some point in the eviction process.<sup>29</sup>

Tables One, Two and Three only capture the involvement of lawyers in the eviction process when there is a paper trail preserved in the Authority's records. When a tenant consults a lawyer, and the lawyer tells the tenant how to behave before the board or what to say in a letter of appeal but doesn't write a letter himself or take other steps to represent the tenant, the tenant shows up in our data as unrepresented, although she may have benefitted from legal advice. In recent years especially, it appears that legal aid attorneys often refuse to represent tenants, but give them some advice about what they must do to retain their units (usually pay the rent debt) before sending them on their way. This may aid some tenants facing eviction in ways our data do not capture.

Table Four shows how representation has varied by attorney type over time.<sup>30</sup>

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in period B [and lower in all three of these periods than in the first two periods]. In income falsification cases there are no lawyers at hearings in any periods except A and B which each have one lawyer, and so there is no meaningful trend. When cases brought for the various other reasons are aggregated together the probability of counsel is similar in periods A and B, but lower in C. There are no such cases with attorneys in the 1975-77 and 1978-79 periods, but in the former period only two cases fall into this category. The proportion of [such] cases with counsel in the 1966-74 period is slightly greater than in period C but less than in periods A and B.

<sup>29</sup> Some attorneys who represented tenants on appeal, particularly before 1980 when appeals might involve *de novo* hearings, also participated in hearings that were informal in the sense that the judges were lay persons and basic legal rules of procedure did not apply. Including cases which were docketed but resolved without a hearing, there were attorneys present at some stage in 8.5% of the actions.

<sup>30</sup> One case with an attorney is excluded from the Table because we could not tell if the attorney was with LASH or was a member of the private bar.



Table Four

Percentages of Cases Within Periods  
Represented By Attorneys of Different Types\*

% OF CASES REPRESENTED	PERIOD						Total
	1966-74	1975-77	1978-79	A	B	C	
By LASH Attorneys	6.7% (13)	5.0% (7)	1.7% (2)	2.5% (8)	1.7% (6)	1.3% (2)	3.0% (38)
By LASH Paralegal	--	--	2.6% (3)	5.1% (16)	3.8% (13)	4.4% (7)	3.1% (39)
By LASH, Type Unclear	1.5% (3)	.7% (1)	--	--	.6% (2)	.6% (1)	.6% (7)
Total LASH	8.2% (16)	5.7% (8)	4.3% (5)	7.6% (24)	6.1% (21)	6.3% (10)	6.6% (84)
Private Attorney	1.0% (2)	.7% (1)	0%	2.5% (8)	2.6% (9)	1.9% (3)	1.8% (23)
							N = 1268

\* Number of cases in parentheses.

Bearing in mind that the percentage figures for 1975-77 are deflated relative to those for other periods because of the large number of cases that did not go to hearing, it appears that LASH supervising attorneys were relatively active on behalf of tenants until about 1977, and then their presence diminished dramatically. The fall off in appearances by LASH attorneys coincides with a major class action victory in a case brought by LASH to secure the HHA's compliance with HUD grievance regulations.<sup>31</sup> It also seems to reflect a transfer within LASH of responsibility for public housing evictions from its lawyer staff to its paralegals. The two may be related, for once LASH felt that the Authority was complying with the various rules and regulations governing its eviction process, it may have seen the problems of tenants faced with eviction as routine matters that could be handled by paralegals. Indeed, LASH apparently designated one

<sup>31</sup> See the discussion of the Tileia case in the text accompanying notes 66 through 69 below.

paralegal as its specialist in public housing evictions. He was involved in at least 19 cases arising between 1980 and 1984.

Overall, legal aid handled more than three cases for every case handled by a private attorney, and this is true of every period except B where the ratio is closer to two to one. While the proportion of tenants represented by private attorneys is always quite small, there is a marked increase in that proportion, both absolutely and relative to LASH representation, during the 1980s. It is difficult to say why this occurred. It may reflect the Reagan era cutbacks in legal services funding and the willingness of some members of the private bar to leap into the breach, and it may also reflect the increasing number of LASH alumni who were joining the private Honolulu bar and may have been particularly willing to take such cases, for we know that at least some of the private attorneys who represented tenants had had prior legal aid experience. In addition, it may reflect the relative well-being of some tenant families and their desire for "real lawyers" at a time when all LASH was willing to provide was paralegals.

Table Five relates attorney usage to the reason the Authority sought eviction.<sup>32</sup>

Looking at the second row in Table Five we see a suggestion of a wealth effect in the fact that 14.6% of those tenants charged with non-payment of rent who had an attorney had a private attorney compared with 25% of those charged with behavioral violations.<sup>33</sup> Moreover, private attorneys account for 30% of the attorneys representing tenants charged with income falsification, the offense that is most suggestive of higher than average income.<sup>34</sup>

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<sup>32</sup> When more than one lease violation was charged, we coded cases involving non-payment and a behavioral charge by the behavioral charge because we felt that the Authority would ordinarily not take the trouble to prove the behavioral charge if it were certain it could evict for non-payment. Where more than one behavioral violation was charged one of the violations always involved "Other Trouble" while the other involved falsification, guests or pets. We coded these cases into whichever of the three more specific categories applied. All told 118 of 1261 cases involved multiple charges and in 74 of these cases non-payment was the only other violation.

<sup>33</sup> These include guests, pets and other trouble.

<sup>34</sup> Usually when tenants conceal income it is income from some source other than the principle wage earner's full time earnings. Common sources of concealed income are second jobs, a spouse's earnings and part-time or temporary employment. The amount saved in rent from concealing income is often in the range of a thousand dollars or more, and there are cases in which it has been in excess of \$5,000. This will depend on the amount concealed and the length of time it goes undiscovered.

Table Five

Lawyer Representation By Cause of Action and Attorney Type<sup>35</sup>

	CAUSE OF ACTION						Total
	NP	Fals.	Guests	Pets	OT	Misc.	
Percentage of All Cases With Attorneys*	5.2% (48)	10.1% (10)	26.9% (14)	20.9% (14)	20.8% (21)	9.1% (1)	8.6% (108)
Percentage of Attorney Cases With Private Attorneys*	14.6% (7)	30.0% (3)	14.3% (2)	28.6% (4)	30.0% (6)	100.0% (1)	21.5% (23)

\* Number of cases in parentheses.

Looking at the first line of Table Five, we see that tenants are substantially less likely to have attorneys in cases brought for non-payment of rent than they are in cases where guests, pets or other trouble behavior is charged.<sup>36</sup> The rate of attorney usage is intermediate for income falsification, although closer to the pattern in non-payment cases. The rate for miscellaneous lease violations is like that for falsification but there are so few cases in this category that there is no point in attempting an explanation.

The difference between non-payment cases on the one hand and the behavioral violations is striking. It must represent differences in the propensity of tenants facing eviction to seek out lawyers and/or differences in the propensity of lawyers to take on clients. In particular, since so

<sup>35</sup> Non-payment (NP) is failure to pay rent; "Falsification" (Fals.) involves not reporting or misreporting income at the annual examination used to determine the next year's rent; "Guests" involves letting unauthorized persons live in the unit; "Pets" involves keeping animals - almost always dogs - in violation of Authority rules; "other trouble" (OT) includes other troublesome behavior such as fighting, unsanitary housekeeping or parking inoperable vehicles, and "miscellaneous" (Misc.) includes other, often technical, lease violations such as the refusal to transfer to a proper size unit.

In one case in the OT category we know the tenant had an attorney but do not know if the attorney came from legal aid or was privately retained. We omit this case when we calculate the percentage of represented OT tenants with private attorneys and the overall percentage of represented tenants with private attorneys.

<sup>36</sup> This is true of all the time periods except 1975-77 and 1978-79. In the former period only four cases charged with these offenses reached the hearing stage, and in the latter period attorney usage, for reasons we cannot identify, was low for all causes of action.

many tenants are represented by legal aid and can afford no other attorneys, the pattern may reflect LASH policy over the years about which tenants to represent.

We think that both tenants, in their propensity to seek out attorneys, and attorneys (particularly LASH attorneys), in their propensity to take on clients, respond to the same considerations. These are that non-payment of rent cases are ordinarily open and shut on the facts and raise no great value issues.<sup>37</sup> Pet cases, by contrast, were often seen - by tenants especially - to raise important value issues,<sup>38</sup> and guest and other trouble cases were often hotly disputed on the facts. Thus in the eviction setting lawyers tend to appear for tenants when it seems that their special skills will make a difference.<sup>39</sup> Our data do not allow us to distinguish between tenant self-selection and attorney selection in explaining this association, but LASH informants reported that in recent years they counseled but refused to represent most non-payment tenants who approached them for aid. They felt, correctly, that if the tenant could pay back her rent she would be allowed to stay regardless of their involvement, and if she could not pay back her rent there was nothing they could do. As a result in periods B and C combined only about one percent of non-payment tenants had a lawyer at the hearing, and only about five percent of evicted non-payment tenants who appealed had a lawyer to aid them. During the same two periods 17.5% of the 63 tenants charged with guests, pets or other trouble had a lawyer's aid

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<sup>37</sup> Income falsification cases tend to be similar in these respects, although in some cases there is a genuine question about whether a tenant realized that a certain type of income had to be reported.

<sup>38</sup> Justifications that would appeal to middle class values were more common in such cases than in those brought for other reasons. The most common justification was that a dog was kept for security reasons. The most compelling justification we encountered was offered by a grandmother who said that a pet was necessary for her young grandson's (whom she was raising) psychological well being. The grandmother's claim was supported by a social worker and by school reports that when she had tried getting rid of the dog her grandson's behavior had markedly deteriorated. Nevertheless the Authority and the board refused to allow her to keep the dog, and the grandmother moved rather than deprive her grandson.

