Scott M. Clark
Arizona Bar # 6759
Law Offices of Scott M. Clark
3008 N 44th St
Phoenix, AZ 85018

Andrew Hull
Arizona Bar # 004153
Andrew Hull Attorney at Law
301 E. Bethany Home Rd., 295-C
Phoenix, AZ 85012

J. Denton Dobbins, Jr.
Arizona Bar # 013519
Koglmeier, Dobbins & Smith.
715 North Gilbert Road, Suite 5
Mesa, Arizona 85203

Matthew D. Koglmeier
Arizona Bar # 007200
715 North Gilbert Road
Ste. 5
Mesa, Arizona 85203

Mark Heldenbrand
Arizona Bar # 011790
J. Mark Heldenbrand Attorney at Law
300 W. Clarendon Ave., Ste. 325
Phoenix, AZ 85013

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	SUPREME COURT
	)	No. R-07-0023
PETITION FOR	)	**CORRECTED**
PROCEDURE FOR	)	COMMENTS ON
EVICTION ACTION	)	PROPOSED RULES

WHO ARE WE

As Arizona attorneys representing landlords in landlord-tenant and fair housing matters for a combined 117 years in Arizona, we write these comments in concert with the Arizona Multihousing Association (AMA). AMA is a professional trade association representing over 2,200 members and 210,000 rental units in the State of Arizona. AMA members include owners of large multi-family properties, property management companies, developers, individual rental owners and the vendors that serve this vital industry. AMA was formed in 1966 to promote industry professionalism, create educational opportunities and engage in government relations.

The work of our combined practices attorneys work includes evictions for residential rental units in almost every Justice of the Peace court in Arizona, and combined our firms represent property owners and managers in tens of thousands of cases per year, primarily in the Maricopa County Justice of the Peace courts, but also in every county in the State.

BACKGROUND and INTRODUCTION

It is our understanding that the State Bar's Landlord Tenant Task force was formed primarily as a response to concerns raised in a report titled, "Injustice in No Time: The Experience of Tenants in Maricopa County Justice Courts**"** (herein, *the Morris Report*).

The Morris Report was based on the observations of 626 cases over a ten-week period in the summer of 2004 in 14 Maricopa County Justice courts. Within the pool of observed cases, 128 files were reviewed, including five cases that were not observed.

We believe the Morris Report contained several flaws and that it was not an appropriate reference document for the following reasons:

1. Many economists suggest that as rule of thumb for large pools of data, one doesn't need a specific percentage if at least 300+ cases can be sampled. The economists we spoke with tell us that the authors of the Morris report used a "convenience sample," not a "strict random sample," which is projectable to the total universe. Generally, economists like to work with samples of no less than 400 samples if the universe is over 10,000 in order to generate a margin of error of +/- 5% at a 95% confidence level. *The Morris Report was based on a universe of 82,000 cases from which 128 case files were pulled and reviewed. This does not provide a statistically valid sample*.

2. The Morris Report does not summarize how many of the 128 case studies or 600 cases observed were filed for failure to pay rent. But, according to the Elliot D. Pollack & Company report (herein *the Pollack Report*), recently completed on behalf of Arizona's Rental Housing Industry (including the Arizona Association of Realtors, the Arizona Multihousing Association, Manufactured Housing Communities of Arizona and the National Apartment Association), 96% of the eviction cases studied were for non-payment of rent [*the Pollack Report*, page 4].

3. Under the Arizona Residential Landlord & Tenant Act not being able to pay rent is not a defense. Even if a defendant has lost a job or is otherwise financially challenged, the courts are required to grant a judgment for the landlord in these cases. For this reason alone, almost all tenants elect not to appear in court as demonstrated in both the Pollack Report and the Morris Report.

4. The Morris Report included anecdotal comments with no basis of fact, such as, "the courts provide helpful information to landlords, but limited and occasionally incorrect information to tenants"; "the Justices hold tenants to a higher standard of proof for defenses"; "unrepresented tenants rarely had their eviction cases dismissed"; and "currently, the extremely fast and abbreviated proceedings mete out swift judgments, overwhelmingly in favor of the landlords". What the Morris Report fails to acknowledge is that because 96% of the cases in the JP Courts are for non-payment of rent, the tenants already know whether he or she can pay the

rent and whether a judgment will be entered for the landlord. And when the tenant has no way to pay, almost all opt not to appear. This is the primary reason many tenants do not appear in court; not due to lack of proper notice as suggested in the Morris Report.

