

Business Court Advisory Committee

State Courts Building, Phoenix

Meeting Minutes: June 6, 2014

Members attending: David Rosenbaum (Chair), Michael Arkfeld, Ray Billotte, Andrew Federhar, Glenn Hamer, William Klain, Mark Larson, Lisa Loo, Judge John Rea, Marcus Reinkensmeyer, Stephen Tully, Steven Weinberger, Judge Christopher Whitten

Attending by phone: Judge Scott Rash, Mark Rogers

Absent: Judge Kyle Bryson, Patricia Refo, Nicole Stanton

Staff: Mark Meltzer, Theresa Barrett, Sabrina Nash, Nick Olm

1. Call to Order; Introductions; Preliminary Matters. The Chair called the meeting to order at 9:05 a.m. The Chair welcomed the members and introduced himself and the committee staff. The Chair then invited the members to introduce themselves. The Chair also asked the members to summarize their expectations regarding this committee, and those expectations included the following:

- To make Arizona a more favorable forum for resolving business disputes
- To improve access to justice
- To expeditiously resolve business cases
- To create something that works well for the court
- To improve the quality of justice
- To gain the business community's support for the State of Arizona's dispute resolution system

The Chair noted that while there are a variety of business court models already in existence in other jurisdictions nationwide, this committee is not bound to use any of those models, and the members can "think outside the box" for the structure of an Arizona business court. He also observed that other jurisdictions used Arizona's existing complex civil litigation court as a model for their commercial courts.

The Chair reminded the members that this committee is subject to the open meeting requirements provided by the Arizona Code of Judicial Administration. He referred the members to a page of proposed rules for conducting this committee's business that were included in the June 6 meeting packet. These rules establish policies for a quorum, decision-making, and proxies.

MOTION: A member moved to adopt the proposed rules, which was followed by a second and unanimously passed by the members. **BCAC: 2014-01**

The Chair also reviewed Administrative Order number 2014-48, which established this committee. He noted that the committee's scope is statewide. The Order allows the committee to recommend, if appropriate, a pilot business court.

2. The Need for a Business Court in Arizona. Would Arizona benefit from the establishment of a specialty business court? The Chair pointed out that this question was discussed generally at a "concept" meeting on March 28, 2014 (the notes from the

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meeting also were included in the June 6 meeting packet), and the March 28 discussion led to the establishment of this committee. Members then made the following comments concerning the need for a business court in Arizona:

- Business clients generally want answers to two questions: how long will a case take, and how much will it cost? The current civil docket does not allow accurate answers to either question. For example, discovery and motion practice is “reactive.” Costs for discovery and motions are unknown because in large measure cost is dependent on what the opposing party requests or does. The option of having a simpler approach in some commercial cases would be useful for business clients.
- A business court should utilize judges who have commercial experience. A business court should have predictable procedures and a well-defined time line that would drive down the costs of litigation.
- If a business court had a sufficient volume of cases and a stable group of experienced business judges who published their significant decisions, it would further enhance predictability and possibly result in fewer business disputes. As an example, Arizona’s tax court has authority to publish its decisions.
- Having a bench of experienced commercial judges is the most important factor for predictability. Judges must understand the climate in which business is conducted, the transactional side of business, and how to interpret contracts.
- Regular judicial rotation inhibits judges from gaining specialization in business cases and fails to optimize valuable judicial resources. Rotation of the assigned judge also impairs predictability of the outcome. However, another member noted that regular judicial rotation should not be a significant factor because business cases should be resolved quickly, and in that circumstance, rotation would still permit the same judge to manage the case from inception to disposition.
- This committee should avoid sending a signal that business cases might obtain special judicial treatment that consumer cases, for example, may not receive. Another member observed that some Arizona counties have established benches for family, tax, and other specialized areas of the law, and it seems reasonable to have a dedicated business court too. Business is good for the community as a whole. The court that is envisioned would not be “pro-business” and anti-consumer. Rather, it would resolve disputes between businesses or within a business.
- Florida’s Ninth Judicial Circuit has a detailed list of cases it allows in its business court. The idea underlying a business court is to serve the business community. Consumer cases could remain in a general civil court rather than proceed in a business court.