<sup>39</sup> The relationship between lawyer involvement and case type is similar at the hearing and on appeal except in the case of income falsification appeals. Lawyers were present at or before the hearing in 2.3% of non-payment cases; 2.5% of falsification cases; 22.7% of guest cases; 14.5% of pet cases and 16.0% of cases involving other trouble behavior. Considering only those cases appealed, lawyers were involved in 9.1% of non-payment appeals; 26.1% of falsification appeals; 38.5% of guest appeals; 36.4% of pet appeals and 54.2% of appeals in cases involving other trouble behavior.

at or before their first hearing, and 40.9% of the 22 people who appealed evictions on these counts had a lawyers's assistance on appeal.<sup>40</sup>

We have looked thus far at some simple statistics describing the role that lawyers play in the eviction process.<sup>41</sup> We see that, although the eviction process was designed to proceed without lawyers and largely did so during the first decade of its existence, since the coming of the federally funded legal aid program to Oahu, lawyers have been regular if infrequent participants in the Authority's eviction process both at hearings and on appeal. Legal aid attorneys account for the bulk of the representation, but private attorneys represent tenants as well, particularly in cases other than non-payment. We have no way of knowing what proportion of private attorneys are working on a pro bono basis, but we have found in the case files several statements from private attorneys that they are working pro bono and other statements in which private attorneys indicate that they are being paid for their services - sometimes by noting that expected payments have not been made. We also noted a number of cases in which private attorneys were only involved to the extent of writing a letter or making a phone call - behavior usually associated with low fee or no fee representation.<sup>42</sup>

The involvement of lawyers in the eviction process has changed over time. Lawyer involvement at both the hearing and on appeal is, for some reason we cannot identify, sharply down in 1978-79, the period following LASH's greatest triumph and then again diminishes after 1982 in the periods we have labeled B and C. Beginning in period A (from October, 1979) and continuing through periods B and C, private representation, while never high, is, both as a

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<sup>40</sup> However all of the latter instances of lawyer use were in period B. In period C none of the seven tenants who appealed on these counts had a lawyer to assist them. This may be because at the outset of period C the HHA's Commissioners delegated to the Executive Director the responsibility of determining if there were new fact and evidence sufficient to justify an appeal. This meant that an attorney appealing such a case could not appear before the Commissioners to argue that the appeal should be heard, but could only petition the staff. Attorneys may have felt that in these circumstances there was little they could do to help tenants.

<sup>41</sup> We are currently working on a paper that will explain with the aid of multivariate models the likelihood that tenants will have attorneys and the effects of representation on delay and outcomes.

<sup>42</sup> Lochner, Philip R., Jr. "The No Fee And Low Fee Legal Practice Of Private Attorneys," 9 Law & Society Review 431 (1975).

proportion of all cases and in relation to LASH representation, about twice what it had been in the prior fourteen years. We offered some possible explanations for this, but they are quite speculative.

We feel we are on somewhat firmer ground when we look at the kinds of cases attorneys appear in. They are relatively unlikely to appear in non-payment cases and much more likely to appear when the charge involves sheltering unauthorized guests, keeping pets or engaging in other trouble behavior. We believe this is because neither tenants nor attorneys see much of a role for lawyers when an open and shut violation of a generally accepted rule is alleged. Tenants want attorneys and attorneys are willing to represent tenants before informal tribunals when cases conflicting factual allegations or otherwise pose issues similar to those posed in ordinary contested litigation.

### Issues of Style

Now we shall turn our attention to the ways that attorneys represent tenants before informal tribunals. We were able to identify three distinct styles. The first we call legalistic. It involves an attempt to impose legal rules on the tribunal. The rules may be procedural or substantive but are often the former, as when a lawyer at the hearing objects to evidence as if he were in court or moves for a dismissal before the hearing because the tenant's notice of the Authority's intention to evict did not meet a statutory deadline. The second is what we call tenant style. Lawyers employing this style make the same kinds of arguments that unrepresented tenants might make or encourage tenants to do the same things, like paying back rent, that unrepresented tenants often do if they wish to remain in housing. The third we call the service style. Lawyers employing this style use their professional skills to help tenants deal with agents, other than the Authority, that have contributed to their current situation or may help them escape it. The service we most frequently encountered was helping the tenant secure money from welfare agencies to pay the rent. Examples of other actions that fall under the service category

are filing for bankruptcy to help a tenant cope with her debts and seeking a restraining order against a former spouse when the Authority sought to evict a tenant for the trouble her ex-husband caused when he visited her on the project.

The service style is a melange of the legalistic and tenant style. The services that lawyers perform for tenants often involve arguing or manipulating the law. But once these services have been accomplished, argument to the board usually follows the tenant style. Often a strong tenant style argument can be made because the lawyer's service has given the tenant the wherewithal to correct the lease violation or gives the board a special reason to accept the tenant's promise to cure the violation and not relapse in the future.

Table Six presents the basic breakdown of lawyer styles by period and Table Seven breaks down style by cause of action.<sup>43</sup>

Table Six  
Styles of Representation By Period\*

LAWYER STYLE	1966-74	1975-77	1978-79	PERIOD			Total
				A	B	C	
Legalistic	72.7% (8)	40.0% (2)	20.0% (1)	33.3% (10)	45.5% (10)	30.0% (3)	41.0% (34)
Service	--	40.0% (2)	60.0% (3)	16.7% (5)	4.5% (1)	10.0% (1)	14.5% (12)
Tenant	27.3% (3)	20.0% (1)	20.0% (1)	50.0% (15)	50.0% (11)	60.0% (6)	44.6% (37)
Total Cases	11	5	5	30	22	10	83

\* Number of cases in parentheses.

We see from Table Six that the tendency to resort to the tenant style appears to have increased markedly beginning in Period A when the Authority rationalized its eviction processes

<sup>43</sup> About a quarter of our lawyer cases did not contain sufficient information to allow us to identify attorney styles.

by appointing a full time eviction specialist and a second eviction panel. It was also in this period that the statute establishing the eviction board was amended and rules regulating the board's procedures were adopted in accordance with the Hawaii Administrative Procedure Act. At the same time the utilization of the service style, which accounts for a high proportion of the cases between 1975 and 1979 but never a large number, falls off. To some small extent this increased tendency to use a tenant style may be due to the fact that LASH paralegals appeared in only 3 cases before period A but in 36 cases afterwards, and they seem somewhat more likely than LASH supervising attorneys to use a tenant style.<sup>44</sup> But this cannot be the whole story. Not only is it possible that LASH channels to its supervising attorneys cases with obvious legal claims, but the style these attorneys used changed markedly with A's arrival. Before period A, LASH attorneys used a legalistic style in 64.7% of the 17 cases for which we have style data and a service style in an additional 17.6% of their cases. Beginning with period A, LASH attorneys used a legalistic style in 42.9% of the fourteen cases we could code and a service style in one additional case or 7.1%. Thus these attorneys made tenant style pleas in only 17.6% of their cases before A's arrival on the scene but in 50% of the cases that they handled afterward.

One possible explanation for this change in representational style is that the presence within the Authority of a full time eviction specialist or other changes concomitant with A's arrival meant that the Authority's eviction processes attended more closely to matters of legal form and so left less room for legal challenges.<sup>45</sup> Another possibility is that attorneys became more

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<sup>44</sup> During the last three periods LASH paralegals appeared in 31 cases for which we have information on style. They employed a legalistic style 32.2% of the time, a service style 6.5% of the time and a tenant style 61.3% of the time. During this time LASH supervising attorneys handled 14 cases. They employed a legalistic style 42.9% of the time, a service style 7.1% of the time (1 case), and a tenant style 50% of the time. Private attorneys participated in 15 cases during the last three periods. They used a legalistic style 33.3% of the time, a service style 26.7% of the time and a tenant style 40% of the time. Before period A LASH supervising attorneys constituted almost all of the lawyer participants. During this time 17 of the 21 lawyer cases for which we have information on style involved LASH supervising attorneys, 3 involved LASH paralegals and one involved a private attorney. In one lawyer case in period A we do not know the lawyer type and in one period B case we know the lawyer came from LASH but we do not know if he was a supervising attorney or a paralegal. In both these cases the attorney used a legalistic style. They are not included in the above figures.

<sup>45</sup> Examination of changes over time in lawyer style controlling for the reason for action indicates that the style changes we have identified cannot be explained by changes in the mix of case types.



accepting of the Authority's procedures. This may reflect both the Authority's greater attention to legal form and the increasing number of cases that LASH represented once the Authority's pace of evictions increased. More regular representation may have allowed LASH's attorneys and paralegals to develop working relationships with the Authority's hearing officer.<sup>46</sup>

Table Seven

Styles of Representation By Cause of Action\*

LAWYER STYLE	CAUSE OF ACTION						Total
	NP	Fals.	Guests	Pets	OT	Misc.	
Legalistic	23.7% (9)	40.0% (4)	72.7% (8)	55.6% (5)	50.0% (7)	100.0% (1)	41.0% (34)
Service	23.7% (9)	--	9.1% (1)	--	14.3% (2)	--	14.5% (12)
Tenant	52.6% (20)	60.0% (6)	18.2% (2)	44.4% (4)	35.7% (5)	--	44.6% (37)
Total Cases	38	10	11	9	14	1	83

\* Number of cases in parentheses.

When we look at Table Seven we see that the tenant style was more common in non-payment and falsification cases than in cases brought for other causes of action. This, we hypothesize, is a function of the more or less open and shut nature of these cases and the legitimacy of the rules they sanctioned. In non-payment cases the tenant style was to promise to pay or, in the later periods, to actually pay the rent owing. In falsification cases the usual tenant style was to argue that reporting requirements had been misunderstood. Service style representation is highest in non-payment cases because the services that lawyers were best situated to perform involved aiding tenants in acquiring money or managing their debts. The

<sup>46</sup> This does not explain the fact that private attorneys were legalistic in only a third of the cases they handled, but since, with one exception, private attorneys are only involved in evictions from period A on, we cannot establish an earlier private attorney baseline.

intermediate rate of tenant style representation in other trouble cases and pet cases suggests that lawyers tried to excuse their clients behavior ("The neighbors started the fight") or made promises of reform ("My client will give her dog away") more often than they contested the legal validity of the Authority's evidence or challenged the rule on which the Authority relied. If we contrast cases that only had a lawyer at the prehearing or hearing stage with those that only had a lawyer on appeal the legalistic and service styles are somewhat more common at the hearing. Fourteen of 26 hearing cases employed one of these styles at the hearing compared to 12 of 30 cases that only had representation at the appeal stage. This suggests that there may have been more room for legal maneuvering to aid tenants at hearings than there was on appeal.<sup>47</sup>

Finally, we can look at the relationship between legal representation, lawyer style and outcomes. Table Eight takes a step in this direction.<sup>48</sup> It aggregates subjective judgments about whether attorneys affected case outcomes<sup>49</sup> and presents this information controlling for lawyer style. The Table only includes information on cases in which the tenant was allowed to stay after the hearing, appeal or post hearing plea. In twenty-nine attorney cases in which the tenant was

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<sup>47</sup> In 12 of 16 cases in which a lawyer represented a tenant at both the hearing and on appeal the legalistic or service style was employed as it was in 7 of the 10 cases in which the lawyers involvement began after the appeal had been heard. The latter often involved taking the Authority to court, for no official internal remedies remained. In both these situations service style representation was less common than it was when representation was only at the hearing or only on appeal. We are, of course, not talking about large numbers of cases.

