Representing People with Disabilities in Unlawful Detainers

Webinar Transcript

September 26, 2024

ERIN: Hi all. My name is Erin. I'm a Senior Staff Attorney at Disability Rights Education and Defense Fund. I'll be your trainer, your host today for Representing People with Disabilities in Unlawful Detainers. Just for a quick background, I've been a lawyer for 10 years. I've spent most of the time doing eviction defense. A lot of that was in New York City, and I've also done some unlawful detainers in California and currently doing housing rights in various different areas at DREDF. So there is a lot to talk about when it comes to representing people with disabilities in unlawful detainers, way too much than what can be consumed in an hour. So this presentation, this training's really focusing on reasonable accommodations and how that can be used to help a person going through an eviction process. So we're gonna talk briefly about disability law, that we're gonna go over how reasonable accommodations work, how to request it, how it might work in a context of eviction. Then we'll kind of narrow down a little bit into what that looks like in the context of an eviction. And then we're gonna talk a little bit about claim and issue preclusion for people who might be, who might want to bring an affirmative case for disability discrimination and how that might be impacted by an unlawful detainer case. And we have some hypotheticals at the end. I'm also gonna try to reserve some times for questions. There's a lot of information to get through, so I'll share my email at the end. If we don't get to get to your question, you can send me an email. Oftentimes also on this training, there are a lot of experienced attorneys on here as well. So I welcome you all to engage in the chat or the Q and A if someone has a question and someone else knows the answer to it, feel free to answer that question. I'm not able to see the Q and A and share the presentation at the same time. So, you know, we can all sort of work together to get each other's questions answered. Okay, diving in. So disability and housing, I think as most of probably aware who've been litigating unlawful detainers, it's not very often that you're going to get a case where someone says, I am evicting you because of a disability. You know, that is sort of black and white disability discrimination and we don't see that very often, but people are still evicted regularly because the root cause being their disability. So when it comes to non-payment of rent, people with disabilities oftentimes have more housing instability because of the way income and finances often will work for a person with a disability. So one of the prime examples of that is if you're someone who survives on social security, especially if you survive on SSI or SSD, you're just never gonna make enough money to cover the average rent in the United States. And this training is specific to people in California. So definitely you're not gonna make enough money off of SSI and SSD to live probably almost any place in California. People should be spending 30% of their rent, 30% of their income on rent. But oftentimes with SSI and SSD, even if you use a hundred percent of that, that wouldn't cover your income unless you had something like a section eight voucher, or other rental voucher. People with disabilities in certain occupations with certain disabilities, it's also okay to pay someone some minimum wages. So a lot of people probably know, even with the minimum wage, you often are not able to cover your rent for the average one bedroom apartment and that is compounded when you are paid sub minimum wages as a person with disability. There can often also be some job instability when you're a person with a disability, you know, if you have to. Unfortunately, there's also a lot of discrimination against people with disability in the workplace. If you're someone who might have to go in for treatment, go to a hospital often because of a disability, that can lead to a lot of job instability. So that's how a disability might lead to a non-payment of rent case. And we'll talk a little bit about how there might be some ways to address non-payment of rent cases through reasonable accommodation. And then there's also the mon non-payment of rent cases that can be connected to disability. So a common one is hoarding, right? So hoarding is, and the diagnostic statistical manual, it is a disability and it is unfortunately something that someone can be evicted for. DREDF if did a separate training on hoarding. That should be on our website if people are interested in that in particular. But, so hoarding is a big one that needing assistance animals, a lot of apartment buildings and other housing have no animal policies and people will need a reasonable accommodation for an assistant animal, which includes an emotional support animal, or a service animal. A lot of leases also have provisions saying, you can't sublease, you can't have another occupant there without permission of the landlord. Or sometimes not at all. That could be very difficult for a person with a disability who needs a live in aid. And then unfortunately, I think the most difficult aspect of disability and unlawful detainers comes when a person's symptoms, other disability manifests in behaviors that neighbors and landlords don't like. And I think that oftentimes can be the most difficult unlawful detainer case to deal with. If people's disability leads to bad interpersonal relationships with their neighbors and that leads to maybe an unlawful detainer case for a nuisance or something like that. So there are several laws that could help a person with a disability in the context of housing. So there's a Fair Housing Act or the Fair Housing Amendments Act. This is a federal law that protects people in housing who have a disability. So it applies to physical and mental disabilities that substantially limit one or more major life activities or a record of having such a disability, or if you're regarded as someone having a physical, or mental impairment. FEHA or the Fair Employment and Housing Act, this is a California specific law that will be focusing on the most in this presentation generally, unless otherwise stated in the presentation what the things I'm talking about derived from FEHA. So the disability