PETS AND EMOTIONAL SUPPORT ANIMALS IN NYC NO-PET BUILDINGS

First Edition

The Tenant Learning Platform, LLC

tenantlearningplatform.com

Materials prepared for the Tenant Learning Platform, LLC
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I. INTRODUCTION

A. Welcome to the Tenant Learning Platform.

- The Tenant Learning Platform delivers on-demand, online classes for all kinds of NYC tenants on specific legal topics, to help tenants prevent and solve problems with their apartments.

- At TLP you will get ACCURATE and ACTIONABLE information on your legal rights as a tenant. We have developed classes like:

    - The Laws About Getting Paint Jobs and Repairs in Your NYC Apartment
    - How To Do Airbnb Legally in Your NYC Apartment
    - Generation Z, Welcome to Your First New York City Apartment
    - How To Protect Your NYC Rent Stabilized Apartment from a Non-Primary Residence Claim

The Tenant Learning Platform is ***NOT***:

- a legal referral service.

- a marketplace for online legal forms.

- a tenant advocacy group. Buying the class does not mean you are joining or supporting anything. You are just taking a class.

- legal advice on your particular matter. The Tenant Learning Platform's goal is to help people *prevent* legal problems that relate to their apartments. The goal is not to give tenants legal advice about existing problems with their apartments.

B. Who This Class is For

This class is for anyone who wants a pet or who needs an Emotional Support Animal (defined herein), who lives in or is planning on moving into a building in New York City that has a no-pets policy. This class has no relevance to service animals.

C. How To Take This Class

- Read this booklet. This booklet is a comprehensive guide on the topic. It will explain, in clear language, WHAT the law is and WHERE to find it. The booklet contains plenty of helpful examples and best practices.

- Watch the video lessons, which are voiced-over slides.

- Take the online quiz. Taking the multiple-choice quiz will help make sure that you have learned what we think is most important.

- This class will be about three to six hours of work, depending on how fast you read, etc. **Taking this class is NOT a quick fix.** TLP is teaching you the law and best practices. Those things are not short stories.

D. Meet Your Instructor

So, whose voice are you hearing when you read this booklet, watch the voiced-over slides, etc.? I am Michelle Itkowitz and I have been a landlord and tenant litigator in New York City for twenty-five years. I represent tenants and landlords in residential and commercial landlord and tenant disputes.

I have always marketed my law practice via *content marketing*; I never advertise. I write articles about landlord and tenant law in the City of New York and get them out there any way I can – books, blogs, email blasts, videos, podcasts. In 2018 and 2019, I was invited to speak to groups on landlord and tenant law 21 times; 14 of those lectures were for-credit Continuing Legal Education classes where I taught other lawyers about landlord and tenant law in New York City. In 2020, I did a ton of teaching about tenant's rights during the Pandemic. In 2021-2022, I became one of three co-authors of the New York State Bar Association's nearly 500-page treatise *New York Residential Landlord-Tenant Law and Procedure.*

Because I have so much content out there, hundreds of residential tenants started finding me and I realized how desperately tenants need practical information about their legal rights. I, however, have a very small firm and I am very expensive at this juncture in my career journey. I cannot be everyone's *lawyer*. But maybe I can be many people's *teacher*. Maybe I can teach tenants, just as I teach lawyers and real estate professionals.

E. <u>This is Not Legal Advice</u>

The author is ethically obligated to remind you that, just because you read this booklet or take this course, does not mean that we have a lawyer and client relationship. I am not your lawyer. This is not legal advice about your particular situation. We at Tenant Learning Platform make no representation or guaranty about the outcome of your particular matter.

II. PETS IN NYC APARTMENT BUILDINGS – IN GENERAL

Every tenancy is governed by three things:

(1) The Lease. The lease is the contract between landlord and tenant.

(2) Applicable Laws. Laws are made by the legislatures (city, state, and federal). If the lease and the law conflict, sometimes the lease trumps the law, but sometimes the law trumps the lease. It depends. The important point is that we must look at both the lease and the law when analyzing these situations.

(3) Cases that Interpret the Lease and the Law. We also look to case law to see how courts have interpreted lease clauses and laws.

Thus, this is the order we are going to proceed in as we crack the code on pets in New York City apartment buildings.

A. Cracking the Code on Pets in New York City Apartment Buildings

1. The Lease

You should read your entire residential lease closely before signing it. The same advice applies to renewals and modifications of your lease.

If you want a pet and are not sure you can have one, the first place to check is your lease. The lease may allow you to have a pet. Or the lease may be silent on the issue of pets. If the lease does not prohibit pets, then you may have pets.[1]

Below are five examples of no-pet clauses in residential leases, found in the author's files.

These first two clauses were found in the bodies of leases:

> 17. **ANIMALS.** Tenant shall be entitled to keep no more than (0) domestic dogs, cats or birds.

[1] *Sulkow v. Stern*, 1 Misc.3d 19 [App Term, 2d Dept, 9th & 10th Jud Dists 2003].

M. NO PETS

Animals of any kind shall not be kept or harbored in the Apartment, unless in each instance it is expressly permitted in writing in advance by Landlord or if otherwise permitted by law. Unless carried or on a leash, a consented-to pet or any other pet shall not be permitted on any passenger elevator or in any public portion of the Building.

These next two clauses were taken from riders added on to leases:

35. NO PETS ALLOWED IN THIS APARTMENT.

38. **No Pets.** Unless authorized by written consent, pets shall not be allowed in the Building. Tenant agrees that any breach of this provision shall entitle Owner, at its option, to notify Tenant in writing that any pet kept by Tenant must be removed within five (5) days after such notice. Failure to comply with such notice shall entitle Owner to terminate this lease. Tenant will be responsible for all damages stemming for breach of this provision.