<sup>48</sup> In another paper we propose to do a multivariate analysis of the effects of having a lawyer on case outcomes. Here we simply summarize subjective judgments, based on case records, of whether lawyers made a difference in the cases of those they represented, and, if so, whether they helped or hurt their clients.

<sup>49</sup> These judgments are the first author's and based on often fragmentary case files. In about 20% of the cases no judgment could be reached because of insufficient information. We say that a lawyer made a difference if the board's decision or the Authority's action on appeal or even afterward seems to have responded to arguments that unrepresented tenants were not likely to have made. We also say that representation made a difference if the lawyer made and the Authority responded to a tenant style argument that the tenant probably would not have been able to make had she not had legal help (as when a service-oriented attorney solves a welfare problem for the tenant which provides her with money to clear her rent debt) or that the Authority would have been unlikely to respond to had the argument not been made by a lawyer. We say that a lawyer did not make a difference where the result appears to be one which an unrepresented tenant would have obtained. If there is no special indication of a lawyer effect, we assume that, if the result is the routine board disposition for cases of that type at that time, there was no effect. In some cases we are unsure about whether a disposition is routine or whether certain information should be taken as an indication of a lawyer effect. We code these cases as cases in which the presence of an attorney "perhaps" had an effect. But even when we code "Yes" or "No" in response to the question of whether a lawyer had an effect, we are talking in probabilistic terms.

either evicted or vacated without a board decision, there is no case in which it appears that a lawyer's actions denied the tenant a likely victory and only two cases in which the lawyer's representation is such that it appears that the tenant might have been better off had she done without it. In short, if our judgments are accurate, legal representation virtually never hurts tenants. When represented tenants are evicted, one may almost always conclude that they would have fared no better on their own.

Table Eight

An Evaluation of Whether Lawyers Make a Difference, By Lawyer Style\*

LAWYER STYLE	DID LAWYER MAKE A DIFFERENCE?			Total
	Yes	Perhaps	No	
Legalistic	78.9% (15)	15.8% (3)	5.3% (1)	100% (19)
Service	50.0% (5)	40.0% (4)	10.0% (1)	100% (10)
Tenant	12.0% (3)	28.0% (7)	60.0% (15)	100% (25)
Total	42.6% (23)	25.9% (14)	31.5% (17)	100% (54)

\* Number of cases in parentheses.

Includes only cases represented by a lawyer where tenant was allowed to stay in housing.

Table Eight indicates that in 23 cases, or 42.6% of the cases in which represented tenants were allowed to stay, we are reasonably confident that they would have left or been evicted but for the aid they received from counsel. In an additional 14 cases, or 25.9% of these cases, legal representation may have made a difference. In 31.5% of the cases it appears that the tenants would have been allowed to stay whether or not they had had an attorney.

Not surprisingly, among the cases in which the tenant succeeded in staying, lawyers are most likely to have made a difference when legalistic arguments were advanced. These are arguments that require knowledge that tenants do not have, so when the board or Authority

responds to such an argument by allowing the tenant to stay, it seems likely that the lawyer's presence was crucial to the Authority's decision.<sup>50</sup> This is not to say that legalistic arguments are the most effective kinds of arguments that lawyers make. Lawyers advanced legalistic arguments on behalf of about a third of the tenants allowed to stay but made such arguments in 56% (14 of 25) of the cases that we can classify for style in which the tenant left or was evicted.

The service style approach, like the legalistic style, appears to have been often instrumental in aiding tenants allowed to stay. In only one of the ten service style cases in which the tenant was allowed to stay are we reasonably confident that the outcome would have been the same had the attorney not been involved in the action, and in five of the ten cases it appears likely that the outcome would have been different. In the remaining 4 cases it was difficult to say whether the lawyer's presence was crucial or unimportant. These were cases in which the tenant might have accomplished for herself what her lawyer provided or the board might have let the tenant stay without the extra guarantees the lawyer was able to offer. The service style is about as prevalent when tenants stay as when they leave. It was used in 18.9% of the former cases and 16.7% of the latter.

Among the group of cases in which tenants are allowed to stay, the tenant style is least likely to appear to have mattered. This too is not surprising because savvy tenants make such

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<sup>50</sup> The difficult issue for coding is whether the decision to allow a tenant to stay is overdetermined. Thus, if a non-payment tenant paid back all her rent and was allowed to stay by the board after her lawyer made a legalistic argument, we would code the case as one in which the lawyer made no difference. On the other hand, if as happened in one case, the tenant paid back her rent after her appeal and the lawyer had to go to court to stop the eviction, we would code the case as one in which the lawyer made a difference. If by objecting to a legally deficient notice the lawyer succeeded in delaying an eviction action for several months during which time the tenant was able to secure money to pay her rent, our coding of the case would depend on what information we had about the likelihood that the tenant would have come up with the money had there been no delay. In the absence of information about these prospects we would code the case as one in which the lawyer perhaps made a difference. If the lawyer pretermitted the eviction process as when a lawyer objected to the absence of a witness and the Authority cancelled a hearing without rescheduling it, we assume the lawyer made a difference even though we cannot know what would have happened at the hearing had it been held. In this sense, our estimate of when lawyers made a difference should be taken as a maximum estimate. We are conservative in saying that lawyers had no effect. We are similarly conservative in that we coded cases where the lawyer helped secure a conditional deferment as cases in which the tenant stayed and the lawyer made a difference even if the tenant subsequently defaulted on conditions that had been set and vacated or was evicted. We do this because at some point the lawyer helped the tenant secure a positive outcome that she would not have secured on her own even if in the long run the tenant was still unable to stay in housing. Four of the 23 cases (17.4%) in which the lawyer made a difference fell into this category as did 1 of 14 cases in which the lawyer perhaps made a difference.

arguments on their own behalf. Our judgment was that 60% of the successes associated with tenant style arguments involved situations in which unrepresented tenants commonly made similar arguments to the same effect. In three cases, or 12% of the total, it appeared that a tenant's argument would not have succeeded where a lawyer's argument did. For example one lawyer wrote a personal letter raising what he called non-legal considerations to an Authority official after the tenant's appeal had been rejected, and the tenant was given a second chance. Seven cases were difficult to classify because, while the arguments were of a kind a tenant might have made, it was not clear that the board or the Authority would have bought the arguments had they not been made by an attorney. For example, in arguing that a tenant's debts would not interfere with future rent payments, an attorney might note specifically how each could be managed while a tenant might simply assert that they could be handled. In the later time periods it is difficult to say whether a board which accepted the attorney's argument would have been satisfied with the tenant's vaguer assertion. Had the case arise in 1970, however, it would have been clear that the representation made no difference.

Overall the tenant style argument is relatively successful. It accounts for 47.2% of the arguments advanced in cases where tenants were allowed to stay but only 36% of the arguments in cases where tenants left or were evicted. However, this largely reflects the availability of this argument whenever a non-payment tenant paid back her rent debt and the Authority's general willingness to allow tenants to stay in these circumstances.

These data indicate that lawyers can make a difference in informal tribunals like the public housing eviction board we have examined. However, we started with 1268 cases. In only 23 cases or 1.8% of the total does it appear that the presence of an attorney helped the tenant and in only an additional 1.1% of the cases do we feel that we cannot exclude that possibility. What do these figures mean? If we extrapolate from the data we have to 100% representation, it appears that lawyers would have aided tenants about 27% of the time, and they would perhaps have aided them in an additional 17% of the cases.<sup>51</sup> But one cannot extrapolate from the group of tenants

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<sup>51</sup> We extrapolated by assuming that when a tenant stayed and we could not determine whether a lawyer had made a difference the probability that the lawyer made a difference was 42.6% and the probability that the lawyer

who have had attorneys to the group of unrepresented tenants in this fashion. We are confident that the number of unrepresented tenants in our sample who would have been helped by an attorney does not approach 44% or even 27% of the total number of tenants who lacked council.

Consider first that a majority of unrepresented tenants have, over the years, prevailed before the board or on appeal, and so did not need an attorney to secure a favorable outcome. Second, another substantial group - amounting to more than 8% of the total - vacated before the first hearing.<sup>52</sup> Many of these are likely to have had hopeless cases. Third, of those who were evicted at the first hearing and then vacated or unsuccessfully appealed about 64% were charged with non-payment of rent. Except where attorneys might have identified sources of funds that the tenants could not have acquired on their own, these tenants are unlikely to have been aided by legal representation. Fourth, attorneys are not always successful. Represented tenants are evicted about a third of the time and even when represented tenants stay about 35% of the time the representation appears to have made no difference<sup>53</sup> and in another quarter of the cases it may not have been crucial. Fifth, and most important, represented cases have been selected by the tenants involved, and often by the attorneys as well, as cases in which a lawyer's presence seemed useful. Thus our estimate of the frequency with which lawyers make a difference is probably far higher than what the figure would have been had all the tenants in our sample had attorneys. While we cannot know the proportion of cases that would have turned out differently if all tenants had lawyers, we think that proportion is small.<sup>54</sup>

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might perhaps have made a difference was 25.9% (See Table Eight). We then calculated the number of additional cases that these percentages represented, added these numbers to the totals for the "yes" and "perhaps" cases in Table Eight and divided by 107, the total number of lawyer cases for which we had outcome information. For the reasons mentioned in note 50, this figure is a maximum estimate. Our coding conventions may be added to the list of reasons for concluding that this extrapolation is a substantial overestimate of the degree to which lawyers might have helped the group of unrepresented tenants.

<sup>52</sup> Tenants who attend board hearings and are eventually evicted or vacate constitute about 20% of the docket cases in our sample.

<sup>53</sup> This figure is not inconsistent with Table Eight, for it includes cases for which we had no style information.

<sup>54</sup> Note also that the Authority can react to steps that tenants take to avoid eviction. If represented tenants often prevailed at hearings, the Authority would probably have taken steps to diminish their success rate unless that success were due to non-payment tenants repaying their rent. Some of the changes the Authority secured in the

## Changes Over Time

One recurring theme in the data we have presented thus far is that the relationship of attorneys to the eviction process changed over time. We can better understand these changes with information gleaned from case records and interviews that we cannot quantify. The story these materials allow us to tell largely concerns legal aid's involvement with the Authority, for private attorneys were rarely involved with evictions until Period A, when the transformation of the Authority's procedures and of lawyers' reactions to them was well under way. When private attorneys did get involved, their ways of representing tenants were, so far as we can determine, not very different from that of their legal aid counterparts, but one sees proportionately more private attorney cases in which representation appears to be confined to one or two letters or phone calls.