definition is very similar to the Fair Housing Act. The slight differences is it only requires a limitation as opposed with a substantial limitation of a major life activity. And any sort of impairment is considered without regard to mitigating measures. So you might have a disability that is very minimized because of medications or something like that. That would, you're still considered a person with a disability. And then FEHA mirrors the analysis under the Fair Housing Act and really the Fair Housing Act is sort of, can be seen as like a baseline and FEHA can build upon that. There are other relevant laws to disability discrimination and unlawful detainers that I want you all to be aware of. Again, FEHA has sort of like the best law to use in this context, so we're focusing on it. But you should also be aware that an unlawful detainer, or in an affirmative case for disability discrimination and housing, you might also have claims under the ADA under section 504, the Rehabilitation Act. There's the Disabled Persons Act, which is the California state sort of equivalent of the ADA. There's the Unruh Civil Rights Act, which prevents discrimination for all protected classes, including disability. And there's government code 11135, which again prohibits disability discrimination. Okay, so diving into the reasonable accommodations. So what is a reasonable accommodation? I'm guessing that most of you have probably requested a reasonable accommodation before. So the very sort of basic bare bones of it is that it's just a change in some sort of rule policy or practice that allows a person with a disability to use and enjoy their apartment, their home, you know, in the way that it's meant to be used. There's also reasonable modification, sometimes reasonable accommodation, reasonable modification, or use interchangeably. And in different laws are used interchangeably. In the context of FEHA, a reasonable modifications are generally physical changes that usually the tenant has to pay for. And reasonable accommodations are generally changes to the lease to policies management, service policies and stuff like that. Since we're focusing on what will prevent an eviction, we're not really gonna be talking about reasonable modifications or physical modifications of the home, but just so you kind of know the difference between that. So in addition to sort of like the obvious types of disability discrimination, a refusal to grant a reasonable accommodation request is also considered disability discrimination. So a reasonable accommodation needs to be necessary. So what is considered necessary in this context? So necessary is something that might change or remove a policy that interferes with the tenant's ability to use and enjoy their home. Something that might enhance the tenant's quality of life by ameliorating the effects of the disability and a change in policy that would enable the tenant to satisfy requirements of the tenancy to be able to comply with the lease and stuff like that. And we'll get into examples also in a little bit. So a reasonable accommodation is an affirmative obligation. So it's not sort of discretionary to the landlord, it's not sort of like up to the landlord to say yes or no. They have an affirmative obligation. They shall make the accommodation if it is necessary. And this could mean that they have to give the accommodation even if a accommodation is not requested. So the housing provider needs to know, or reasonably be expected to know that the person has a disability. So the most obvious example of this is if a person is in a wheelchair, if a person is blind and has a service dog, that's an obvious disability and they obviously would need an accommodation to any sort of pet policy to allow their service dog. And in some limited situations, the housing provider might pay for the accommodation if it's not unduly burdensome. So when can you make a request for reasonable accommodation? Under FEHA and I cite to the regulation here, you can really make the accomodation at almost any time, including after an unlawful detainer trial, after a writ of eviction is issued and even after an eviction in certain circumstances. And we'll get more into like sort of the details of how you make the requests and how the landlord responds. But each request requires an individualized analysis. So although you can make a request at any time, whether or not at that particular time, a request would be considered reasonable, which be based on that person's individual situation. So it could kind of vary whether or not it might be reasonable for one person reasonable accommodation requests after an eviction. It might not be reasonable for one person, but might be reasonable for someone else. So what should you include in your reasonable accommodation requests? Reasonable accommodations aren't very complicated. When a tenant makes a request, they don't need to use the phrase reasonable accommodation. I think, you know, as an attorney, if you're making that request, you should use that phrase. But point being, if you're talking to a client, if you're doing an intake and they say, well, I have a disability and I asked my landlord for this, and they said no, even if they don't use a phrase reasonable accommodation, you can deduce that this was what was requested was essentially reasonable accommodation and then you might have a defense to unlawful retainer, or a claim for disability discrimination. But if you're doing it yourself, the best practice is one, you wanna obviously describe your disability. You don't have to give a diagnosis, you don't have to give like official medical records to explain your disability, you just have to say sort of what the symptoms are, what the disability is, and only to the extent that it's connected to the accommodation you're requesting. So it's generally referred to as the nexus between the disability and accommodation. So you're gonna describe a disability, you're gonna describe the accommodation that you need, you make that connection. In the context of an unlawful detainer, it's helpful to describe how that accommodation would help keep the tenant housed, help keep the tenant from maybe violating a lease provision, that could be the basis of an unlawful detainer from keeping up with rent and stuff like that. You also want to include contact information. So