This clause was in the "Rules", which were incorporated by reference into the lease:

9. No Pets Dogs or animals of any kind shall not be kept or harbored in the Apartment, unless in each instance it be expressly permitted in writing by Owner. This consent, if given, can be taken back by Owner at any time for good cause on reasonably given notice. Unless carried or on a leash, a dog shall not be permitted on any passenger elevator or in any public portion of the building. Also, dogs are not permitted on any grass or garden plot under any condition. BECAUSE OF THE HEALTH HAZARD AND POSSIBLE DISTURBANCE OF OTHER TENANTS WHICH ARISE FROM THE UNCONTROLLED PRESENCE OF ANIMALS, ESPECIALLY DOGS, IN THE BUILDING, THE STRICT ADHERENCE TO THE PROVISIONS OF THIS RULE BY EACH TENANT IS A MATERIAL REQUIREMENT OF EACH LEASE. TENANTS' FAILURE TO OBEY THIS RULE SHALL BE CONSIDERED A SERIOUS VIOLATION OF AN IMPORTANT OBLIGATION BY TENANT UNDER THIS LEASE. OWNER MAY ELECT TO END THIS LEASE BASED UPON THIS VIOLATION.

As you can see, the no-pets clause can be located anywhere within the lease, so it is important that you read the whole lease carefully from beginning to end.

Finally, here is an example of a lease clause that allows pets:

PETS:·The·Tenant(s)·shall·be·allowed·to·have:··¶

Three·(3)·pets·on·the·Premises·consisting·of·Birds,·Cats,·Dogs,·Fish,·Hamsters,·with·no·other·types·of·Pet(s)·being·allowed·on·the·Premises·or·common·areas,·hereinafter·known·as·the·"Pet(s)".·The·Tenant(s)·shall·not·be·required·to·pay·a·fee·for·any·pet·allowed·on·the·Premises.·The·Tenant(s)·is·responsible·for·all·damage·that·any·pet·causes,·regardless·of·ownership·of·said·pet·and·agrees·to·restore·the·property·to·its·original·condition·at·their·expense.·There·shall·be·no·limit·on·the·weight·of·the·pet.·pounds·(Lb.).··¶

2. <u>The Law</u>

There is a state law with respect to pets in multiple dwellings, commonly known as the **"Three-Month Rule"**. New York City Administrative Code § 27-2009.1 (Rights and responsibilities of owners and tenants in relation to pets) states:

"a. Legislative declaration. The council hereby finds that the enforcement of covenants contained in **multiple dwelling leases** which prohibit the harboring of household pets has led to widespread abuses by building owners or their agents, who knowing that a tenant has a pet for an extended period of time, seek to evict the tenant and/or his or her pet often for reasons unrelated to the creation of a nuisance. Because household pets are kept for reasons of safety and companionship and under the existence of a continuing housing emergency it is necessary to protect pet owners from retaliatory eviction and to safeguard the health, safety and welfare of tenants who harbor pets under the circumstances provided herein, it is hereby found that the enactment of the provisions of this section is necessary to prevent potential hardship and dislocation of tenants within this city.

b. Where **a tenant in a multiple dwelling openly and notoriously for a period of three months or more following taking possession of a unit, harbors or has harbored a household pet or pets, the harboring of which is not prohibited by the multiple dwelling law, the housing maintenance or the health codes of the city of New York or any other applicable law, and the owner or his or her agent has knowledge of this fact, and such owner fails within this three month period to commence a summary proceeding or action to enforce a lease provision prohibiting the keeping of such household pets, such lease provision shall be deemed waived."**

[continued below...]

> "c. It shall be unlawful for an owner or his or her agent, by express terms or otherwise, to restrict a tenant's rights as provided in this section. Any such restriction shall be unenforceable and deemed void as against public policy.
>
> **d. The waiver provision of this section shall not apply where the harboring of a household pet causes damage to the subject premise, creates a nuisance or interferes substantially with the health, safety or welfare of other tenants or occupants of the same or adjacent building or structure.**
>
> e. The New York city housing authority shall be exempt from the provisions of this section."
>
> [Emphasis supplied.]

As per the Three-Month Rule, when it comes to pets in New York City, the law trumps the lease. Thus, even if your lease contains a no-pet clause, your pet can remain in your apartment, if:

- you live in a building with three or more apartments (i.e., which is known in New York City as a "Multiple Dwelling"[2]);
- the pet is not otherwise illegal to own;
- landlord knows (or should know) about the pet in your apartment (which will be explored in more detail below);
- three months goes by without landlord bringing a summary proceeding; and
- the pet does not cause damage to the apartment, or create a nuisance or interfere substantially with the health, safety or welfare of other tenants.

[2] Multiple Dwelling Law § 4(7)(A).

The Three-Month Rule applies to residential co-operatives.[3] However, remember that the Three-Month Rule is not applicable to apartments in single- or two-family homes. The Three-Month rule also does not apply to apartments under the auspices of the New York City Housing Authority.

3. ***The Cases***

Next, we will look at how the Three-Month Rule works in the real world by examining court cases.

a. The Three-Month Rule: Owner's Knowledge of the Presence of the Pet

The three-month period begins to run from the time the owner "has knowledge" of the pet. Tenant, therefore, has the burden of proving when landlord obtained knowledge of the pet. We get a lot of guidance on this question from *Seward Park Housing Corp. v. Cohen*, 287 AD2d 157 [1st Dept 2001].

EXAMPLE: In *Seward* the court held that the plain meaning of the Three-Month Rule is to impute the actual knowledge of landlord's servants and employees at a building, as to tenant's possession of a pet, to landlord. The court held that this includes maintenance staff, porters, and security guards, who observed a dog on daily basis, and were agents of landlord within meaning of the code.

EXAMPLE: In *Metropolitan Life Ins. Co. v. Datta*, 2002 WL 221077 [App Term, 1st 2002], the court held that where both security personnel and a porter assigned to tenant's building were aware of the presence of the dog and saw it on a daily basis, such knowledge is imputed to the owner for purposes of the Three-Month Rule. Landlord's duty to take action is triggered by the knowledge of its on-site employees, who are best situated to observe and report the presence of pets.