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- Attracting quality commercial litigators to become business court judges requires an increase in compensation and benefits from what is presently offered. Also, some qualified litigators may be dissuaded from applying for the bench because of a reluctance to assume a juvenile, criminal, or family law calendar.
- The size of the superior court bench in Maricopa County, and possibly in Pima County, should offer the flexibility to have dedicated business court judges, even if they are assigned on a part-time basis. In counties without a business court, statewide rules could still provide a process for management of business cases.
- Business judges need to exercise more oversight over their cases. Judges need to hold parties' "feet-to-the-fire" to control litigation costs. On the other hand, another member suggested that broad discovery motivates parties to settle, because discovery often reveals the most probable outcome of the litigation.
- Cases can be tried more quickly and efficiently with less discovery, although this may lead to less predictability. Before discovery became institutionalized, cases went to trial with little discovery. Criminal cases, even those where the stakes are high, generally are tried more quickly, and with less discovery, than comparatively straightforward civil cases.
- Parties might be amenable to trying a \$250K civil case with little discovery, but they would be reluctant to do so in a \$250M case. Parties involved in controversies with \$100-300K at issue are frustrated by the cost of litigation.
- Cases should be eligible for a business court based on subject matter rather than party status. But if cases are eligible based on case-type, would someone need to be a "gatekeeper" in order to admit a limited volume of cases? Would an Arizona business court be similar to its tax court, i.e., that every case statewide is heard in Maricopa County? Based on current data, how many Arizona cases would be eligible for a business court? **ACTION:** Mr. Billotte and Mr. Reinkensmeyer will attempt to obtain statistical information for this committee. They noted that there may be a large number of cases in "other" or "miscellaneous" categories.
- Pretrial disclosure and ADR contribute to a decrease in the number of jury trials, which is not necessary good for the judicial system. Jury trials are an essential and valuable feature of the court system. What could be done to increase the number of jury trials?
- A higher number of cases in arbitration proceed to a hearing because there is more certainty concerning the arbitrator, and less uncertainty because there is no jury. In addition, litigation costs in arbitration are more proportional to the amount in controversy. New York's accelerated business court procedure is

similar to arbitration, because it allows only limited discovery and a case proceeds to trial in a relatively short time.

- The most important consideration for businesses is the quality of judicial decision-making. Qualitatively better decision-making by more experienced federal judges can motivate a party to file in federal court rather than state court.
- An experienced commercial litigator has little incentive to apply to the bench because judges receive substantially lower compensation and benefits than well-paid attorneys. The majority of applicants for the superior court bench are attorneys from the public sector; in the most recent appointment cycle, only two of thirty applicants were from private practice. This is a matter that should be of concern to the business community. An exercise of political will is needed to assure that judges with solid civil experience are appointed to the bench.
- Attorneys from the public sector who are appointed to the bench may not appreciate the nuances of commercial cases. In jurisdictions such as Delaware, the prestige of the bench drives parties to that forum. If Arizona had an efficient and predictable business court it could, like Delaware, attract litigation from nearby states, such as California. Some business entities are now adopting forum selection clauses in their company charters.

3. Identifying Models and Solutions. The Chair outlined three core issues that this committee needs to address. He proposed workgroups for each of these three core issues:

- A. Judicial selection, including judicial appointments (and a need for the business community to have experienced jurists), judicial assignments, and judicial rotation

On this issue, the members agreed on the importance of retaining merit selection for business court judges, and the need for compensation and benefits that would be appealing to qualified applicants from the private sector. The members also discussed judicial rotation. The rationale for rotation is that judges over the course of ten years can acquire experience in criminal, juvenile, civil, and family departments; but rotation also appears to be driven by judges' preferences for relatively brief assignments to particular benches. The members discussed options that the Supreme Court, which has supervisory authority over the superior court, could exercise concerning assignments and rotations. Options that require changes to Arizona statutes or to the State Constitution would be less practical and more difficult to implement.