The State Bar Task Force (herein "*the Task Force"*) began meeting in 2005 and included 29 members. The Task Force, while comprised of many esteemed participants, did not reflect a fair or balanced mix of members representing both defendants and plaintiffs in landlord-tenant cases. The three "landlord attorneys" were significantly outnumbered by persons currently or recently affiliated with the Morris Institute or Community Legal Services, both tenant-advocate organizations.

The proposed rule package submitted by the State Bar is of significant concern primarily because, if adopted by the Supreme Court, the rules will increase the cost and time associated with disposition of these cases ultimately affecting rents and tightening rental standards and credit requirements for all residents. This will make it more difficult for those who are lower income to secure an affordable rental residence, but more importantly, the proposed court rule changes will do nothing to increase the number of tenants who appear in court and will do nothing to improve their chances of being successful when they do appear.

The rental housing industry has concluded that for a housing unit renting for $700 per month it currently costs approximately $2,700 - $3,800 to evict a resident from a property depending on how much damage needs to be repaired in the housing unit and how long it takes to find and qualify a new tenant. The costs include:

Item	**Estimated Cost**
Unpaid rent	$700.00
Legal fees and court costs	$275.00
Maintenance and supplies (i.e., repair of damage)	$300.00
Labor for damage repair	$300.00
Painting	$300.00
Replace or repair flooring	$1,300.00
Costs to re-rent the unit and lost rent while the unit is vacant (until re-rented)	$700.00
Total	$3,875.00

These calculations are based on a survey of 55 Arizona rental properties representing 15,853 units. The total cost of an eviction does not include employee time, storage fees if the resident leaves behind any personal belongings, late fees, concessions that may have been given to the resident upon move-in (such as two months free rent), liquidated damages and unpaid utilities.

The proposed rules also fail to take into account the anticipated 44% increase in Justice Court fees that are currently being considered by the Arizona State Legislature (HB2861 and SB1301). These fees do take into account that a typical eviction process takes 30–45 days, until the unit is ready to rent. However, since most housing units are rented on the first of each month, the average timeframe is actually closer to 60 or more days.

We estimate the following costs if the:

- proposed rules are adopted as written;
- HB2861 and SB1301 pass the Legislature; and
- Governor signs the Justice Court Fee increase legislation

Item	**Estimated Cost**
Unpaid rent	$1,050.00
Legal fees and court costs	$550.00
Maintenance and supplies (i.e. repair of damage)	$525.00
Labor for damage repair	$475.00
Painting	$300.00
Replace or repair flooring	$1,300.00
Costs to re-rent the unit and lost rent while the unit is vacant (until re-rented)	$1,050.00
Total (72% Increase)	$5,250.00

The increase in expenses is a result of the additional time for the eviction process from 30 – 45 days to 45 – 90 days, increased cost for legal fees and additional damage to the unit. It has been the experience of rental owners and managers in Arizona that the longer the tenant stays in the unit while the eviction process is pending, the greater potential there is for more damage.

RENTAL HOUSING INDUSTRY CONCERNS REGARDING PROPOSED COURT RULES AND RECOMMENDATIONS

Concern: The Task Force was not a fair and balanced committee of interested stakeholders.

Recommendation: We respectfully request that the Supreme Court convene a balanced committee to review the Task Force recommendations and (1) determine which rules should be implemented so as to improve the efficiency of the courts for the benefit of all parties and (2) to determine what rules require statutory changes and draft those changes as a consensus legislative package. We believe Judge Williams addresses this concern accurately in his minority report filed on 12/26/07. Not addressing the statutory requirements prior to adopting rules will increase confusion and conflict in the Justice Court system for both landlords and tenants.

Concern: *Appendix A - Residential Eviction Information Sheet (published and distribution required by the Arizona Supreme Court).* This proposed rule change is problematic for a number of reasons:

(1) There is not a statutory requirement that landlords be required by the Arizona Supreme Court to provide this information sheet to tenants
(2) Information contained in the proposed appendix appears to provide legal advice to tenants
(3) Information contained in the proposed appendix is not accurate
(4) Cost for printing and distribution is not reasonable
(5) Information regarding the process and resources available to all parties can be provided at the court or on-line similar to what is currently available in Maricopa County at http://www.superiorcourt.maricopa.gov/JusticeCourts/CourtsAndSections/Evictions.asp

Recommendation: We respectfully request that a landlord and tenant information piece be developed by the Supreme Court Task Force recommended above and be made available upon request in all Justice Courts as well as on-line.