EXAMPLE: In *1700 York Associates v. Kaskel*, 182 Misc.2d 586 [New York City Civil Court, New York County, 1999], the court held that notice to the building superintendent of the presence of the pet is deemed notice to landlord. This is true even if the superintendent in fact never reported the pet to landlord.

[3] *Clearview Gardens Corp. v. Volpicelli*, 213 AD2d 582 [2d Dept 1995].

Pro Tip: Superintendents, maintenance staff, porters, and security guards are agents of landlord within the meaning of the Three-Month Rule. If these people know about the pet, then the law deems that landlord also knows about the pet and the three-month clock starts running.

EXAMPLE: In *184 West 10th Street Corp. v. Marvits*, 18 Misc.3d 46 [App Term, 1st Dept, 2007], *affd* 59 AD3d 287 [1st Dept 2009], the court held that where the evidence showed that landlord's managing agent and superintendent inspected the apartment in contemplation of repair work, and saw a litter box in the bathroom and some feeding bowls in the kitchen, landlord's agents should have been alerted to the fact that there were cats in the apartment. Since the presence of cats was deemed open and notorious, the three-month clock started running.

EXAMPLE: In *Robinson v. City of New York*, 152 Misc.2d 1007 [Supreme Court, New York County, 1991], the court held that waiver of a no-pet rule can be found even where the pet is not regularly taken outdoors. In *Robinson*, there was proof that various maintenance employees of the owner had seen the dog. Therefore, the court concluded that the dog was deemed to have been kept openly and notoriously for purposes of the statute.

Pro Tip: If landlord's agents enter the apartment to inspect for repairs or to do repairs and see litter boxes and food and water bowls, this satisfies the open and notorious requirement and the three-month clock starts running.

EXAMPLE: In *149th Street LLC v. Rodriguez*, 2016 WL 544242 [App Term, 2d Dept, 9th & 10th Jud Dists 2016], the court found tenant had established by a preponderance of the evidence that a dog was openly and notoriously harbored for a period well exceeding three months. There was testimony that the dog was walked through the public hallway and outside the building twice daily, that building employees had seen the dog during several visits to the apartment for purposes of performing repairs, and that there had been conversations between members of tenant's family and the building superintendent regarding the dog.

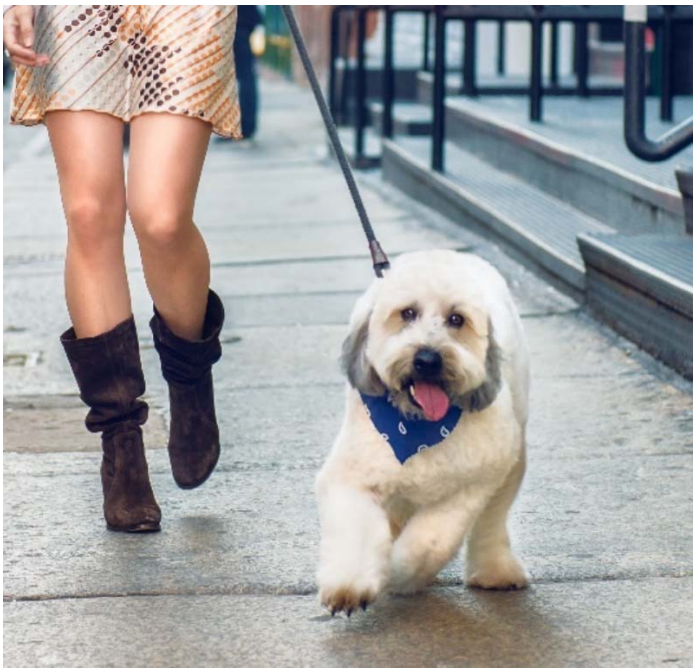
Pro Tip: If a dog is walked through the common hallways and outside of the building twice per day, this may satisfy the open and notorious requirement and the three-month clock starts running.

EXAMPLE: In *Chelsea Ventura, LLC v. Romansky*, 19 Misc.3d 132(A) [App Term, 1st Dept, 9th & 10th Jud Dists 2008], the court held that where a landlord in an apartment building formally notified tenants, by way of a letter, to immediately remove their dog from the premises or risk possible termination of their lease, that the letter clearly established landlord's knowledge of the presence of the dog. Since landlord failed to commence eviction proceedings within three months of that date, this constituted a waiver of the no-pets provision of the lease.

EXAMPLE: In a similar case, *Noonan Plaza LLC v. Rubio*, 37 Misc.3d 132(A) [App Term, 1st 2012], the court held that a note from landlord to tenant, stating "you will be fined…dogs are not permitted on the premises," established landlord's knowledge of the presence of the dog, and the three-month clock started running.

EXAMPLE: Likewise, in *174 LLC v. Goldstein*, 45 Misc.3d 129(A) [App Term, 1st 2006], a tenant used landlord's own correspondence to prove that landlord had knowledge of the presence of a pet in the apartment, for purposes of the three-month waiver rule. Landlord's note said, "you are harboring a dog-a direct violation of your lease."

Pro Tip: If landlord sends a tenant a letter, email, note, or text about a pet being unauthorized, this proves that landlord knew about the animal and the three-month clock starts running.



EXAMPLE: It also does not hurt if the superintendent knows your dog's name. In *Central Harlem Associates LLC v. Davis*, 46 Misc.3d 1209(A) [New York City Civil Court, New York County 2015], the court held that landlord had waived the no-pet clause in the lease, via the Three-Month Rule. In *Davis*, the court found that:

> "[Tenant] treats Dutchess [the Dog] like her own child. Dutchess is often dressed up and always on a leash when walked. Photos of Dutchess in the common areas of the building on various dates in all different outfits, and with different bows for her hair were admitted into evidence (Ex A). Other witnesses credibly testified on [Tenant's] behalf that Dutchess was frequently seen in front of the Subject Building and coming in and out of the building, when being walked by [Tenant] There is a security guard stationed in the lobby of the building on weekends. There are cameras in the lobby and elevator of the Subject Building."