if you have the attorney doing it and you want the landlord to respond to you, don't forget to include your contact information. Having a deadline to respond is really helpful. The law requires a landlord to respond with an a reasonable amount of time and a lack of response can be effectively a denial. I still think it's helpful too. So there's not like a prescribed specific time in the law, but I think it's helpful to put in a timeline, particularly with how quickly unlawful detainers, you know, how quickly the process moves. If you've got a three day notice, you put in reasonable accommodation, you know, requesting a turnaround in like 24 hours because the amount of time you have to maybe comply with the notice secure is very short. I think it's also helpful to cite the law. I put in here case law and citations to regulations and code. I think sometimes some landlords see that and think like, oh, this is like scary, they're citing to the law, it might be more likely to comply. Although again, that's not necessary. Point being that if you have a client who sort of hasn't done all of that, that doesn't mean they haven't put in a proper reasonable accommodation request. So verification of disability. The landlord might ask, you know, well how do I know you have a disability? I want some sort of verification for that. Now the important thing to note here is the bar for that is very, very low, especially under FEHA. It's a little bit higher under the Fair Housing Act, but under FEHA, an individual with a disability can provide a statement themselves. The law refers to it as a credible statement and that should be enough. If it's readily available and you have other means of verifying, I think that would be easier to just provide that. So the obvious one being, you know, a doctor's note something around, you know, something related to that. But it could also be verification from a social worker, a therapist, non-medical service provider, a reliable third party. So that could be a roommate, that could be a friend, that could be a family member. Documentation. Again, the bar up for this is also low. It doesn't have to be official medical records, it doesn't have to be a diagnosis. You can show like, here's a prescription for medication if you feel comfortable with that just to show something. And then the important thing to know is that you only need to show what is necessary to show that you need the accommodation, right? So if you, you know, maybe have a complicated medical history and multiple disabilities, the landlord doesn't have a right to all that information at all. The only thing that you really need to provide is the basis to show why you need the accommodation. Okay, so you've made the request, what happens after you've made their request? So how might the landlord respond, or how should the landlord respond? So there needs to be an individualized assessment for each person and each request, even if a request has been made multiple times. So again, there might be someone who requested a reasonable accommodation to allow an emotional support animal and wasn't able to show a clear nexus between their disability and the support animal. Doesn't mean that a different person making the exact same accommodation should not also be assessed to be able to have an emotional support animal. This is the law makes clear that it's regardless of prior or future requests, you can make the same requests multiple times. You know, people with disabilities, people with certain illnesses that can change over time. So a request at one point might not be considered reasonable and at another point could be considered reasonable. You can't base a decision on opening the door to similar requests. So someone might have, you know, a big request that might require a significant change. But just because the landlord wouldn't be able to make that request for everybody in an apartment building would not be a basis to deny a request. The landlord also has to engage in what's called the interactive process. So what this means is essentially the landlord can't just say no, especially if it was a decently written or a requested reasonable accommodation request. So there needs to be a good faith interaction between landlords and tenants. In my experience, a lot of times it's unfortunately when you ask for reasonable accommodation, the landlord either doesn't reply, or just flat out says no. But what the landlord is supposed to do is, the interactive process is this process of asking questions, sharing information, determining how the accommodation would be implemented, determining if there's alternatives that would be better. Even if the reasonable accommodation request was not sort of adequately stated, or might be considered unreasonable, the landlord still has a responsibility to engage in the interactive process to see if the parties can come to a reasonable accommodation to find alternative accommodations. So, you know, for example, if a person has, you know, if there's a lease provision that says you can't have guests for more than 14 days, but someone is going through maybe an episode of PTSD that is particularly distressful and they need someone there for more than 14 days, the landlord just can't flat out say no to that. They have to make a determination of, well, you know, what's the disability? Why is more than 14 days appropriate? Is a different amount of days also reasonable and go through this process and really have a discussion with the tenant. So the interactive process, just sort of as a side note, the interactive process is required under FEHA, but it's not required under the Fair Housing Act. Again, it's sort of, you know, presumably if you're in California you would just litigate it under FEHA but it is encouraged under the Fair Housing Act, under guidance from HUD and the DOJ and the failure to engage in the interactive process under the Fair Housing Act could be a factor to consider on whether or not the landlord engage in disability discrimination. All right, so here are some reasonable accommodation examples that could potentially help prevent an eviction. Again, this is, you know, this isn't sort of, this is gonna work a hundred percent of the time for everybody as an individual analysis. So it's going to depend on the person, the situation, the landlord and the