## The Attorney's Perspective: 1966-74

The federally funded legal aid program (LASH) arrived in Hawaii in 1967 as part of the Johnson Administration's War on Poverty. By 1970 the HHA was well aware of LASH, as LASH attorneys took on the cases of a few tenants threatened with eviction and worked with other public housing tenants to organize a tenants' union and to lobby for the inclusion of two tenants on the eviction board. LASH's organizing efforts quickly bore fruit, for the HHA's staff encouraged rather than resisted their initiatives. As the first LASH director of law reform recalls:

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statute establishing the board and in its own rules and regulations were almost certainly designed in part to make its eviction system less vulnerable to legal challenge and so reduce the success rate of legalistic arguments.

Although for this reason and those we discuss in the text it is unlikely that more widespread representation would make a great difference in the outcomes tenants receive, preliminary examination of data we do not present here suggests that there is one difference that is strongly associated with legal representation. This relates to delay. Cases with lawyers take longer to resolve than those without them. When lawyers get involved in eviction actions, continuances are almost always requested and are usually granted. Delays may also occur when negotiation is ongoing. Delay may be valuable for tenants because it gives them more time in public low rent housing and more time to search for other accommodations.

They [the head of the HHA and his official superior the head of the Department of Social Services] were virtually impossible to organize against because they were completely affable and very friendly . . . very reasonable.

In contrast to this evaluation of the HHA's leadership are the recollections that various LASH attorneys who handled cases between 1969 and 1974 had of the eviction board and its hearing process. One attorney, when asked about the Authority's eviction process and the quality of the eviction board, remarked:

[I]t was a nightmare. There wasn't any due process; there was no notion that people were allowed to have due process .... [T]he [eviction board] chairman . . . was so angry at us for attempting to assert anybody's rights because it had never happened before.<sup>55</sup>

Another attorney, when asked about due process during this period replied, "There wasn't any." A third, who at one time was the head of LASH, identified as major due process problems during 1974-75, "Notice, right to representation, types of enforcement of federal regs." When asked what legal aid attorneys thought of the board from a pure fairness standpoint, he replied, "lack of professionalism, knowledge," but noted that the board improved toward the end of his tenure. In fact at the start of this director's tenure, tenants charged with non-payment were virtually never evicted at initial hearings, but by the end of this lawyer's tenure they were evicted about one-quarter of the time.<sup>56</sup> Tenants, in short, did better during the "nightmare" period than they were ever to do again.

Moreover, it is not clear that the Authority's eviction process during this period should be labeled a nightmare from a due process standpoint. This characterization appears to reflect the standpoint of a lawyer with an expansive view of due process and an expectation of something like courtroom procedure more than it does the state of the law. The board's procedures, it appears, always met the minimum requisites of due process as enunciated in the leading opinions of the day.<sup>57</sup> Tenants received notice of the Authority's charges; they had a right to counsel; they could

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<sup>55</sup> The project managers regarded this chairman with equal disapproval. To them he was a "bleeding heart" who always sided with the tenant.

<sup>56</sup> The proportion of evictions in cases brought for reasons other than non-payment did decrease somewhat during this director's tenure, but there were so few such cases that not much can be made of this.

<sup>57</sup> Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969). Goldberg v. Kelley 397 U.S. 254 (1970).



hear the case against them; they could introduce evidence; they could cross-examine witnesses; and they had the benefit of an independent decision maker that was not only purportedly neutral but was in fact sympathetic to their needs and concerns. In the welfare area due process has not required more. Indeed, while LASH attorneys do not recall the pre-1975 eviction board with fondness, they agree that when it came to evictions public housing tenants were better off than their counterparts in private housing who faced judicial summary eviction. One reason they give for the small number of public housing cases that LASH handled during this period is that the situation of impoverished tenants in private housing was far more desperate.

The interesting question is why these lawyers so misevaluated the implications of the board's informality for the interests of the client population they wished to protect. We believe there are several reasons. The first is that LASH attorneys appeared before the board only rarely. Since they were not repeat players, they did not appreciate the overall pattern of board decision making. The second is that LASH attorneys appeared in tenant-selected actions. Thus, tenants who had more complex cases, who were standing on issues of principle,<sup>58</sup> or who had the greatest fear of being evicted - in short tenants charged with offenses other than non-payment - were more likely than other tenants to be represented by legal aid. These were the tenants who were most likely to be evicted during the period 1966-74 regardless of representation. Had LASH attorneys represented a random sample of tenants brought before the board during this period, they might have recognized the generally lenient pattern of board dispositions.<sup>59</sup> The third reason is that the LASH attorneys were professionally trained to see certain features as keys to fair adjudication.<sup>60</sup> When the keys were lacking, they triggered in the professionally trained mind

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<sup>58</sup> These seem to have been true largely in "pet" actions. One tenant, for example, had given his dog away before the board hearing, but did not reveal this to the board until after his hearing had concluded and the board had voted to evict.

<sup>59</sup> This explains why the LASH attorneys and the project managers could be equally harsh in their judgment of the board during this period. Managerial judgments were based on large samples of board actions in which non-payment cases predominated.

<sup>60</sup> See Chapter 2 in E. Goffman, Frame Analysis, where he discusses the concept of keying.

the conclusion that the board was unfair. One source of such conclusions was the absence of familiar procedural rules and the frustration this engendered.

The following interchange, for example, comes from a case that the board heard in 1969. It shows a LASH attorney attempting to impose a legalistic model - rules of evidence - on the board's proceedings. The case involved a 59-year-old woman, Mrs. Y, who because of a disability had been placed in a high rise apartment building for the elderly. Her drinking, cursing and frequent male guests led to a series of complaints by the neighbors and ultimately to an attempt to evict her. Because the tenant had a LASH attorney who signalled through pretrial motions his intent to proceed legalistically, the Authority arranged to have a Deputy Attorney General (DAG) assigned to it for the hearing.<sup>61</sup> At one point the DAG attempted to introduce records of complaints the project manager had received about the tenant. The DAG too had the rules of evidence in mind. Although her understanding of what they entailed was not as good as her opponent's, she prevailed because the board was informal and both unwilling and incapable of making a legal ruling on the matter.<sup>62</sup> The following is a shortened version of a dialogue that occupied more than three legal size transcript pages. It began with the DAG questioning the project manager and establishing that certain records he had with him were records of complaints he had received about the tenant.

DAG: Are the entries made in the regular course of business in the office?

MANAGER: Yes, they are.

DAG: I submit for evidence, Mr. Chairman, the records in the file of Mrs. Y, being the records of [project], showing the daily entries or the entries made in respect to Mrs. Y.

LASH: Mr. Chairman, I've got some problems here. May I ask the purpose for which the records are being submitted?

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<sup>61</sup> We have no way of knowing whether the Authority would have sought to present its case through an attorney if the LASH attorney's pretrial behavior had been confined to informal requests for information and not included formal motions to dismiss, to inspect evidence, and for a more definite statement of the charges.

<sup>62</sup> In fact she should have prevailed because the eviction board was not bound by judicial rules of evidence. But the debate proceeds - except for one brief moment - as if these rules should be followed.

DAG: We wish to show the history and complaints made and entered into by [project] and I have here Section 6, 22-5 of the Hawaii Revised Statutes and I'll give you a copy of the Section of the Statutes pertaining to business records as being an exception to the hearsay rules.

LASH: Mr. Chairman, I don't have any difficulty with facts that those records are what Mr. [manager] and his staff have written down and if it is admitted for the purpose of showing there have been complaints, I don't have any difficulty with that. I would like to be very clear that these records should not be taken as a reference to indicate the truth or falsity of anything in any complaint.

\* \* \*

I have another difficulty and that is it is not grounds for eviction, that there have been complaints. A person might only be evicted by what the person does, otherwise the person with an animus against a tenant could call every other name about a friend and you'll get a stack of complaints and be up for eviction.

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CHAIR: The Board will be broadminded in that if you will just accept this, you will have no further objections for Exhibit A and then whatever any decision that is made based on our complaint, we will make it known. We will accept this as Exhibit A.

DAG: Mr. Chairman, we submit that these records are an exception to the hearsay rules pursuant to Section 6-22-5, Hawaii Revised Statutes as being entered in the duty records in the regular course of business. Mr. [manager], would you please read to the Board the entry for April 2, 1969 in the records of the [project]?

MANAGER: On April 2, 1969 .....

LASH: Mr. Chairman, let me inquire, if I may, why this is being read to the Board. Is it for the purpose of showing the truth of the matter contained in it?

DAG: Mr. [LASH], we're not saying that these matters are true. We are saying that these complaints have been made and that is an exception to the hearsay rules.

LASH: Mr. Chairman, we're willing to stipulate that complaints have been made and if somebody is going to count the complaints we'll be willing to stipulate the number of the complaints that have been made but it seems to me that there is a great danger of prejudicing the Board against Mrs. Y unfairly by reading into evidence complaints that are not testified to by human beings, and we've experienced the matter. Part of the objections is based on the Administrative Procedure Act which was discussed earlier and that is one of the reasons why I wanted to bring it up earlier which guarantees to tenants the right to cross examine witnesses against them.

DAG: Mr. [LASH], the Administrative Procedure Act further states under Section 91-10 of the Hawaii Revised Statutes that oral or documentary evidence may be received.

LASH: Mr. Chairman as to right, the counsel is right, I don't like to sound like a lawyer, it is not reversible error for you to see and read bad evidence. However.....

DAG: I object to your usage of the word bad evidence.

LASH: All right, otherwise in evidence and admissible in court. It is not reversible error as you can see. I really .....

DAG: Mr. [LASH], I must remind you that this is an exception to the hearsay rules. This is perfectly admissible in the court of law. In any court it would be perfectly admissible as being a business entry.

LASH: It is admissible for the purpose of showing that a complaint has been made. It is not admissible for the purpose of showing the truth or falsity of the complaint.

\* \* \*

[And so on for another two pages]

The chairman of the board hardly got a word in edgewise in this discussion - and no wonder. He was not a lawyer, and there was no way he could resolve the dispute at the level at which the attorneys were going at each other. This must have been particularly frustrating for the LASH attorney who was correct in his analysis of the hearsay rule. If the evidence of the complaints were offered simply to show that complaints were made, they were not hearsay, and there was no reason to read the complaints to the tribunal.<sup>63</sup> If they were offered for their truth, they did not, despite the DAG's legal argument, qualify as business records because the declarants were under no business duty when they made them, and so they should not have been admitted at all if the ordinary rules of evidence applied. However, as the LASH attorney agreed in a concession that was quickly lost in further wrangling about the hearsay rule, the board was not bound by judicial rules of evidence and so could listen to this "bad evidence" if it wished.