Pro Tip: If the superintendent calls your doggie by name, then the three-month clock starts running. It also does not hurt to take pictures of your dog trotting through the lobby. It also helps if neighbors will testify on a tenant's behalf. It also helps if the building has security cameras.

EXAMPLE: In *167 LLC v. Mendoza*, 53 Misc.3d 1219(A) [New York City Civil Court, Bronx County, 2016] the court held that the three-month clock starts running where tenants explained the following regarding their dog in detail:

> **"**[The dog was walked] 'two times a day, every day, throughout my building and on and/or near the building's premises. We walk Bella between 8:00 am and 9:00 am, and again between 6:00 pm and 7:00 pm.'...Mr. Muniz states that the landlord's employees ('maintenance workers and the previous and current superintendents of my building',...) have seen and interacted with Bella, both when making 'numerous repairs' since September 2015 in his apartment, where they 'have also seen my dog's bed, her bowls, and toys, which are located throughout my apartment,'... [Tenants] also support their [claim] with paperwork documenting the purchase of Bella (female, white, Havanese, d.o.b. 7/4/2015, registered with 'America's Pet Registry, Inc.' by the breeder, Jesus Morfin) by Ms. Mendoza on September 11, 2015 from Bronx Zoo–Rama Pets. This paperwork includes a sales receipt, an 'information Statement' pursuant to General Business Law Section 753–B, a 'Disclosure of Animal Pedigree Registration' form, and a four-page Bronx Zoo–Rama Pets customer information form, all signed by Ms. Mendoza as purchaser; a rabies vaccination certificate signed off on by a veterinarian, Dr. Cornelis Rillen, on November 7, 2015...**"**

Pro Tip: Save all the information that documents the date when you adopted your animal. This may help prove when the three-month clock started running.

b. A possible downside of the Three-Month Rule is that it forces landlord to take legal action quickly.

A possible downside, for tenants, of the Three-Month Rule is that it forces a landlord's hand very quickly. Landlords who might not otherwise rush to the courthouse are often forced to do so[4], for fear of letting the three months expire. Unfortunately, this can put more pressure on both parties, which can hamper negotiations.

The Three-Month Rule is strictly enforced. In *Gold Queens, LLC v. Cohen*, 42 Misc.3d 15 [App Term, 2d Dept, 9th & 10th Jud Dists 2013], a landlord served the predicate notice required for an eviction proceeding. Landlord then brought an eviction proceeding within the required three-month period, but had to discontinue that proceeding, without prejudice, based on improper service of the notice. Landlord then brought a second holdover proceeding, this time after the expiration of the three-month period. The court held that where landlord acted in a procedurally defective manner, it had not diligently pursued its rights within the three-month period and had waived the no-pet clause.[5]

c. If you get a Three-Month Rule waiver allowing you to have a pet or pets, that waiver only applies to your existing pet or pets, not to future pets.

If you get a Three-Month Rule waiver, allowing you to have a pet or pets, that waiver only applies to your existing pet or pets, not to future pets. *Park Holding Co. v. Emicke*, 168 Misc. 2d 133, [App Term, 1st 1996] ("Any waiver under the law is more properly limited to existing pets which are part of the household; it is not reasonably extended to future pets which were not yet in the premises … .").[6]

[4] *Metropolitan Life Ins. Co. v. Friedman*, 205 AD2d 303 [1st Dept 1994] ("Plaintiff landlord's failure to commence this action within three months after learning that tenants were harboring a dog in their apartment must be deemed a waiver of the 'no pets' provision in the lease.")

[5] See also *Bray Realty, LLC v. Pilaj*, 54 Misc.3d 7 [App Term, 2d Dept, 9th & 10th Jud Dists 2016].

[6] *See also EQR Hudson Crossing A, LLC v. Kalouf*, 33 Misc.3d 140(A) [App Term, 1st 2011].

B. Another Option: Simply Ask Your Landlord If You May Have a Pet or Find an Apartment that Allows Pets

This whole publication and the class that goes with it are predicated on the assumption that a no-pets building is serious about remaining a no-pets building, and that is probably not a terrible assumption. Nevertheless, one can always simply ask landlord if it will allow a pet. Asking permission, not forgiveness, has several things to recommend it. First, asking first is arguably the more ethical route; more considerate of one's landlord and neighbors. Second, asking first is also perhaps the less stressful and less risky route. The difficulty here is that if you ask, you may get an answer that you do not like, i.e., "no", while simultaneously garnering more attention from landlord, who will be watching you more closely to see if you are violating the no-pet rule. These are difficult decisions.

Moreover, you always have the option of simply finding an apartment that allows pets, although this limits your selection of apartments in an already difficult market. Nevertheless, the option is always there.

EXAMPLE: The author got a call from a woman who was moving from California to NYC, into a no-pets elevator building, yet one without a doorperson. The problem was that she was planning on moving in with her two 90-pound dogs. She was operating on the "forgiveness, not permission" plan. This lady was all geared up to beat landlord on the Thirty-Day Rule. She wanted my advice. My advice was, *"Don't do it; find another place."* The problem, I told her, was that her real obstacle here was likely to be her neighbors. Most landlords are happy just to get the rent. Landlords take issue with tenants' behavior, however, when landlords start getting complaints from other tenants. I told this lady that the second her neighbors got in the elevator with the two 90-pound dogs, that the trouble would start. The neighbors would likely pressure landlord to act against tenant. Not only is this unfair to those neighbors, but it is unfair to the animals. Animals sense when humans feel animosity towards them. I have so often seen people set their pets up for failure in this way.