person's disability. But none of these are blanket nos either, right? So a reasonable accommodation could be rescinding a notice of eviction and dismissing an unlawful detainer. So I cite here to case McAlister where this happened. So you know, this could be a situation where, you know, you've received a notice for having violating a pet policy, but you're requesting a reasonable accommodation for an emotional support animal. In addition to the accommodation for the emotional support animal, it should also ask for an accommodation to rescind any notice to perform covenants or quit, or any someone's in complaint of the unlawful detainer. Other reasonable accommodations that people are probably familiar with against the policies and rules. Something that would be in a lease is allowing animals, allowing guests and subleasing, or allowing additional occupants if someone has a home health aide that they need. If someone needs a guest, as per my previous example, you know, for emotional support, for physical help in the home, these are also accommodations that can be requested. Additional examples, more time to comply with the notice secure. So I think a good example of this would be in a case of someone hoarding, oftentimes, and this might vary depending on what city that you live in and what the local ordinance for your city are, but generally you people have a minimum of three days to comply with a notice to perform covenants or quit. And with hoarding, you're not gonna be able to, you know, comply with that in three days. Hoarding is a disability, so that should be a reasonable accommodation request for more time. And I would also argue that given the fact that it would be an obvious disability, the landlord, if the landlord is evicting for hoarding and hoarding is a disability, they know that it's an obvious disability and they have an affirmative obligation to provide a reasonable accommodation. And the most obvious reasonable accommodation in that situation would be more time to cure. So when it comes to non-payment of rent, a reasonable accommodation can be paying rent on a different schedule. So, you know, income you're con you're getting from social security, or other sources might not be coming in a way that coincides with your rent payment schedule. So requesting to pay on a different day of the month, requesting to maybe pay half the rent in the beginning, half the rent later in the month. Obviously they're gonna be some limitations to this and that the capitalist society that we live in, you know, you're never gonna be able to request a reasonable accommodation to pay less rent. And you know, I think this is kind of one of the things where, depending on what judge you're in front of, you know, a judge, some judges might think it's more reasonable than others, but there is some basis in the federal, or the FEHA regulations for paying rent on a different schedule that I cite to here. So that would be a good thing to point to for having a basis to change the way you pay the rent. More time to move after writ of eviction was issued. I know this does get a little complicated with sort of the court system and requiring payment of rent and that kind of being done through the court system, but you can still request it as a reasonable accommodation as well. Property damage can be something that happens and that can also be a reasonable accommodation request. And again, that's sort of the thing. Another thing that would depend on the individualized analysis, that's gonna depend on the basis for the damage, the cost of the damage and stuff like that. But as just sort of a basic example, you know, if you're a person with a wheelchair and maybe the doorframe is just a little narrow, so you're hitting the doorframe often and damaging it, that shouldn't be a basis to evict someone. And that should be something where you can ask for a reasonable accommodation that, you know, that will continue to be damaged through their tenancy, but will be fixed at the end of their tenancy, or something like that. And of course I think it's important to think about, you know, there some landlords are just quick to say this is a lease violation. Well you also pay a security deposit for damage and that's assessed when a person moves out, right? So using that to address property damage rather than an unlawful detainer is much more reasonable, especially for a person with a disability. Okay, so exceptions, this is sort of the landlord's defenses to reasonable accommodation. So a landlord can claim that a reasonable accommodation cannot be provided because it's an undue financial or administrative burden. So that is also fairly fact specific. A landlord can't just say, oh yeah, it's, you know, this is too difficult for me. So what the state regulations say under FEHA is there's these factors right here that need to be considered when determining whether it's an undue burden, right? So the cost and financial resources of the landlord. So this means that the analysis is gonna be very different if it's a landlord that owns, you know, one single family home, or one small property versus a big time landlord that owns several buildings or one large building. You're also balancing that to the benefit to the tenant. Is it a huge resource for a small benefit to the tenant. The availability of equally effective, less expensive alternatives. So the landlord's not required to grant the reasonable accommodation requests that you request. They can give an alternative and if the alternative addresses your disability in the same way, or alleviates issues related to your disability, that could be a reasonable response to an accommodation request. Undue burden also considers whether or not the landlord, or the housing provider is part of a larger entity that has more resources. This kind of goes back to the cost and financial resources of the landlord in general. It will also take into consideration whether the accommodation's needed because of a failure of the landlord to comply with other laws. The most obvious example of this being, you know, unfortunately a lot of landlords will let their apartment buildings go into disrepair. So is that oftentimes is gonna create a larger burden on a person with a disability, especially a person with a mobility disability, or a physical disability. So, you know, if there were