Concern: *Rule 4.e. Duties of Parties and Attorneys – Entry of Appearance.* We do not support this rule that will require an attorney "covering or subcontracting" with another attorney to enter a formal appearance as counsel of record. This is not practical as the attorney of record retained by the landlord is responsible for the case. This practice has not been found to be detrimental to residents or the courts. This rule will result in additional cost and court delay as the attorney of record without the ability to cover will

have to reschedule court hearings. Note: Courts outside of Maricopa and Pima counties are likely to be affected to a greater degree.

Recommendation: We respectfully request this rule be rejected as it does not benefit the landlord, tenant or the courts.

Concern: *5 a. Summons and Complaint: Issuance, Content and Service of Process.*

The current practice in Arizona JP Courts is to allow the summons and complaint to be combined into one document. The proposed rules and the supporting commentary suggest that separating the documents may eliminate the impression in some tenants that the court is somehow endorsing the action by the landlord.

There is no evidence, anecdotally from the attorneys and rental unit owners we interviewed, or in the Morris Report or the Pollack Report, to suggest that separating these two documents would increase attendance in these court proceedings or that there is any confusion with the current practice.

Because this current practice has worked so well throughout the years without significant issue, landlords and their attorneys have developed pre-printed, five-part forms and specialized computer software programs, at great expense, to create the summons and complaint as a single document. Requiring that these documents now be separated will cause a complete overhaul of the computer system for the attorneys who practice in this area and require that all preprinted forms be thrown away.

Recommendation: Without a clear finding, supported by, at very least anecdotal information, that a number of tenants failed to act or appear because of the current practice and that there will be a benefit to the tenants and landlords or will create a more effective and efficient eviction, we request that this proposed rule be rejected.

Concern: *Rule 5.a.(5) Summons and Complaint: Issuance, Content and Service of Process.* This rule will require the proposed Appendix A be included on the back of the summons or as a separate page and be served upon the tenant. If the Supreme Court determines this appropriate, it should be prepared and distributed by the court or placed on the court Web site available to the public. This is currently not a statutory requirement. The Arizona Residential Landlord and Tenant Act does not require that a copy of the Act be made available, only that it be referenced in the lease agreement and that it is available through the Secretary of State Web site. The Legislature recognized the cost burden to make such a requirement and this proposed document should be handled in a similar manner.

Recommendation: We respectfully request that the Supreme Court disregard this proposed rule and develop a landlord-tenant information form available on-line. In

addition, if the Supreme Court determines this to be beneficial to the Justice Courts, tenants and landlords, a like requirement should then be added to State Statutes.

Concern: *Rule 5.b.(1) Summons and Complaint: Issuance, Content and Service of Process.* This proposed rule requires the attorney to bring the complaint in the legal name of the party claiming entitlement to possession of the property. This information is readily available to the resident via the county assessor office (see: www.maricopa.gov/Assessor/Residential_Property_links.aspx) and there is a rental registration requirement for all rental units in Arizona. More importantly, however, the tenant who leases an apartment at "Maple Gardens" writes rent checks to "Maple Gardens" and sees property staff wearing "Maple Gardens" uniforms every day will be confused if he or she receives a summons and complaint from the legal entity "Acme Realty Trust". Requiring that the complaint be made in the name of the legal owner will cause confusion for the tenant who is unfamiliar with the other entity.

Recommendation: The current system works well in regard to this issue and we recommend that no changes be made and that the proposed rule be rejected.

Concern: *Rule 5.b.(7) Summons and Complaint: Issuance, Content and Service of Process – State Specific Reason for the Eviction.* This proposed rule requires the complaint to include a specific reason for the eviction; that the defendant was served a proper notice to vacate, if applicable; the date the notice was served; and the manner of service used. It also requires that a copy of the notice be attached as an exhibit to the complaint. State Statutes do not require that the notice be "re-served" upon the tenant as part of the notice process. This will increase costs and time. Currently, the reason for eviction is provided to the tenant in the initial notice as well as on the summons and complaint form (see: Exhibit A in the Pollack Report). By the court date, the tenant has been formally contacted at least twice informing them of the reason for the eviction. In addition, many landlords often contact the resident via telephone or have left numerous voice mail messages. In 96% of the cases (non-payment of rent), this is already being done. Tenants know when they have not paid their rent and they are aware they can and will be evicted for failure to do so. Lacking a legal defense, the majority of these tenants elect not to appear in court.

Recommendation: The current system works well in regard to this issue and we recommend that no changes be made and that the proposed rule be rejected.

Concern: *Rule 5.b.(8) Summons and Complaint: Issuance, Content and Service of Process – Government Subsidy.* In recent years, many affordable and subsidized housing programs have moved towards allowing the use of an apartment community's lease and rules and regulations in order to encourage property owner and manager participation. In those instances where this is being done, participation increases. This is especially true with respect to tenant-based Section 8 vouchers.