The hearing proceeded for 61 transcript pages, longer than some criminal trials. The lawyers proceeded like lawyers. Witnesses were called, examined and cross-examined. Objections were made and argued. Ultimately the board voted to evict. LASH did not appeal to either the Authority or the Court, and the tenant moved out almost three weeks before the board's deadline.

As a legal case, this one was a loser. The tenant was clearly guilty of behavior that created disturbances in violation of the lease provisions, and the LASH attorney knew it. Indeed,

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<sup>63</sup> The records reporting the complaints would be hearsay, but, as the LASH attorney conceded, they would be admissible to show that a particular number of complaints had been received.

the theme that emerges from his examination of the witnesses is that many of the problems stem from the fact that his client, an active and cantankerous woman of 59, had been misplaced in a project of quiet-seeking retirees, many of whom were in their seventies or eighties.<sup>64</sup> The solution the LASH attorney wanted was clear - he wanted his client transferred to an ordinary low income project.

This indeed is the strategy most likely to have worked. But by attempting to implement it in a trial-type context the LASH attorney minimized the chance that he would get his message across. For example, one incident that the Authority cited involved an occasion when Mrs. Y cursed a 79-year-old woman, Mrs. C, in a dispute over who should have use of a clothes dryer. After briefly reviewing the incident the cross examination proceeded:

LASH: Mrs. C, you never lived in public housing before this, have you?  
Mrs. C: No.  
LASH: You lived in a private home, I think.  
Mrs. C: I lived in another apartment house ....  
LASH: And you never had any experience with public housing before?  
Mrs. C: No.  
LASH: And you didn't have any friends living in low income public housing, I take it?  
Mrs. C: No, first time I ....  
LASH: So, I assume that with your background and all, you're not used to hearing loud [indiscipherable] things and great disturbances?  
Mrs. C: No, I didn't.

At this point there was an argument about the relevance of this line of questioning, and the Supervising Public Housing Manager [SPHM] who was present interjected that in his experience on the projects the use of vulgar language in public was rare. Then Mrs. C who

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<sup>64</sup> She had qualified for admission to this project although she had not met the usual age threshold because she met a disability standard.

apparently thought her veracity was being questioned interjected, "I have to tell the truth," and the LASH attorney who may have been confused by the spontaneous witnessing of the SPHM said he had missed his observation, which gave the SPHM the chance to repeat his remarks in more detail:

I stated that in all my experience with public housing in the low income project, I very seldom heard words used in public as presented by witnesses here, and this I can state as a matter of fact. Well, we may have heard lots of "damn" and some of the "F" words, but some of the words that were used, they made implications that because this is in the public housing low rent projects that the words are commonly used....

LASH: Mr. Chairman, I have a witness who is a tenant in public housing who'd like to make comments later, if we can.

On this note the cross-examination of Mrs. C. ended. The witness the LASH attorney promised was never produced, for as the hearing dragged on and the board began to appear as if it was impatient and ready to render a verdict, Mrs. Y's attorney simply stated that he had available a witness who would testify that profanity is quite common in low income projects and vulgarisms are not exceptional or shocking. The witness was not presented.

But the LASH attorney misunderstood the issues. The dispute was not over whether as a matter of fact profanity is common in low income public housing. It was over whether Mrs. Y should be allowed to stay in housing either at the elderly project or in some other low income development. The board in assessing Mrs. Y's moral fitness - which is really what they were doing - was not likely to be greatly moved by whether the targets of her vulgarity in the elderly project came from more middle class backgrounds (a point the LASH attorney tried to make in questioning several tenant witnesses) and so were more likely to be offended by profanity than were tenants from ordinary low income projects.

Similarly the following dialogue at the close of Mrs. Y's direct examination was unlikely to make the case for transferring her rather than evicting.

LASH: Mrs. Y is [project] a dull place?

MRS.Y: Looks like a funeral parlor most of the time. The people are elderly, and they like to make fun that I have a crooked leg, what kind of slippers you wear, if you're a little younger they make fun of the color of my lipstick, or I tint my hair, or how I comb or dress.

LASH: Do you believe that you would be happier in a housing project with younger people?

MRS.Y: Oh yes, I think so very much. That place is too dull for me, looks like a funeral parlor to me. If they'd leave me alone it would be alright....

LASH: They don't by and large enjoy your sense of humor I take it?

MRS.Y: Oh yes, not at all, but I like everybody and I would say good morning or good afternoon....

LASH: No further questions at this time, Mr. Chairman.

Moreover, since both the LASH attorney and the DAG were proceeding legalistically, the direct examination opened the door to a cross-examination as to credibility that revealed that Mrs. Y had an arrest record extending back until 1933, which included charges of threatening police, carrying a gun, prostitution, trespassing and drunk and disorderly conduct.

Ironically, the LASH attorney did not employ his best opportunity to argue that Mrs. Y's elderly neighbors were unduly sensitive and that a transfer was the appropriate resolution, for when he was invited to make a closing statement, he responded, "I suspect we talked enough Mr. Chairman."

#### Alternative Approaches

The LASH attorney went wrong at the outset of the case when he signaled his intention to treat the eviction action as a quasi-criminal legal proceeding by filing motions to dismiss, for a more definite statement of the Authority's charges and for inspection of documentary evidence in the Authority's possession.

These motions - indeed the very fact of proceeding by motion rather than with an informal phone call - signaled to the Authority that the case would be both aggressively and legalistically contested; they perhaps induced the Authority to proceed by attorney since the motions had to be

referred to an attorney, and they may have led the Authority to present more witnesses than would ordinarily have testified in a case like this. What the attorney should have done was to attempt to negotiate a transfer before the meeting. If this failed he should have handled the case in a low key fashion. Cross-examination of the Authority's witnesses should have been limited to an attempt to emphasize the limited number of disturbances that Mrs. Y was reported to have caused. On direct examination Mrs Y should not have been narrowly confined by questions that demanded specific answers. Rather she should have told a story in which she explained away those incidents that could be explained, apologized for those that could not, promised not to repeat her behavior in the future and asked for a transfer to a low rise, low income unit in which she would not be living in such close proximity to her neighbors. Ideally the lawyer would have had Mrs. Y enter an alcoholism treatment program or start attending Alcoholics Anonymous and would have had a witness present to testify to this effort at self-improvement.

In short the attorney could have most helped his client by coaching her so that she behaved as a savvy tenant would, with or without legal counsel. But the attorney had no idea how a savvy tenant would act; for he was not a repeat player before the eviction board - this was his first case. Thus he drew on the repertoire of moves with which he was most familiar - the moves that characterize a contested criminal case. He was probably aware that these moves were poorly suited to the facts of his case and the tribunal hearing it, but he knew of no other way to proceed.

We cannot, of course, know that the approach of a "savvy tenant" would have been any more successful than the trial type approach that the LASH attorney used. Indeed, if the case arose today we could be fairly certain that the final result would have been the same - an order of eviction. However the 1969 board that heard the case of Mrs. Y frequently found for tenants, and a repentant Mrs. Y might have moved it to give her a second chance, particularly if the Authority could arrange a transfer which would mean that the complaining neighbors would no longer be bothered by Mrs. Y.



Because board hearings are seldom transcribed, we cannot know how frequently lawyers made technical evidentiary objections like those made by the LASH attorney in Mrs. Y's case. Comments from board members indicate that this trial type mode of contesting eviction occurs occasionally, but, especially in recent years, a more cooperative expository stance predominates. This is borne out by summary case decisions which indicate that lawyers most often simply make or support tenant excuses or offer plans to remedy an admitted wrong. Thus we saw in Table Six that since about 1980 lawyers are more likely to take a tenant style than a legalistic approach to board hearings. Moreover, the kind of legalism we see in Mrs. Y's case - an attempt to impose court-like ways of proceeding on board hearings - is not the only or even the usual way that lawyers act legalistically. Most legalistic arguments do not concern the conduct of the hearings but instead focus on interpretations of adequate cause for eviction or on procedural lapses such as an Authority failure to provide a tenant with adequate notice.<sup>65</sup>

We did, however, see the transcript for one case in the 1980s which looked very much like the case of Mrs. Y in the evidentiary wrangling that occurred throughout. The tenant was a Samoan chief who faced eviction because of the violent behavior of his grown son. He was represented by a private counsel who was an alumnus of LASH but had never handled public housing evictions. A long time board member recalled this case in explaining his judgment that lawyers more often hurt tenants than help them:

Within the first 30 minutes that [tenant's] attorney had the ability to irritate everybody on the board and piss them off. In other words, and right away, they were anti-tenant. He created that atmosphere. Now, how did he do that, I don't know if he intended to do that, I don't know. But he succeeded admirably.

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<sup>65</sup> Without transcripts we cannot be certain that evidentiary disputes are absent from most lawyer-attended hearings. However, many of them have no witnesses apart from the tenant and project manager; the hearing summaries prepared by the board's secretary mention legal arguments made on behalf of tenants but rarely if ever note evidentiary objections, and the case files seldom include formal legal motions or expressions of lawyerly concern about the Authority's evidentiary and hearing procedure, although these are found in the files of several cases arising in the early 1970s.

The sentiment expressed by this board member - that lawyers more often hurt than helped tenants - was shared by most board members.<sup>66</sup> A few, however, thought that, on balance, lawyers aided tenants by forcing the board to "toe the line."

Regardless of their global judgments, most board members would probably share the views of one tenant board member about when attorneys did help:

Well, I found that the lawyers who admitted that the tenant was wrong and had a formula or plan that the tenant would be agreeing by, that it would do. That was the most productive for the tenant. But when we had to argue about the circumstantial evidence and we had to argue about many other things then, you know, it became just mind boggling.

In short, as far as the board members were concerned attorneys were most helpful when they proceeded not legalistically but from a problem-solving perspective. This involved making admissions, excuses and promises similar to those that unrepresented tenants often made. But the excuses and promises of represented tenants may have had more credibility than those of unrepresented tenants. Not only was a lawyer vouching for the tenant's position but the lawyer might muster others - like a social worker - to vouch for a tenant's excuse or second her promises, or the lawyer might take a service approach and make arrangements that helped to clear up a past problem or guarantee future performance.