steps to the home that have not been maintained, if they're stairs and now a person with mobility disability can't get down it and they need, I am forgetting the word at the moment, you know, railings, they need something to hold onto to get up and down the steps. You know, it might be that that is an undue financial burden for a small time landlord, but the landlord has a duty of habitability to maintain the property and the landlord hasn't done that in a long time and that's why the steps have fallen into disrepair and it's become now harder for a person with a physical disability, then the landlord can't really rely on that undue financial burden argument in the same way. And then finally the or then an undue administrative burden. I can't think of too many examples where something would be an undue administrative burden. But, you know, something obviously that would just require a lot of management, a lot of more than just money, but a lot of work on the part of the landlord or management company. And then fundamental alteration, so that you cannot change the essential nature of the services that a landlord or a housing provider gives. So one example of that would be a run of the mill reasonable accommodation is for an emotional support animal. But what would possibly change the essential nature of the service is if you also ask for like, a reasonable accommodation to have, you know, a little, like, dog park within the apartment, or within the property, so that your dog can like roam freely. That might be considered changing the essential nature of the services, 'cause it's providing this additional service for the dog beyond what's provided to any of the other occupants in the apartment and is more than just sort of changing a policy, or provision of a lease. But that would again, would still sort of depend on the individual situation. If there, you know, is like an area that a dog could clearly roam in that you would just need to put a fence in that might be considered more reasonable. Okay. Oh, here. Well, here's another example of fundamental alteration if a landlord doesn't normally provide social services. So I think it's important to note that FEHA, you know, we often think of just in the unlawful detainers like the slum lords, but this could, you know, someone can also be evicted obviously from permanent supportive housing, from social housing, from other types of housing. So in housing where someone there might, it might come with social services, then a reasonable accommodation could be changing those social services. But if it's just run of the mill housing that doesn't have any services connected to it, then that would be a fundamental alteration. Another basis for a landlord to say, no, I'm not gonna grant this reason accommodation request if it could present a direct threat to the health and safety of other people. So this could be a difficult one for some people with particular disabilities, but it is the analysis for direct threat is somewhat narrow and very individualized. And I think it's really important to keep that in mind when representing a person who, particularly who's in an unlawful detainer for behavior related things where they're fighting with neighbors, where they're maybe yelling outside and so the direct threat is a substantial risk of bodily harm. So yelling at someone is not a substantial risk of bodily harm, right? It also includes physical damage to the property. And a really important thing to keep in mind is that you can request an additional reasonable accommodation to a address the risk of a direct threat. And if that will mitigate the harm, then the landlord really can't use the direct threat to health and safety as a basis to not grant a reasonable accommodation. So how do you determine if a reasonable accommodation, or a person is a direct threat? Again, as with all things with their reasonable accommodation, it requires an individualized assessment. You know, someone who might have schizophrenia, you know, a lot of times the assumption is, well this person is a threat, this person is violent. You can't base assessments on direct threats, on stereotypes and unsubstantiated evidence, or on the basis of a different person with the same disability or illness. The evidence needs to be objective and recent. If someone had an issue years ago with maybe a neighbor where there was something violent that happened, or an assault, that was a long time ago, that's not recent evidence and that can't necessarily be used now. The landlord also needs to look at the nature, duration and severity of the risks. So again, I think the most sort of obvious thing is someone who might yell a lot. You know, I've helped tenants where, you know, they might not understand sort of like basic boundaries where they talk to their neighbors a lot, they maybe knock on their neighbor's door, but they're not, that's not a severe risk of a health and safety issue, right? That's not something, you know, and also looking at how long has this been lasting? How long has this been going on? Also looking at the likelihood that something will happen, right? If there's ever been a physical altercation, but someone's yelling, then the likelihood is low. Direct threat also applies to support animals. So I mean, I think I love dogs. I think that sort of obvious example is pit bulls, people just automatically will perceive pit bulls as being a direct threat. But the dog has to go through this same analysis. Have they ever actually attacked anyone? Has anything ever actually happened? And if the answer is no, then they're not a direct threat. Okay, so looking more specifically at evictions. So the things that are a little bit more obvious, obviously an unlawful eviction is evicting a person just because they have a disability. Again, that's gonna be relatively rare that it's going to be obvious that, you know, you're not gonna see in a notice that you're being evicted because you're blind, right? So oftentimes you have to read between the lines. This could also be because of an association with a person with a disability. I recently was interacting with someone who they themselves didn't have a disability, but their mother that they lived with had a disability and they were handling all of the reasonable accommodation requests and issues related to their disability and