III. EMOTIONAL SUPPORT ANIMALS

A. Introduction

1. Emotional Support Animals Defined

This definition of Emotional Support Animal **("ESA")** is from the American Kennel Club[7], and we have changed the word "dog" to "animal":

> "Although all dogs offer an emotional connection with their owner, to legally be considered an emotional support [animal]…(ESA), the pet needs to be prescribed by a licensed mental health professional to a person with a disabling mental illness. A therapist, psychologist, or psychiatrist must determine that the presence of the animal is needed for the mental health of the patient. For example, owning a pet might ease a person's anxiety or give them a focus in life. The [animal] can be of any age and any breed…ESAs provide support through companionship and can help ease anxiety, depression, and certain phobias. However, they are not service dogs."

The American Kennel Club further states, "The key difference between a service dog and an emotional support dog is whether the animal has been trained to perform a specific task or job directly related to the person's disability. For example, service dogs are trained to alert a hearing-impaired person to an alarm or guide a visually impaired person around an obstacle..."[8]

Please keep in mind that nothing in this booklet or class is relevant to service animals. This booklet and class are relevant only to pets and ESA's.

[7] https://www.akc.org/expert-advice/news/everything-about-emotional-support-animals/

[8] https://www.akc.org/expert-advice/news/everything-about-emotional-support-animals/

2. ***New York City Human Right's Law***

In this class, we will be focused on the New York City Human Rights Law[9] **("HRL")**.[10]

The HRL prohibits discriminatory housing practices against people in **"Protected Classes"**. [11]

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[9] New York City Administrative Code § 8-107.

[10] There are also federal laws (Fair Housing Act; 42 U.S.C.A. §§ 3601 et seq.) and state laws (New York State Human Rights Law; Exec. Law §§ 290 et seq., L. 1951, ch. 800, as amended) that prohibit housing discrimination. It is beyond the scope of this class to treat those laws in detail here. This is why lawyers should not use this resource as if it is continuing legal education material. The way the author would teach lawyers would be very different than what she is doing here, educating the general public about their rights.

[11] NYC Human Rights Library page https://www1.nyc.gov/site/cchr/law/the-law.page; Here is a list of Protected Classes under the HRL for purposes of housing discrimination:

- Age
- Immigration or citizenship status
- Color
- **Disability**
- Gender
- Gender Identity
- Marital status and partnership status
- National origin
- Pregnancy and Lactation Accommodations
- Race
- Religion/Creed
- Sexual orientation
- Status as a Veteran or Active Military Service Member
- Lawful occupation
- Lawful source of income
- The presence of children
- Status as a victim of domestic violence, stalking, and sex offenses

There are certain types of housing that are exempt from coverage by the HRL, including:

- the rental of private housing accommodations in one- or two-family homes, if the owner or a member of the owner's family resides in one of the units, and if the unit has not been publicly advertised, listed, or otherwise offered to the general public[12]; or

- rooms in private housing accommodations, when offered by the occupant or by an owner whose family resides in the unit[13].

As you can see in Footnote 11, people with disabilities are a Protected Class. The HRL defines a **"Disability"**[14] as:

> **"**…any physical, medical, mental or psychological impairment, or a history or record of such impairment. As used in this definition:
>
> 1. Physical, medical, mental, or psychological impairment. The term "…mental, or psychological impairment" means:…
>
> **(b) A mental or psychological impairment.**
>
> 2. In the case of alcoholism, drug addiction or other substance abuse, the term "disability" only applies to a person who (i) is recovering or has recovered and (ii) currently is free of such abuse, and does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.**"**
>
> [Emphasis supplied.]

[12] HRL § 8-107(5)(a)(4)(1).

[13] HRL § 8-107(5)(a)(4)(2).

[14] HRL § 8-102(16)(a).

If you have a mental or psychological impairment Disability, then under the HRL, you have the right to ask your landlord for a **"Cooperative Dialogue"** (defined below) for the purpose of discussing landlord making the **"Reasonable Accommodation"** (defined below) of allowing you to have an ESA. With respect to housing, as per HRL § 8-107(2)(c) through (e), these terms mean:

"(c)…It shall be an unlawful discriminatory practice for an owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agency or employee thereof **to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require an accommodation related to disability…**

(d) Upon reaching a final determination at the conclusion of a cooperative dialogue…, the covered entity shall provide any person requesting an accommodation who participated in the cooperative dialogue with **a written final determination identifying any accommodation granted or denied**.

(e) **The determination that no reasonable accommodation would enable the person requesting an accommodation to…enjoy the right or rights in question may only be made after the parties have engaged, or the covered entity has attempted to engage, in a cooperative dialogue."**

[Emphasis supplied.]

The case law that flushes this area out interprets the state and federal counterparts to the HRL. **To establish a strong case for a Reasonable Accommodation ESA under the HRL tenant must prove that the animal is, (a) necessary, (b) because of the mental or emotional disability, (c) in order for tenant to use and enjoy the apartment.** *Kennedy Street Quad, Ltd. v. Nathanson*, 62 AD3d 879 [2d Dept 2009], *leave to appeal denied,* 13 NY3d 714 [2009], is an important case in this area. In *Kennedy*, the court held that:

> ***"**...the [tenant]s submitted evidence that the dog helped them with their symptoms of depression. Nonetheless, **they failed to present any medical or psychological evidence to demonstrate that the dog was actually necessary in order for them to enjoy the apartment**."*
>
> *[Emphasis supplied.]*

Also worthy of attention here is *Matter of One Overlook Ave. Corp. v DHCR*, 8 AD3d 286 [2d Dept 2004], where the court held:

> "To show that a violation of the Human Rights Law occurred and that a reasonable accommodation should have been made, the **complainant must demonstrate that her son was disabled, that he was otherwise qualified for the tenancy, that because of his disability it was necessary for him to keep the dog in order for him to use and enjoy the apartment, and that reasonable accommodations can be made to allow him to keep the dog**...Here, the complainant failed to demonstrate through either medical or psychological expert testimony or evidence that her son required a dog in order for him to use and enjoy the apartment."
>
> [Emphasis supplied.]