When lawyers used a tenant style, whether alone or as an aspect of a service approach, it was often because the problem giving rise to the eviction had been cured before the hearing or it was plausible to guarantee that it would be cured in the near future. This was particularly likely to be true of non-payment cases where the entire debt might be paid before the hearing or a source of funds to pay the debt could be identified. Tenant style arguments might also be used in cases like Mrs. Y's where it seemed possible to identify an outcome like a transfer which would respond to the Authority's concerns while allowing the tenant to remain in housing. In any of

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<sup>66</sup> The judgment of some board members who felt this way may have been distorted by their experience with a man who had represented several Samoan tenants brought before the board. This man, a public housing tenant, Samoan chief, and self-appointed defender of Samoan interests, took a legalistic approach when defending his fellow tenants. A number of board members thought he was a lawyer, but he was not. His defenses were legally unsound and sometimes, from a legal point of view, bordered on the crazy. He also appealed a number of adverse board decisions to the Circuit Court, but he never followed up on the appeals, so the cases were always dismissed. The cases he handled are not coded as "lawyer cases" in our data.

these circumstances the lawyer might try to persuade the Authority to cancel the eviction hearing as unnecessary. Until recent years hearings were often cancelled, but it appears that it was the tenant's action - most commonly the payment of a rent debt - rather than the presence of an attorney that mattered. With respect to the terms of their continued occupancy, tenants seldom if at all did better by settling "out of court" than they would have done had they appeared before the board.<sup>67</sup>

### Capitulatory Justice

Settling matters out of court is familiar to lawyers who dispose of most cases on a "negotiated" pre-trial basis, and the HHA's records contain instances where lawyers negotiated settlements after some discussion with the Authority about plausible disposition of a case. One also sees cases where attempts to settle get nowhere. For example, although the available records of Mrs. Y's case provide no evidence of any pretrial negotiation, it is possible that her lawyer tried to persuade the Authority before the hearing to transfer rather than evict her. In a few cases negotiated compromises of this sort were reached. Ordinarily, however, pretrial settlements involve complete capitulation to the Authority.

In non-payment cases, for example, which constitute close to 75% of the eviction docket, prehearing dismissals usually occurred only after the tenant paid all or a substantial portion of the amount owing. In the Authority's records one does not encounter settlements for so many cents

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<sup>67</sup> Tenants whose hearings were cancelled did avoid the stress of a hearing, prolonged subjective fear of eviction and the need to take time off from work or other activities to attend the hearing. Also, if they subsequently defaulted on the terms of the agreement, the board would not have seen them before, and so they may have been more likely to receive a lenient disposition.

These advantages from avoiding hearings are not negotiated *quids pro quo* for satisfying the Authority's demands. Rather they are benefits that automatically attach to avoiding the hearing process. Recently there was a more concrete gain from having a hearing dropped in a non-payment case. This is that the board began putting zero-balance non-payment tenants who appeared before it on conditions. This not only imposed a verification requirement (see note 68 *infra*) on the next six months of rent payments but made it very likely that even a slight failure to pay the rent on time would result in an eviction. Within a few years after this distinction arose between zero balance tenants whose cases proceeded to hearings and those whose hearings were cancelled it disappeared, as the Authority adopted the policy of bringing all zero balance tenants to a hearing.

on the dollar. Similarly, in cases involving the fraudulent concealment of income or most behavior problems, the situation was usually so egregious before the Authority decided to evict that the Authority was unwilling to entertain any solutions that would allow the tenants to remain in housing. In a few of these cases we find evidence that a lawyer may have regarded the attainment of a negotiated settlement as an end in itself. In these cases formal documents were signed whereby the Authority agreed to drop charges or to refrain from securing a writ of possession in exchange for the tenant's agreement to move by a specific date, often a date no more or even less distant than the earliest date that the Authority could have forced the tenant to move had the tenant exhausted all her legal rights.

There are several reasons why we find capitulatory rather than negotiated justice in most eviction cases that are settled without hearings. First, the tenant's liability is usually clear. In non-payment cases there is never a dispute about the existence of the rent debt that provides the legal basis for eviction. In other cases the Authority's evidence of "guilt" is usually overwhelming, although occasionally the tenant may have a plausible defense of misunderstanding or lack of responsibility. The one-sided nature of the evidence ordinarily means that there is seldom much uncertainty about the legal situation, and there is usually little uncertainty about what the eviction board will do. While the board has disposed of cases in very different ways at different points in time, at any given point in time the board's dispositions have been largely predictable from the facts of the case. Moreover, in the early 1970s, when the board's dispositions were most lenient, the Authority's advocate toward the board did not take an adversary stance but was content to let the board do what it wished. Thus, even when tenants had a good chance of prevailing before the board, they could wield few incentives that might induce the Authority to prefer a less than complete victory to a board solution. The result was that tenants either gave the Authority a complete victory by curing the problem or moving out, or they proceeded to a board hearing. Even when tenants were represented, hearings were unlikely to be pretermitted by compromise solutions.

A second reason why we don't see the Authority offering significant concessions to lawyers who would negotiate is that from the Authority's perspective hearings are cheap. The board members are volunteers who receive only a token payment of \$10.00 a member per meeting plus travel expenses. The staff time that the hearing phase of the eviction process demands is not great, and no use of the staff time that would be saved by cancelling an occasional eviction hearing is important enough to justify concessions to tenants who have violated their lease obligation.

Finally, the lawyers and paralegals who represent HHA tenants generally accept the private landlord-tenant model that underlies public housing. While these attorneys would no doubt accept concessions if these could be wrung from the Authority through negotiations, they do not regard the Authority's insistence on capitulation rather than compromise as unjust. Indeed, between 1980 and 1987 the Authority's attitude in non-payment cases changed from a willingness to negotiate time payment schedules before or during hearings to an insistence on a hearing regardless of whether the debt had been cleared pending the hearing and a demand at that hearing for immediate eviction unless the debt had been cleared, in which case a conditional deferment was acceptable.<sup>68</sup> LASH's attorneys and paralegals were aware of these changes and of the fact that the board invariably complied with the Authority's wishes, but they had no strong feelings about it. The change of policy from their point of view was within the HHA's rights. It meant that by 1987 LASH usually refused to represent non-payment tenants before the board because their cases had become sure losers (hence wastes of time).

Non-payment tenants who sought LASH's help received advice instead. One paralegal who had dealt with a number of public housing tenants over the years paraphrased what he told those behind on their rent:

I always advise my tenants to pay off delinquent rent. If for nothing else than to convince them, remember now, if you don't pay you are bound to get evicted. I try to convince them that with a big family like yours, you are going to have a very

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<sup>68</sup> These deferrals of eviction orders were not conditioned on time payments to clear a debt since no debt existed. Instead, the usual conditions were that the rent be paid on time during the succeeding six months and that each payment be verified. Verification consisted of bringing the receipt for rent deposited at a bank to the project office by the rental due date. This enabled the project manager to learn whether the condition of time payments had been met before the computer print out of bank payments was received.

difficult time finding housing on the outside.... I really impress upon them that at all costs it pays for them to pay their rent, it is one thing that they had better do and keep current, or they are going to get evicted. Other debts, you know, at least they are not going to lose the roof over their head....

This tenant advocate's remarks could have been made by a project manager addressing a tenant behind in her rent and are very much like the moralistic lectures that some board members have given tenants they confronted.

### Process Legalism

Mrs. Y's case illustrated one kind of legalism, but most of the behavior we have coded as legalistic does not involve an attempt to proceed before the board as if before a court. Rather it involves legal objections to aspects of the eviction process. Over the years such objections have taken two forms. One form challenges the fundamental legitimacy of the eviction process and the board's role in it. The second points to particular procedural defects in the way the Authority has initiated or prosecuted a case. The first characterized a number of cases in the early 1970s and culminated in a law suit that for most of 1977 brought evictions almost to a standstill. The second, which was found occasionally before 1977, has since that time characterized almost all legalistic responses to board action. It often involves "technical" matters such as complaints about deficiencies in the Authority's notice procedures.

LASH lawyers from the start were uncomfortable with eviction board procedures. We saw this in the remarks of the attorney who called board procedures a "nightmare" and in the conduct of Mrs. Y's case as well. Thus, in our earliest period the LASH response to informality was to seek to formalize board procedure. Attorneys felt that both the rules establishing the board and the board's ways of proceeding were too vague to give the guidance that proper legal representation and due process required. In 1972, for example, a LASH attorney who entered the picture only after the board had evicted his client for trouble behavior sought a copy of the Authority's rules and regulations regarding appeals. He appeared genuinely shocked to learn from the DAG to whom his letter had been referred that the Authority had no administrative

rules regarding appeal but felt that the state law (Chapter 360) establishing the eviction board was clear and sufficient. The attorney responded to the DAG's letter conveying this news by questioning the legitimacy of the eviction board on the ground that although it was authorized by state law the Authority had not established the board by rules enacted under the Hawaii Administrative Procedure Act.<sup>69</sup> He then wrote:

Even assuming the existence of authority for the eviction board, appeal could not be undertaken. As you indicate, HRS 360 seems specific regarding rules governing such proceedings. Assuming, arguendo, that recourse to HRS 360 would provide a clear outline of the procedure to be followed in this general kind of case, then I must honestly say that I would still not know how to prosecute the appeal in Mrs. G's specific case. I have carefully reviewed the minutes of the hearing. I do not in any way wish to appear facetious, but I have no way of knowing what findings of fact the board made, nor upon what conclusions of law their decision rested. I suggest that this result would have been avoided had clear and specific procedural rules been available for the guidance of the board.<sup>70</sup>

He also expressed his shock at the way the board had proceeded:

What is to become of the present record? Will it be read by the new panel? Although I fully appreciate the need for wide evidentiary latitude in such cases, I find the "record" in this one nearly astonishing. This is most certainly not to say that any member of the panel or of the staff was prejudiced or otherwise acted improperly. It is rather to say that completely natural human curiosity does not seem to have been curbed in that manner in which the basic principles of evidence would dictate. I suggest that this kind of problem could be avoided if eviction panels were assisted by legal counsel. In this case it is difficult for me to imagine how anyone could remain impartial after reading the existing record.

Indeed, so concerned was this attorney about the board's procedural deficiencies that, at the conclusion of his argument to the Commissioners on behalf of his client, he spoke not of why his client should be allowed to stay in housing but rather of his willingness to volunteer his services to help the eviction board get its procedural house in order.