then they received a, you know, an eviction notice. Because of that, I was really connected to their association with the person in their home who had a disability. Being regarded as having disability, even if you don't have one, I'm including in here for having a section eight voucher. It is unlawful to evict someone for having section eight, or to refuse to rent to someone for having section eight. I include that in there because section eight, I think it some localities prioritize section eight vouchers for people with disabilities. And for a lot of people who are on SSI or SSD, like I mentioned earlier, a section eight voucher might be the only way they can really afford rent since it would be 30% of their social income, or social security. Again failing to provide a reasonable accommodation. Now when we're talking about this in the context of an unlawful detainer, it's important to note that the reasonable accommodation request needs to be related to the possession of the property or the eviction for it to be an affirmative defense in an unlawful detainer, right? So let's say for example, you requested a reasonable accommodation to have an emotional support animal, and the landlord said no, unlawfully said no, and then the landlord evicts you for not paying rent and indeed you haven't paid rent, that is sort of two separate issues because the rejection has a reasonable accommodation for an emotional support animal isn't related now to the possession of the property related to the non-payment of rent, unless you can kind of make a connection that, you know, you did in fact pay the rent and this is actually in retaliation for requesting the reasonable accommodation. Other protected classes, so unfortunately there is a lot of overlap here. So you know, if the eviction's also related to based on race, gender, gender expression, sexual orientation and then finally retaliation for asserting your rights. So if you've made a complaint to the Civil Rights Department for disability discrimination and now the landlord's trying to evict you under some pretense, that could be considered retaliation and that would be an unlawful eviction. So I'm just adding the code for nuisance here. When I was doing fiction cases, I feel like a lot of times evicting someone for a disability came under nuisance. So I think it, when dealing with that, it's really important to sort of keep in mind like what is the definition of nuisance and trying to defend against that, because I think a lot of times a person's disability doesn't actually qualify as a nuisance. So I think the most relevant part of this is where it says obstruction to the free use of property. So preventing someone from using property in a manner that interferes with the comfortable enjoyment of life or property. So, you know, unfortunately this could come up to the judge's interpretation of what this means, but to me this is a higher standard than, you know, maybe a person with a disability who neighbors might find annoying, or might find a nuisance in more of the commonplace use of the term as opposed to the legal term. So that's just something to keep in mind. So in your UD form, these are the sections that you're going to wanna check off as affirmative defenses. The one on page three, the second one's the most obvious one, the refusal to provide reasonable accommodation, again, it should be connected to the basis for the unlawful detainer. And then you might also have a claim for the top one serving the defendant knows to quit arbitrarily discriminating against them, violation of the constitution, or the laws of the United States. So that might be an opportunity to bring in some of the other laws we mentioned like the ADA. So how would you actually like fight the eviction? So I think this is sort of the million dollar question and the sort of the hardest thing to do. So the most obvious thing, right? Is putting it in as an affirmative defense, checking that box off on the UD form. I think a lot of us know that that is not even half the battle to put it in as affirmative defense, 'cause you don't always get the opportunity to litigate it and there's a lot of pressure to settle. So that's sort of like the baseline of what you want to do. Another option would be, as soon as a person receives a notice, that three-day notice, any other predicate notice, filing for a temporary restraining order, or preliminary injunction. If that notice is based on something related to denied reasonable accommodation, something related to a person's disability on another unlawful basis for an eviction, that way potentially you can stop the unlawful detainer from ever even being filed at least temporarily. I think that is probably sort of best case scenario. Once that unlawful detainer has been filed, it becomes a lot more difficult. Obviously I know that that could, that is very difficult for an unlawful detainer attorney to do, 'cause sometimes you don't meet the client until they're already in the position where they've been served as summons and complaint and sometimes you meet them even later than that. And I also know that oftentimes people aren't gonna have this resources and means in addition to helping someone with an unlawful detainer, preparing for an unlawful detainer to then also file a temporary restraining order. One thing I'll say is, if anyone's in that position, you know, DREDF doesn't have a huge amount of staff, but if you're in a position where, you know, you feel like you have this strong disability claim and you want to go the temporary restraining order route, preliminary injunction route, like reach out to our office and we'll see if there's something we can do to help you with that. And I'll put my email in the chat at the end and the last slide has my email in it. But I think that that's sort of like a gap in services that needs to be filled that, you know, we can maybe make a small attempt to do at DREDF. If another option, which is a gray area I would say, is filing an affirmative case in requesting a stay of unlawful detainer. Now a lot of that obviously is gonna be up to the UD judge to decide whether or not to stay the unlawful detainer. And in my sort of research and preparing for this training, I couldn't find a case that was sort of directly on point with disability discrimination. If anyone's aware of that