In *Durkee v. Staszak* 223 AD2d 984 [3d Dept 1996], although tenant did obtain a letter from a physician stating that "[a] forced separation of [the tenant] from his dog for even a short period will adversely affect his mental health and result in a deterioration of his emotional condition," the complete absence of objective medical findings to support this conclusory opinion justified the denial of the ESA.

From these New York State appellate cases, we see that there must be a solid demonstration made, via admissible evidence, that the animal is, (1) necessary, (2) because of the mental or emotional disability, (3) in order for tenant to use and enjoy the apartment.

B. Steps for Establishing Entitlement to an ESA

Here are the steps for attempting to establishing your entitlement to an ESA.

1. Documentation of Disability and of the Necessity for the ESA in Order for Tenant to Use and Enjoy the Apartment

You must be able to document that you have a mental or psychological impairment. Remember the HRL definition of "disability" above: "A mental or psychological impairment."

Preferably, you will obtain a letter or an affidavit from a professional who is qualified to diagnosis you as having a mental or psychological disability, whom you have worked with for a while.

Weak =	Letter from your general practitioner physician who you see once per year.
Strong =	Affidavit from your licensed therapist who you have been seeing for three years; and affidavit by the psychiatrist that prescribes you medicine.

Furthermore, the more specific the diagnosis is the better.

Weak =	"Tenant is depressed."
Strong =	"Tenant suffers from depression, bipolar disorder, panic disorder, anxiety, panic attacks, and acute insomnia." The affidavit may also note Tenant's treatments, prescriptions, and hospitalizations.

Next, it is crucial that the professional writing the letter or affidavit connect why the animal is necessary for tenant to "use and enjoy the apartment". ***This step is vital.*** If you recall the *Kennedy* and *Overlook* cases discussed above, you will see that failing to make this connection is fatal to the request. Again, the more specific this connection is the better.

Weak =	Conclusory Statement: "Tenant needs the animal in order to use and enjoy the apartment."
Strong =	"Without Chester the Dog in the apartment, Tenant has increased symptoms of anxiety and panic attacks, which make it difficult for him to engage in the daily activities of living. I, as Tenant's treating psychologist, based upon my experience with Tenant and my extensive experience treating such disorders, believe Tenant requires Chester to fully use and enjoy the apartment. I have documented the positive effects of Chester on Tenant. When Tenant has a panic attack, Chester sits on Tenant's chest…"

In conclusion, the more specific the letter or affidavits is, the better.

Keep in mind that if the matter eventually progresses to court, the professional who submits the letter or affidavit on your behalf may be called to testify under oath.

Quite obviously, a less effective way to document your disability would be to depend upon one of these websites where you can answer some questions and get a letter from a therapist that you never met, which supposedly documents one's need for an ESA.

2. Choose the Right Animal and Be a Responsible Pet Owner

As for a *Reasonable* Accommodation, courts have found that allowing a disabled tenant to own a pet is, in general, a reasonable accommodation.[15] It is more reasonable to request a cat or a small dog than a large dog. Certain breeds of dogs might be considered more reasonable than others. The pet cannot be dangerous, make a lot of noise, or cause odors. The animal needs to be a good neighbor.

Likely Reasonable =	**Not Likely Reasonable =**
	

EXAMPLE: The author of these materials had a client who convinced his co-op board that he was entitled to a small dog as an Emotional Support Animal in his no-pets co-op. Then the little dog bit another resident in the elevator. The co-op board was eventually appeased, and the man was allowed to keep the dog, but they asked him to put a muzzle on the dog in the elevator. The man failed to follow the muzzle rule. The little dog bit the same resident again! The co-op board withdrew its consent for the dog as an ESA and began legal action. The man, who could not bear to be parted from the dog, sold the co-op.

[15] *Bronk v. Ineichen*, 54 F.3d 425, 429 [7th Cir. 1995].

An easy rule of thumb is if your neighbors complain about your ESA, it is probably not reasonable. At the very least, those complaints will result in the issue of the animal's reasonableness as an accommodation being challenged. The best advice here is simply this. Be a responsible pet owner and a good neighbor.

3. Tenant's Request

The New York State Human Rights Law requires all residential landlords to provide a written notice to tenants (and any prospective tenant) detailing tenant's right to request a reasonable accommodation based on a physical or mental impairment.[16] Therefore, your landlord should have already provided you with a "Reasonable Accommodations Request Policy", which contains instructions on how to make your request. If you have received a copy of a Reasonable Accommodations Request Policy, follow its instructions closely.

Your request should:

(1) Document your disability. This is done with the enclosure of the psychologist affidavit discussed above.

(2) Establish the NEED for the ESA in order for you to use and enjoy the apartment. This is done with the enclosure of a psychologist affidavit discussed above.

(3) Suggest the type of ESA you will get and how the accommodation will be reasonable, i.e., not a nuisance to fellow residents of the building.

4. Cooperative Dialogue and Written Determination

As we explored above, after your request for a Reasonable Accommodation of an ESA is made, landlord is required to enter into a Cooperative Dialogue process with you, tenant, to attempt to accommodate your needs. This is where topics such as the breed of the dog and policies for transporting the animal through the lobby may come up.

Your landlord is required to give you a written final determination identifying any accommodation granted or denied.

[16] New York Executive Law § 170-d.

If your landlord fails to enter into this Cooperative Dialogue or if landlord begins the conversation but never makes a determination, than these facts in themselves mean that landlord has violated the HRL.