The proposed court rule provides a trap for the unwary and, in an industry where staff turnover is 50%, a new manager having to understand an underlying subsidized housing program at her new property may cause her to be unaware of the additional notice requirements of the program. Inconsistencies like these create confusion among apartment managers and cause difficulties for managers who must comply with one set of notice requirements for some residents and another for other residents residing within the same property.

More than anything, this change in the rules does nothing to provide and promote additional affordable housing or make the eviction process more understandable for tenants, more accessible to tenants or improve the outcomes in court for tenants. Instead, rules like this one create obstacles that discourage participation in subsidized housing programs by apartment owners and managers.

Recommendation: The entities that administer the various affordable and subsidized housing programs already enforce their rules. The current system works well in regard to this issue and we recommend that no changes be made and that the proposed rule be rejected.

Concern: *Rule 5.c.(4) Summons and Complaint: Issuance, Content and Service of Process – the Method of Calculating the Late Fee.* The method of calculating late fees is specified in the lease agreement and known to the tenant at the time a lease is executed. In addition, it is not possible to calculate all late fees this early in the eviction process. Current practice is to calculate those fees when the case reaches the court stage and the listing of fees is required.

Recommendation: The current system works well in regard to this issue and we recommend that no changes be made and that the proposed rule be rejected.

Concern: *Rule 5.g.(1) Summons and Complaint: Issuance, Content and Service of Process – Failure to Obtain Service.* Currently, if service is not served in a timely manner, the attorney will ask for a continuance. To dismiss the case and require the landlord to re-file is unnecessary and inappropriate, particularly in cases that involve criminal activity and destruction of property. If the basis for the eviction is for this type of breach, delaying the process additional days or weeks will result in placing the landlord, their employees and other tenants in danger.

Recommendation: The tenant can always ask for the case to be dismissed if notice is not properly served. The current system works well in regard to this issue and we recommend that no changes be made and that the proposed rule be rejected.

Concern: *Rule 9 Motions.* Letter '*g'* of this subsection is open-ended and unnecessary.

Recommendation: The basis for all necessary motions is already codified in this section. We respectfully suggest that letter 'g' of this proposed rule change be rejected.

Concern: *Rule 10 – Disclosure.* Currently there is no disclosure requirement in eviction cases. This requirement is not grounded in State Statutes and will increase the time and cost of eviction cases. Again, 96% of the evictions in Maricopa County Justice Courts are for non-payment of rent, thus disclosure is not necessary and can be used as a stalling technique to allow the tenant to stay in the unit for a longer period of time

Recommendation: The current system works well in regard to this issue and we recommend that no changes be made.

Concern: *Rule 11 – Initial Appearance and Trial Procedure.* This proposed rule will cause delay and increase the cost of evictions.

Recommendation: The current system works well in regard to this issue and we recommend that no changes be made.
.

Concern: *Rule 11.e – Change of Judge.* This rule change will allow the tenant to choose a judge. Currently, if a judge feels he or she has a conflict of interest, the judge may recuse him or herself. We certainly support "change of a judge for cause" where questions of bias or prejudice exist. However, we believe that the already existing practices provide all parties with appropriate protection.

Recommendation: The current system works well in regard to this issue and we recommend that no changes be made and that the proposed rule be rejected.

Concern: *Rule 13.b.(3).(c).Entry of Judgment and Relief Granted – Forms of Judgment.* This requires the attorney to incur the cost of mailing a copy of the default judgment. It is important to note that at this point in the eviction process the tenant would have already been evicted. It is typical in this situation that the landlord does not have a forwarding address and the default judgment mailed would, in most cases, be returned. This will not benefit the tenant and will only increase cost and time associated with the eviction process.

Recommendation: The current system works well in regard to this issue and we recommend that no changes be made and that the proposed rule be rejected.

CONCLUSION

We respectfully request that the rule package not be adopted and that a new fair and balanced task force be created by the Supreme Court to address issues herein. Please note any proposed rules not addressed in this document will have little or no impact on the process and to the rental housing industry.

Thank you for your time and consideration of our position. We will be happy to provide additional information if necessary and look forward to participating in the rule-making process and working with the Supreme Court, a new task force and any other interested parties to craft effective solutions.

Scott Clark

Andrew Hull

Denny Dobbins

Matt Koglmeier

Mark Heldenbrand

Mike Clow – AMA 2008 Chairman of the Board

DATED: May 21, 2008

A copy of this comment has been mailed this 21th day of May 2008 to:

Robert B. Van Wyck, Esq.
Chief Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016