case, please drop it in the chat, but it's sort of, it's very limited that doing this would have success. I think some judges would say you can, you know, instead of bringing, you know, staying the unlawful detainer, you can bring this as an affirmative defense and litigate it that way. If we're talking about disability discrimination, or failure to provide a reasonable accommodation that is connected to the possession of the property. But I put it out there because it's not something you definitely can't do in most cases. I think if you can argue that the disability discrimination is sort of like too complex for a summary proceeding, you might have a better basis to stay an unlawful detainer to litigate an affirmative case. But I think that that, you know, is a potential strategy that is worth trying, although I can't, you know, guarantee the success of that. Okay, so now we're gonna talk more about preclusion. I think this is sort of an issue less that comes up less often in trainings and stuff like that. So I thought it'd be an important thing to kind of make people aware of. So if you, it is possible that if you bring an affirmative case, or if you litigate an issue under a UD, that you would then be precluded in an affirmative case. So if you put in a reasonable accommodation, the denial of reasonable accommodation, it is affirmative defense in a UD, the unlawful detainer, even though it's a summary proceeding, is still considered a court of competent jurisdiction. And then you could be precluded if you put that in as an affirmative defense to then later litigating that issue in an affirmative case. And by that I mean you can still, you know, bring an affirmative case since you can't get damages through UD as a tenant that you can't bring cross claims. You know, you could bring an affirmative case, but the denial of a reasonable accommodation isn't up for debate again. So if you are denied a reasonable accommodation, you successfully litigate that in a UD, you know, that might be a good basis to bring in affirmative case for more relief. But if you don't successfully litigate that in a UD, you might, you'll be likely precluded from addressing that issue in an affirmative case. So these are sort of the elements of Issue Preclusion, also known as Collateral Estoppel, which is a little bit different from claim preclusion or res judicata, which will be the next slide. But in order to preclude a particular issue. So the issue of whether or not a reasonable accommodation was in fact disability discrimination, you need a final judgment. The issues need to be identical. So we're talking about the same reasonable accommodation requests. The issue needs to be litigated and decided, and needs to be the same party or people who are in privity with a party, excuse me. So privity of the party might mean, you know, there might have been two owners to a property who brought an unlawful detainer, but only one owner was named on the unlawful detainer. Now that second owner in a second case would likely be considered to have been in privity with the first owner who was named an unlawful detainer. So you can't get around preclusion that way. Similar standard for claim preclusion res judicata. So this isn't just the issue like the specific facts of the case, but this is the causes of action that someone could bring. So it's the same cause of action, same parties, a privy of parties, a final judgment on the merits. Now when it comes to res judicata, courts have recognized that summary proceedings don't give people a lot of opportunity to fully litigate. So res judicata is narrow when it comes to UD. So there is some leeway to getting around res judicata, but that is sort of the kind of thing, there isn't a bright line rule about that. It'll kind of be up, it'll basically be up to the judge and the court will look at whether or not there is an opportunity to litigate the affirmative defenses. So again, depending on your judge, this is gonna look differently. Some cases have seen that a person has, you know, they might list the failure to provide a reasonable accommodation as an affirmative defense and then they settle the case. So really that issue, I would argue wasn't litigated to the final judgments on the merits. But courts have seen that as, well, you could have litigated it to the final judgment on the merits, but you chose to take a settlement agreement, so you had the opportunity to litigate and you chose not to. So these are sort of, so if you're kind of going the affirmative litigation route, these are some issues to consider if you're litigating the same issues in an unlawful detainer. Okay, so we have eight minutes left. I'll see if we, I have two hypotheticals, I'll see if we can get through one and then have some time for questions. So I don't know if I can, okay, I'm gonna try to look at the chat while we go through this. So the hypothetical is, Heather has lived in her apartment for 10 years and has Parkinson's disease. Last month she received a notice of termination for having a friend move into her apartment in violation of her lease, which prohibits subleasing without landlord approval. Heather asked for a reasonable accommodation to allow her friend to stay and to rescind the notice. The landlord says no and plans to move forward with the eviction. So what other information do you need to know? What did the landlord do wrong? How would you help Heather? So maybe if people wanna put in the chat what other information if, you know, if Heather came to you with this notice, you're doing an intake and this is all she told you, what other information do you need? All right, so Leslie is saying the purpose of the friend, was a friend moving into assist in her day-to-day activities? Someone else want to add in a suggestion? Landlord did not engage in the interactive process to the friend, pay rent or utilities. So this is all good. So yeah, I would say sort of the biggest thing is that the, Heather and her reasonable accommodation requests didn't show a nexus between her disability and the friend moving in. So I think the sort of first question was that, the first comment on the chat was, you know, what was the purpose of the friend? So the fact that is the friend there to help Heather with her Parkinson's? Is she there as a home health aide? Is she there maybe to provide emotional