5. ***Where to Go if You Think You Have Been Discriminated Against***

The HRL also created a Commission on Human Rights which has the power to adjudicate claims of housing discrimination. The commission may act to protect members of Protected Classes within the jurisdiction of New York City.[17] Under the HRL, an aggrieved party may file a complaint of unlawful discrimination with the Law Enforcement Bureau of the New York City Commission on Human Rights,[18] at any time within one year of the date on which the discriminatory act occurred.[19] Alternatively, a party may commence a civil action in court.[20] In such instance, the HRC will have no jurisdiction over a subsequently filed administrative complaint, unless the court action is dismissed without prejudice.[21]

The decision about which route to go, whether filing a complaint with the HRC (or its State of Federal counterparts) or suing landlord, is a decision best made with a lawyer. Therefore, it is beyond the scope of these materials to go farther. The salient point is that a tenant who has been discriminated against on the ESA issue by their landlord has multiple options to consider for seeking redress. Tenants must consider those options quickly, however, inasmuch as the HRC option will only be open for one year of the date on which the discrimination occurred.

[17] HRL §§ 8-101 et seq.

[18] HRL § 8-109(a); https://www1.nyc.gov/site/cchr/index.page

[19] HRC § 8-109(e).

[20] HRC § 8-502.

[21] HRC § 8-109(f)(i).

IV. CONSIDERATIONS AND BEST PRACTICES

A. Free-Market vs. Rent Stabilized or Co-Op Apartments

When someone contacts the author of these materials with a question about getting an ESA, the *first* question I ask is this – are you a Rent Stabilized tenant or do you own your co-op apartment? Or are you simply renting a free-market apartment. While it is beyond the scope of these materials to take a deep dive on New York City's different housing modalities[22], a brief review is in order.

1. Types of Apartments

a. Rent Stabilized Apartment

Some apartments are Rent Stabilized. Rent Stabilization is a state regulatory scheme, which applies to about one million tenancies in New York City.[23] Rent Stabilization limits the rent an owner may charge for an apartment, restricts the right of an owner to evict tenants, and imposes other requirements on landlords and tenants. Rent Stabilization is overseen by the New York State Division of Housing and Community Renewal.[24]

Rent Stabilized tenants are entitled to leases and lease renewals. Even if landlord fails to renew a Rent Stabilized tenant's lease, all tenant's rights remain intact.[25] If a Rent Stabilized lease is not properly renewed, a landlord cannot sue tenant for the rent.[26] Family members of a Rent Stabilized tenant residing in a Rent Stabilized apartment often have succession rights to the tenancy.[27] Rent increases for Rent Stabilized tenants are controlled by the New York City Rent Guidelines Board, which sets maximum rates for rent increases once a year, which are effective for leases beginning on or after October 1st.[28]

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[22] See "Generation Z, Welcome to Your First NYC Apartment". https://tenantlearningplatform.com/courses/generationz-welcome-to-your-first-apartment-in-nyc/

[23] Selected Initial Findings of the 2014 New York City Housing and Vacancy Survey; http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf

[24] Rent Stabilization Law § 26-516.

[25] Rent Stabilization Code § 2523.5.

[26] *Paid Enters. v. Gonzalez*, 173 Misc 2d 681, 682 [App. Term 2nd Dept. 1997].

[27] RSC § 2523.5(b)(1); RSC § 2520.6(o).

[28] https://www1.nyc.gov/site/rentguidelinesboard/index.page

b. Free-Market Apartment

Any rental apartment that is not Rent Stabilized or subject to some other type of government regulation (there are a bunch of others but none as prevalent as Rent Stabilization) is generally referred to as a "free-market" apartment. With a free-market apartment:

- You only have a right to stay for the lease term; and
- When the lease term is over, you and landlord must agree on the next rent.

There are a few laws in New York State that slow a landlord down when she is refusing to renew a free-market tenant's lease and/or when she is attempting to raise the rent sharply at the end of the term.[29] But these laws only, at best, delay the inevitable. There is nothing that prevents a landlord of a free-market apartment from not renewing your lease or from demanding from you a large rent increase at the end of your term as a condition of renewing your lease.

c. Co-Op Apartment

Co-op shareholders are a type of tenant. When you purchase "a co-op", you are buying stock in a cooperatively owned housing corporation, and you are issued a "proprietary lease" for your specific apartment. There is an entire section of the New York City Civil Court Housing Parts dedicated to co-op cases. In other words, co-ops are not that different from regular rental apartments when it comes to landlord and tenant legal issues.

2. ***Rent Stabilized Tenants and Co-op Shareholders Have More to Lose than Free-Market Tenants***

Thus, we see that Rent Stabilized tenants and co-op shareholders are occupying apartments that they have the legal right to live in forever, assuming they pay the rent and do not violate other obligations of their tenancies. Moreover, Rent Stabilized tenants enjoy price controls on their rent.

Free-market tenants do not enjoy such protections. A free-market tenant can eventually be evicted. In other words, the free-market tenant

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[29] Real Property Law ("RPL") § 226-c (requiring 30 to 90 days' notice).

might beat landlord on the Three-Month Rule or on establishing entitlement to an ESA, but there is nothing to stop landlord from not renewing tenant's lease at the end of tenant's term. One might ask, *"isn't it discrimination if a landlord refuses to renew a free-market tenant because tenant requested an ESA?"* While the author was not able to find a case directly on point, I assume the answer is, "yes". But that situation should not be confused with the ESA request creating some sort of perpetual tenancy, akin to Rent Stabilization. If you are a free-market tenant, landlord can eventually evict you for a legitimate non-discriminatory reason.

Therefore, considering the type of apartment you are in and how valuable that unit is to you is critical when making decisions about assuming the risks of challenging no-pet clauses.

B. Three-Month Rule vs. ESA Route

If you believe you are entitled to an ESA, there is an argument to be made that it may make sense to adopt the animal and keep it "openly and notoriously", and hope the three months pass with no legal action. Based on the above-discussed Three-Month Rule, this would do the trick; tenant can keep the animal as a pet and not have to resort to any of this ESA stuff.

If this is a legitimate ESA situation, however, the author is a bigger fan of **asking first, and adopting second**. For these reasons:

(1) Asking first is more respectful of one's landlord and neighbors.

(2) Asking first avoids an argument that we see landlords making in these matters, that tenant did not manifest the need for this accommodation until they got caught with an unauthorized animal, i.e., the ESA request is an afterthought, a fallback position, a lie.