Other cases filed by LASH attorneys at about the same time show similar objections to the absence of published rules as well as objections to the specific procedures the board did follow. For example, in a letter of appeal to the Chair of the Authority's Commissioners dated Oct. 19, 1970,

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<sup>69</sup> It appears that the lawyer's claim was that even though state law explicitly allowed the HHA to process evictions through an eviction board and specified basic conditions that the board and the Authority had to meet, the Authority, as a state administrative agency, had to reenact the state law in administrative rules before the board could be officially established. There is no evidence that this argument was ever pursued in court.

<sup>70</sup> Letter from LASH attorney to Deputy Attorney General dated February 2, 1972.

the same LASH attorney who had handled Mrs. Y's case complained more on his own behalf than on that of his client:

[I]n this present case and in previous cases I have had before the eviction board, I have observed that the staff has a practice of placing before the board members a statement of the case from the staff point of view. This statement invariably contains matters that the staff does not intend to prove or rely on, but which is highly prejudicial. I request that you instruct the staff not to place before the Commission members any such material. I am sure your deputy attorney general will understand what I mean on this point.

The last sentence is particularly revealing. The attorney seems to have given up on persuading lay people of proper procedure, but is confident that defects he alleges in how the board goes about its business will be obvious to and unquestioned by any legally trained person.

#### The Tileia Case: 1975-1977

The attack on the eviction board's procedures reached its zenith and, from LASH's standpoint, achieved its greatest success in a class action law suit commenced in 1975.<sup>71</sup> What was at issue was not the eviction board's procedures, but - so the parties at one time thought - its very existence.

In 1971 HUD had begun to move toward providing all public housing tenants with the kind of due process that Hawaii's tenants had received for over a decade.<sup>72</sup> HUD's mechanism was to mandate a grievance procedure that provided public housing tenants with the right to an informal hearing with project management if they wished to dispute some authority action (including in most cases decisions to seek eviction). If the informal hearing did not resolve the dispute, there was a further right to a formal hearing before an impartial arbitrator or, if a single person could

<sup>71</sup> Tileia v. Chang, Civil No. 75-0107 (U.S.D.C. Haw., filed Apr. 16, 1975). The case was ultimately settled, so there is no reported decision. So far as we can determine, the case did not grow out of a specific eviction action but was more in the nature of a preemptive strike at the Authority's eviction process. The rights it aimed at applied outside the eviction context as well.

<sup>72</sup> HUD Circulars and 7465.8 and 7465.9.



not be agreed on, a three person panel composed of one member chosen by each party and a third person selected by the parties' nominees.

The HHA's eviction board, while exceeding the constitutional due process requirements that the Supreme Court had enunciated in the case of Thorpe v. Housing Authority of the City of Durham,<sup>73</sup> did not fit the model of the HUD regulations. The Authority was aware of this and had been considering what to do for some time when LASH forced the issue with its suit.<sup>74</sup> While the suit dragged on in federal court for over a year, it was clear that LASH would prevail. With this in mind the Authority and LASH negotiated a settlement that provided for a grievance procedure following the HUD model.

The implications of this settlement for the future of the eviction board were at first unclear. At one point, as the settlement was being negotiated, the Authority put all its eviction actions on hold for several months for fear the board's procedures were invalid, and as the grievance procedure was being implemented there were, at least at several projects, tenant polls on whether the eviction board might serve as a substitute for the HUD-mandated grievance procedure. This voting suggested that there was some question about whether the Authority could continue to use its board to process evictions.<sup>75</sup>

The eviction board and its procedures were, however, neither coextensive with nor inconsistent with the HUD-mandated grievance option. On the one hand, many issues unrelated to evictions could be grieved under the HUD procedure. On the other hand, the HUD procedures

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<sup>73</sup> 336 U.S. 670 (1967).

<sup>74</sup> It appears from the records of this litigation that a number of the arguments LASH used were taken from material that had been used in cases brought by federally funded legal service organizations in other jurisdictions. One LASH informant recalled that the case fit in with a national "housing law project," and was stimulated by it.

<sup>75</sup> The HUD grievance regulations allowed deviations from specified procedures if tenants approved. Thus the voting implies that the Authority at one point thought that unless the board were approved by its tenants as a substitute for the HUD-mandated procedure, it could no longer be used to process eviction actions.

We do not know whether votes occurred at all projects. The HHA files that we reviewed only reported the results of voting at some of the Authority's projects, but it appears that votes were scheduled at all of them. Then, to judge by the records, there was suddenly a loss of interest in this procedure, and nothing more is recorded. It may, of course, be that some relevant records escaped us, but interviews with people who worked for the Authority at the time suggest a similar petering out of interest.

specifically provided that a tenant by grieving an issue forfeited no other rights to which she was legally entitled. Since under Hawaiian law public housing tenants had a right to a decision by the eviction board before they could be compelled to leave housing, tenants who grieved eviction-related issues and lost still had a right to a board hearing.

LASH, as far as we can determine from records and interviews, took no particular stand on this issue. Their claim had been that the eviction board did not comply with HUD regulations and not that the board had to be displaced by an institution that did comply. And their activity after winning the stipulated agreement did not focus on the eviction board. Rather LASH was concerned with the implementation of the HUD regulations and with its role in monitoring the implementation procedures to be sure that the terms of the stipulated agreement were met.

#### Recent History: 1979-1987

The Tileia case marks a watershed in the history of the eviction board and in LASH's activities on behalf of tenants threatened with eviction. For a variety of reasons of which this case was only a small part, the HHA after Tileia began to rationalize and toughen their entire eviction process. As we have already noted, in 1979 a full-time employee, A, was hired to evaluate and oversee the Authority's eviction process and to handle all cases brought before the board, and a full time secretary was assigned to handle the paperwork that evicting tenants requires.<sup>76</sup> About the same time a second eviction panel was created so that the pace of evictions could be speeded by having lay judges available to hear cases each week, and new board members began to be selected with an eye to their likely strictness.

In 1980, at the instance of the Authority, the Hawaii State Legislature amended the act establishing the eviction board to allow for easier service of process, to restrict appeals, and, one might have argued, to imply that the Authority had a right to an eviction if it proved a lease

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<sup>76</sup> Before 1979 the Supervising Public Housing Manager handled actions before the board as one of the many duties of his job, and the board's secretary was a woman who ordinarily had many other responsibilities.

violation.<sup>77</sup> Also, effective January 1, 1981, more than a decade after LASH attorneys began complaining that the hearing board should be bound by rules promulgated in accordance with the Hawaii Administrative Procedure Act, such rules were enacted. By and large, the rules simply restated long-standing procedures. Rights that tenants were given in the statute establishing the board, such as rights to notice and counsel, were confirmed. With respect to hearing procedures, the status quo was also confirmed, for the rules, as we have already noted, provide: "Hearings shall be conducted in an informal manner unless otherwise required by law."<sup>78</sup> No rule addresses the requisites of a board decision, but the board's secretary incorporates the board's decision into a statement whose boiler plate ensures that the written pronouncement always asserts legally adequate findings of fact and law, thus dealing in pro forma fashion with another aspect of board procedure - the failure to report particularistic findings of fact and law - that LASH attorneys in the early 1970s. had found woefully inadequate. Tenants fair less well under the revised procedures than they did under the earlier ones that so disturbed the LASH attorneys of the late 1960s and early 1970s. It is, however, likely that changes of this sort would have occurred even without LASH pushing legalization on the HHA, although LASH may have hastened them along.

LASH's response to the changes that have occurred in the Authority's eviction procedures has been supportive and accommodative. Again it is difficult to untangle the importance of various causes. It is likely that LASH's attorneys are more comfortable with the presence of a legally knowledgeable counterpart prosecuting evictions for the HHA than they were when they had to deal with an SPHM who was not legally sophisticated or, occasionally, with different deputy attorney generals who, although unfamiliar with the board's procedures, were appointed to prosecute particular contested cases. LASH attorneys have also ceased challenging the board's basic ways of proceeding. Even though the board's modes of procedure and decision making differ

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<sup>77</sup> The 1980 Amendment that might have been interpreted in this fashion was apparently not read in this way by A who was in office when the Statute passed, and it was definitely not read this way by B who was his successor. In one memorandum we discovered, B specifically notes that the board has the authority to withhold an eviction even when there is a lease violation. In addition, the legislative history of the 1980 Amendments, including the HHA's statements on behalf of the bill, contains no suggestion that the board's discretion was to be changed.

<sup>78</sup> 17-501-12(c); Chapter 501 Hawaii Housing Authority Rules and Regulations.

little from what they were in the late 1960s and early 1970s and seem to disadvantage tenants where they do differ, LASH attorneys no longer appear to be bothered by them. This may be because the procedures have now been duly enacted in accordance with HUD regulations and Hawaii Administrative law and so are open to no obvious legal attack. Indeed LASH may now regard them as legitimate.<sup>79</sup> The acceptance of the HHA's eviction procedures may also reflect the fact that from 1980 to 1984 many of the eviction actions handled by LASH were assigned to the same paralegal, who became a repeat player in his relations to the HHA's prosecutors and before the eviction board. Finally, it must be noted that the period we are discussing corresponds with the initiation and height of the Reagan revolution. LASH attorneys may simply be less radical and less aggressive in their dealings with welfare authorities than they were ten to fifteen years before, or they may have fewer resources to devote to a system that, in most respects, functions fully in accord with the law.

The LASH attorneys and paralegals who have handled public housing evictions during the past decade and the three Authority employees who have prosecuted eviction actions over the same period each report having a good working relationship with their nominal adversaries. The characteristics of a good working relationship have, however, changed over the years. In 1980 and '81, when A was the Authority's eviction specialist, a good working relationship meant that a LASH attorney or paralegal could call A and settle the case before a hearing, if a settlement were feasible. In 1987 when the board almost always evicted tenants owing money at the time of the hearing and conditionally deferred tenants who had cleared their debts, a good working relationship meant that LASH respected the Authority's actions as within its legal rights, and

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<sup>79</sup> There is one procedure that LASH attorneys only appear to accept. This is the Authority's practice with respect to stipulated agreements. Stipulated agreements are agreements that are most often entered into by tenants who, having been evicted by the board for non-payment of rent, succeed in clearing their rent debt before their opportunity to appeal has lapsed. In these circumstances the Authority's Commission will routinely ratify a stipulated agreement between the tenant and the Authority whereby the Authority agrees not to seek a writ of possession and the tenant agrees to pay her rent when due for twelve months and to waive all rights to a hearing or appeal should the Authority seek to evict her for a violation of any lease condition. LASH's position is that requiring tenants to waive their hearing rights for future violations other than non-payment violates HUD regulations and due process. This position may well be correct. Occasionally a lawyer has been able to negotiate a stipulated agreement that does not contain this objectionable clause, but ordinarily the Authority has been insistent, and LASH has acquiesced because each client's direct interest is to remain in housing.

ordinarily refused to take non-payment cases to hearing because they were sure losers and so a waste of resources.