support? In which case there would be a nexus between the friend being there and requesting a modification of the lease to allow her to be there? So yeah, so the other thing that people are getting at is the interactive process. And as Jessica said, did the landlord actually consider the RA or did they offer alternatives? So that's another good point. So the landlord just said no. And again, with the interactive process, I would say that Heather didn't write, you know, didn't request a reasonable accommodation in the best way because she didn't provide a nexus, right? But that doesn't allow the landlord to just say no, the landlord still needs to engage in the interactive process. So the landlord, you know, should have responded with, well why do you need your friend there? Like, what's, you know, what's going on here? The other thing I would also ask Heather is, how long has your friend lived there and how long has your landlord known? If the friend has been there for the last year and the landlord lives on the property and says hello to the friend regularly, sort of as a separate issue, you know, it could be that the landlord waived that provision of the lease also. So that's another thing to consider in representing people with disabilities who might be like on their face violating their lease. The landlord might have waived, challenging that provision of the lease if that violation has been like open and obvious and the landlord has known about it for a long time. So that's another thing that I would ask. And then the other thing too that the landlord might think is like, well you've been here for 10 years and you haven't had a problem, so this isn't a reasonable accommodation. Well we need to consider Heather's current situation and unfortunately with Parkinson's it's a, you get worse over time. So she might not have needed a reasonable accommodation for a Parkinson's when she first moved in, but might need it now. Okay, I think I had a couple other questions in that, but I think that was pretty good overview. So I wanna leave the last few minutes for questions. And I think the last thing Leslie said in the chat was good. I think if I was the attorney here, the sort of the first, one of the first things I would do is send another visible accommodation request making all these things clear. So I'm just going to, oh, so here are a few resources. We're gonna share the PowerPoint afterwards, so you all can look at this. And there's also additional trainings on DREDF's website. I'm gonna put this up so that you have my email. So I know we don't have much time for questions, so feel free to email me with questions. And then also as I said, you know, if you find yourself in a situation where you want to bring a TRO or something like that but don't have the capacity, reach out to us, we can see if we can try to help you with something like that. I'm gonna look at the Q and A. David asks, is there any case law or statutory authority regarding making a reasonable accommodation to modify an existing settlement agreement in a UD case, for example, more time to move for a move out step or getting another chance to comply for a conduct step after violation? And that is a great question, David. I'm not aware of any case law that says that. I would argue that under the FEHA regulations that says that you can make, and if you have regulations says that you can make a reasonable accommodation request after a judgment and an unlawful detainer, after a writ of eviction has been issued. So I would argue that if you can make a reasonable accommodation request in that situation that you could make a reasonable accommodation request to modify a settlement agreement is a little bit difficult though depending on the language of the settlement agreement. You know, a lot of settlement agreements will sort of, will have language that this cannot be modified unless both parties sign a written agreement to that effect. You know, in language saying like this is the, you know, all the terms of the settlement agreement is, you know, in the four corners of the agreement and you can't use outside agreements. So what I would say is that you, I would say that you can make the request for sure, and that would really be an individualized assessment as to in that particular situation, in that particular settlement agreement, whether or not it would be reasonable. So, and then I will answer one more question from Philip. This is, does a tenant have a duty to provide notice of their disability to the landlord prior to an RA request? That doesn't seem to have been a factor in your slide. So no a tenant does not have to provide any notice of their disability to the landlord. Landlord really shouldn't be asking in person about their disability. If you have, you know, if you have, if there's some sort of question to that effect when applying to live somewhere that, you know, that could be a basis for an unlawful discrimination claim. You only really have to explain the disability when you make the reasonable accommodation request. There doesn't need to be any prior notice. And again, the information that you're giving about your disability, you don't have to give a diagnosis, you don't have to give detailed information. You only have to give enough information to show the nexus between your disability and the requested accommodation, thus showing why you need that accommodation. Okay, y'all, thank you so much. I appreciate the suggestion for 90 minutes. I definitely think an hour is not enough time and we will definitely think about that again. Just for a little housekeeping, I see someone ask, can we see this training again? All of our trainings are generally posted on our website. So if you go to dredf.org, it's usually, it takes us a little while to get it posted sometimes, but it'll be on our website. You can check it out. If you don't see it, email me at eneff@dreadf.org. We'll be sending you evaluations to fill out and then your MCLE certificates as well as a copy of this PowerPoint within the next couple of days or so. Thank you all, and you'll be getting one MCLE credit for this. It'll just be a general credit. Thank you all for your time. Best of luck representing people. And also thank you all for all the hard work you do in representing people and evictions and enjoy the rest of your day. Bye.