(3) If the basis for keeping the animal is the Three-Month Rule, and not that the animal is recognized as an ESA, then as discussed above, the Three-Month Rule can force a landlord to sue a tenant very quickly.

(4) If the basis for keeping the animal is the Three-Month Rule, and not that the animal is recognized as an ESA, then as discussed above, that privilege applies only to your current animal and not to any subsequent animal.

C. Some Final Considerations

You may decide not to get an animal. Owning an animal is a tremendous responsibility; it is a commitment of time and resources that is akin only to that of having a child. An animal needs you for EVERYTHING: water, food, medical care, companionship, safety, exercise, fresh air, natural light. What's more, the pet will need you for these things for probably about a decade. Cats can live for two decades. The author's last Shepherd-Doberman rescue lived for 12 years, and her oldest cat made it to 19. Your relationship with your animal needs to be able to withstand changes in your personal life, such as a new job, a marriage, a move. Animals are really expensive. Think about it, is all I am saying.

V. TAKE AWAYS

(1) Start by reading your lease carefully. Your lease might allow you to have a pet. If the lease is silent on the issue of pets, then you are allowed to have a pet. Keep in mind that you can always chose an apartment that allows you to have a pet.

(2) As per the Three-Month Rule, when it comes to pets in New York City, the law trumps the lease. Thus, even if your lease contains a no-pet clause, your pet can remain in your apartment, if:

a. you live in a building with three or more apartments;

b. the pet is not otherwise illegal to own;

c. landlord knows (or should know) about the pet in your apartment;

d. the pet does not cause damage to the apartment, or create a nuisance or interfere substantially with the health, safety or welfare of other tenants; and

e. three months goes by without landlord bringing a summary proceeding.

(3) The Three-Month Rule applies to residential co-operatives. However, the Three-Month Rule is not applicable to apartments in single- or two-family homes. The Three-Month rule also does not apply to apartments under the auspices of the New York City Housing Authority.

(4) The three-month period begins to run from the time the owner "has knowledge" of the pet. Tenant, therefore, has the burden of proving when landlord obtained knowledge of the pet.

a. Maintenance staff, porters, and security guards are agents of landlord within meaning of the Three-Month Rule.

b. If landlord's agents enter the apartment to inspect for repair or do repairs and see litter boxes and food and water bowls, this satisfies the open and notorious requirement for triggering the clock for the Three-Month Rule.

c. If a dog is walked through the common hallways and outside of the building twice per day, this may satisfy the open and notorious requirement and the three-month clock starts running.

d. If landlord sends a tenant a letter, email, note, or text about a pet being unauthorized, this proves that landlord knew about the animal and the three-month clock starts running.

e. If the superintendent calls your doggie by name, the three-month clock likely starts running. Consider taking pictures of your dog in the lobby. It also helps if neighbors will testify on a tenant's behalf. It also helps if the building has security cameras.

f. Save all the information that documents the date when you adopted your animal. This may help prove when the three-month clock starts running.

(5) A possible downside, for tenants, of the Three-Month Rule is that it forces a landlord's hand very quickly. Landlords who might not otherwise rush to the courthouse are often forced to do so, for fear of letting the three months expire.

(6) If you get a Three-Month Rule waiver, allowing you to have a pet or pets, that waiver only applies to your existing pet or pets, not to future pets.

(7) An Emotional Support Animal ("ESA") is not a service dog.

(8) The NYC HRL prohibits discriminatory housing practices against people in Protected Classes. You are in a Protected Class if you have a Disability. A Disability can be a mental or psychological impairment.

(9) If you have a mental or psychological impairment Disability, you have the right to ask your landlord for a Cooperative Dialogue for the purpose of discussing the landlord making the Reasonable Accommodation of allowing you to have an ESA.

(10) To establish a strong case for an ESA under the HRL there must be a solid demonstration made, via admissible evidence, that the animal is, (a) necessary, (b) because of the mental or emotional disability, (c) in order for tenant to use and enjoy the apartment.

(11) To request an ESA Reasonable Accommodation for a Disability of mental or psychological impairment, you must obtain a letter or an affidavit from a professional who is qualified to diagnosis you as having a mental or psychological disability, whom you have worked with for a while. A less effective way to document your disability would be to depend upon one of these websites where you can answer some questions and get a letter from a therapist that you never met, which supposedly documents one's need for an ESA.

(12) The animal requested must be a *Reasonable* Accommodation. It is more reasonable to request a cat or a small dog than a large dog. Certain breeds of dogs might be considered more reasonable than others. The pet cannot be dangerous, make a lot of noise, or cause odors. The animal needs to be a good neighbor.

(13) The New York State Human Rights Law requires all residential landlords to provide a written notice to tenants (and any prospective tenant) detailing tenant's right to request a reasonable accommodation based on a physical or mental impairment.

(14) Your request for an ESA pursuant to the NYC HRL should:

a. Document your disability. This is done with the enclosure of the therapist affidavit discussed within.

b. Establish the NEED for the ESA in order for you to use and enjoy the apartment. This is also done with the enclosure of the therapist affidavit discussed within.

c. Suggest the type of ESA you will get and how the accommodation will be reasonable, i.e., not bothersome to fellow residents of the building.

(15) After your request for a Reasonable Accommodation of an ESA is made, landlord is required to enter into a Cooperative Dialogue process with you, tenant, to attempt to accommodate your needs.

(16) Your landlord is required to give you a written final determination identifying any accommodation granted or denied.

(17) A tenant who has been discriminated against on the ESA issue by their landlord has multiple options to consider for seeking redress.

(18) Considering the type of apartment you are in and how valuable that unit is to you is critical when making decisions about challenging no-pet clauses.

(19) If you have both the Three-Month Rule option and the ESA option, you should carefully consider which route you will take.

(20) A pet is a tremendous responsibility.

> *"Animals are such agreeable friends —they ask no questions; they pass no criticisms."*
>
> George Eliot