A good working relationship does not mean that LASH capitulates in all cases or is unwilling to be aggressive. Where it appears that the board might respond sympathetically to an aspect of a tenant's story, the LASH attorney or more commonly a paralegal will try to put that story before the board. Where a legal objection can be made, it will be made but blanket challenges or objections to the board's basic procedures like those encountered in the late 1960s and early 1970s are heard only occasionally, in a few cases handled by private counsel. Nor are LASH attorneys, while accepting the board's authority and procedures, unwilling to challenge the HHA on more substantive matters. In a 1984 case, for example, LASH got a Temporary Restraining Order to let a tenant return to her unit after the sheriff had locked her out. They successfully argued that the tenant had paid her entire rent debt before the Authority's writ of possession had issued and that under Hawaii's general landlord tenant statute this stays the writ.<sup>80</sup>

Strangely enough, LASH and the Authority's tenants appear to have made little use of the grievance procedure that LASH worked so hard to achieve. We found evidence of a few formal grievances filed in the first few years after the Tileia case, but almost never in recent years has a board case been preceded by a grievance hearing, and the project managers report that such hearings are rare for any purpose.

The absence of formal grievance hearings also suggests a lack of militancy on the part of LASH in recent years, for at a minimum the grievance hearing is a procedural obstacle that can be placed in the way of Authority efforts to evict and so is likely to give tenants a few months more in housing.<sup>81</sup> Moreover, in one kind of case at least, it appears that the grievance procedure

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<sup>80</sup> Before a final order could issue, the Authority moved to evict the tenant for chronic lateness in her rental payments. The tenant's attorney could find no legal ground to oppose this effort and consented to a dismissal of the ongoing action.

<sup>81</sup> Under the federal regulations, in cases where the tenant poses an immediate danger to persons or property an Authority decision to evict need not be grieved. It is unclear whether grieving an authority's decision to evict for non-payment of rent may be conditioned on the tenant's putting rent as it accrues in escrow. This is the case if the dispute is over the amount of rent charged, but it is not clear that this requirement extends to the decision to evict

might be especially beneficial. These are cases where the tenant is accused of the fraudulent concealment of income at the time of the reexamination. Because rents are based on income, the discovery of concealed income results in the assessment of backcharges. Tenants often cannot pay such charges, for they may run into the thousands of dollars; but even where the tenant might pay, the Authority will ordinarily seek to evict for the fraud, and it may even refer such cases to the attorney general's office for prosecution. A common tenant response to such charges is to argue misunderstanding: the tenant did not know that a certain kind of income - a part time job, overtime, temporary employment, etc. - had to be reported. Often such claims are plausible, for the tenant speaks English poorly or not at all, and there is no written record of what an income reexaminer told her. In the early years of the grievance procedure several tenants grieved project managers' decisions to seek their eviction for fraudulent concealment and prevailed before three member grievance panels that bought their "misunderstanding" arguments. It is by no means clear that the eviction board would have decided the same way, for the board members' experience makes them skeptical of excuses they have heard before and more likely to have faith in the Authority's procedural routines than a panel hearing a single case.<sup>82</sup> Moreover, even if a grievance panel found for the Authority the tenant would have lost nothing by proceeding with the grievance, for the right to an eviction board hearing would remain.

While LASH apparently does not initiate many formal grievances, it may take advantage of another aspect of the grievance process. This is the provision for an informal hearing between the tenant and project manager that is a prelude to a formal grievance hearing. The LASH paralegal who handled most of the Authority's public housing business from 1980 through 1984 said that he saw the informal hearing as a tool which allowed him to meet with management, and that he had settled a number of cases in this way. Such cases ordinarily do not show up on the eviction board's dockets, and so we can say little about them.

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because of rent owing. In the first few years after Tileia it appears that the Authority interpreted its decision to evict for non-payment of rent as grievable without an escrow requirement. In recent years it appears that the Authority's position on this issue has changed.

<sup>82</sup> The tenant board members appear to be particularly suspicious of tenant excuses of this type.

It is interesting that LASH in the '80s may have used the informal aspect of the grievance procedure but allowed cases to be brought to the eviction board rather than to a grievance panel when informal discussion did not dissuade the Authority from attempting to evict. It may be that LASH attorneys preferred the familiar - informal negotiations or a hearing before a board with procedures they had come to know well - to the ad hoc informality of a grievance panel.<sup>83</sup> One thing is clear: from the LASH perspective - in large part because of pressure they had applied - the "nightmare" that was the eviction board of the late 1960s and early 1970s has ended. The board of that era was replaced by a board and procedures that lawyers could respect.

Yet most changes are merely matters of form. The board now has legal legitimacy, for it complements rather than preempts HUD's grievance procedures, and it is authorized not only by the state statute but by duly promulgated administrative regulations. Its decisions read more like legal decisions, for they include as boiler plate conclusions of law and findings of fact. The procedures before the board, on the other hand, remain essentially as they have always been, although after 1980 it is by regulation as well as practice that these procedures are informal. In fact, the only great substantive change has been that tenants, particularly those charged with non-payment of rent, are more likely to be evicted than they have ever been. Indeed, by 1987 the board had virtually surrendered the discretion to conditionally defer evictions that had once been its most distinguishing and controversial characteristic. In retrospect one can see that the systematic efforts of LASH to legalize the board's status and procedures pushed it in this direction. But one can also see that, if the variety of forces that led to the board's current practices are considered, the efforts of LASH were not that important.<sup>84</sup> In promoting the legalization of the eviction process, LASH was pushing the HHA in precisely the direction it wanted to go. Since the Authority's cases are invariably strong and often indisputable, the HHA had little to lose in the long run by legalization.

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<sup>83</sup> It may also be that the use of informal grievance hearings that one LASH paralegal mentioned is less common than his remarks suggested. We think this is the more likely case, so our remarks in the text should be regarded as speculative.

<sup>84</sup> For further evidence in support of this assertion see "Dynamics" *supra* note 8.

## Conclusion

We have seen in this paper that, over a twenty year period, lawyers have involved themselves in the informal adjudicatory processes of the HHA's eviction board. Most often a legal aid lawyer or paralegal will represent a tenant, but one time out of five a tenant's legal representation will come from the private bar. Legal representation in this setting is not common, for only about one in twelve tenants over the two decades studied have had lawyers, and in more than 40% of these cases the lawyers became involved only after the initial hearing. Thus, the hearings remain largely as they were intended - as informal hearings in which tenants without lawyers state their cases to lay judges.<sup>85</sup>

When lawyers do get involved in eviction actions they may proceed in a variety of ways. One is in a legalistic fashion. During the first ten years of the period we are investigating, this often involved attempts to transform the hearing into a more court-like proceeding or to challenge the basic legitimacy of the way the eviction board operated. More recently the legalistic style has usually involved particularistic objections to the details of the Authority's case handling. One result of the earlier legalism was to push the Authority toward getting its legal house in order. Without making great changes in the way eviction hearings were held, the Authority acted to bring its eviction process more closely in accord with the requirements of formal law. This more legalistic stance fit in nicely with the Authority's determination to make the board more of a cog in the bureaucratic process of evicting tenants than a discretionary, free standing tribunal. Ironically, as the eviction process has become more legally embedded, the tendency of tenants to be legally represented, particularly by organized legal aid, has diminished. In a situation where "guilt" is almost always clear, the Authority's increased legalism means that there is less that lawyers are uniquely equipped to do.

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<sup>85</sup> While the Authority is now represented by a lawyer, this lawyer, as we have noted, ordinarily proceeds in an informal fashion, and the manager not the lawyer often states the essence of the Authority's case.



We see this in the rise of a second style of representation that has become more common in recent years - the tenant style. Lawyers representing tenants can often do no more than make the kinds of cases and pleas that savvy tenants have always made. The pleas, perhaps, have more credibility when made by a professional intermediary than when made by a tenant, but this benefit is unclear.

In between the legalistic style and the tenant style of representation is what we call the service style. Lawyers who adopt this style perform some service for the tenant that draws upon their professional knowledge but is not aimed at refuting the legal basis of the Authority's case for eviction. Examples include collecting money past due from welfare agencies, helping a tenant file for bankruptcy, or aiding a tenant to secure a divorce. This service then allows the attorney - in a tenant style argument - to claim that the problem giving rise to the eviction action has been or is likely to be resolved.

In our judgment lawyers have helped tenants avoid eviction in about twenty-five percent of the cases in which they appeared. In about another fifteen percent of the cases, it may be that their presence was crucial to a positive outcome. These cases, however, represent only a small fraction - our estimate is about 4% - of the cases heard by the eviction board over twenty years.<sup>86</sup> While more tenants would have benefitted from attorneys had they been generally available over the years, the number of unrepresented tenants who would have benefitted from representation is probably not large. Most unrepresented tenants either vacated without a hearing or were allowed to stay and were evicted only if they failed to meet conditions that had been set. Of those evicted at the hearing, about two-thirds were evicted for not paying their rent. Most of these tenants are unlikely to have benefitted from legal representation, although in some cases an attorney might have been able to secure from welfare funds with which the tenant could pay her debt. Finally, it is unlikely that lawyers would have been as effective with those in our sample who were

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<sup>86</sup> In a large proportion of these cases, lawyers, as we have noted, enter only after the informal board hearing has resulted in an eviction order or the board evicts a represented tenant and the attorney pursues an appeal. Thus the presence of attorneys has not affected the eviction board's decisions in some cases where it has affected the Authority's final action.

unrepresented as they were with those they did represent, since the represented were presumably self-selected and selected by attorneys as people with cases likely to benefit from legal assistance.

What is far more important to a tenant's fate than the presence of an attorney are the policies that the Authority and its eviction board follow. These policies changed over the years so that by the conclusion of this study tenants were more likely to be evicted than they had ever been. The contribution of lawyers to this outcome was not crucial. But in pushing the Authority toward greater legalism, lawyers were cooperating in creating the kind of process that would make eviction, regardless of charge, the dominant outcome. It would be a mistake to conclude that lawyers have no place in the Authority's eviction process or that they cannot on occasion help individual tenants. But it would be equally mistaken to conclude that lawyers by participating in this process can make the typical tenant's situation much better. Research in other contexts is necessary to establish a more general theory of when lawyers make a difference in institutions of informal justice. This case study suggests that the kinds of cases the tribunal hears, the rules it applies and the quality of the adversary's representation are likely to be crucial independent variables.