- B. Case eligibility, including criteria for a business court case, whether parties would need to opt-in or opt-out, and the process for determining eligibility (and who makes the determination)

Members discussed a range of dollar value criteria for business cases. Having no minimum amount might produce an overwhelming volume of business court-eligible cases, so selection criteria should establish a monetary floor, but not a ceiling. A party

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may wish to have a declaratory action heard in business court even if the party is not seeking money damages. A member referred to an administrative order in Florida's Ninth Judicial District that specifies cases that are eligible for its business court by the type of action. The members also discussed modifications to Arizona's civil cover sheet that might facilitate screening of appropriate business cases.

C. Procedures for business court cases, including rules, discovery, electronic discovery, juries, and time frames

The discussion of this topic (as well as the prior subject of case eligibility) touched on whether waiver of a jury could be an element for admission to a business court, the form of waiver (whether a failure to request a jury would suffice as a waiver, or whether an affirmative waiver would be necessary), or whether waiver of a jury is a desirable requirement for a business court case. Members supporting a waiver noted that it would be more appropriate to have resolution of a business case by an experienced commercial judge than by a lay jury. Members also briefly discussed expedited procedures; discovery limits and checklists; electronic discovery, proportionality, predictive coding, and cost-shifting; and whether rules for a business court should be contained throughout the civil rules or be contained within a single rule. One member raised the scenario of a case that is initially ineligible for a business court, which subsequently becomes eligible because of a counterclaim. Another member suggested early identification of dispositive issues in a business case, as is done by a judge and the parties during a resolution management conference in a family court case.

Members present at the meeting expressed their preferences for serving on one or more of these workgroups. The Chair will finalize the workgroup assignments and staff will notify the members.

4. Roadmap. The Chair reminded the members that this committee will provide its report and recommendations at the December 11, 2014 meeting of the Arizona Judicial Council. Accordingly, and to accommodate logistics, the committee's report and recommendations should be finalized by the first of November. The Chair would like to have an initial draft report by early September.

The Chair confirmed July 11, 2014 as the next meeting date. Administrative staff will contact members concerning their availability for a meeting in August. The members expressed a preference for morning meetings (9 a.m. until noon).

5. Call to the Public; Adjourn. There was no response to a call to the public. The meeting adjourned at 11:40 a.m.

Business Court Advisory Committee
State Courts Building, Phoenix
Meeting Minutes: July 11, 2014

Members attending: David Rosenbaum (Chair), Michael Arkfeld, Ray Billotte, Mark Larson, Lisa Loo, Judge Scott Rash, Judge John Rea, Patricia Refo, Marcus Reinkensmeyer, Mark Rogers, Nicole Stanton, Stephen Tully, Steven Weinberger

Attending by phone: Glenn Hamer by his proxy Katie Fischer, Judge Christopher Whitten

Absent: Judge Kyle Bryson, Andrew Federhar, William Klain

Staff: Mark Meltzer, Theresa Barrett, Sabrina Nash, Nick Olm

1. Call to Order. The Chair called the meeting to order at 9:05 a.m. He thanked the members for their participation in the 3 committee workgroups that were established at the June 6, 2014 meeting. The Chair believes the committee is on schedule to meet the December deadline for reporting to the Arizona Judicial Council. He then requested the members to review draft minutes of the June 6, 2014 meeting.

MOTION: A member moved to approve those minutes, it was followed by a second, and it was unanimously passed by the members. **BCAC: 2014-02**

The Chair then asked for reports from each of the 3 workgroups.

2. Judge Assignment and Rotation Workgroup (presented by Judge Rea). Judge Rea described an issue associated with judicial assignments in Maricopa County. On the one hand, that court recognizes the desirability of assigning a judge to the area of law in which the judge is experienced. On the other hand, the court needs to address its institutional needs. With regard to those needs, Maricopa County judges are currently assigned to one of the superior court's four major divisions: family (27 judges), criminal (27 judges), juvenile (16 judges), and civil (23 judges.) About one-third of the Maricopa judges rotate every year, in part because many family law judges request rotation after completing a 2 or 3 year assignment to the family division, and this impacts the assignment of judges to the other divisions. This circumstance may affect long-term planning for a business court in Maricopa County. Commercial courts in several jurisdictions, including the Delaware Chancery Court, permanently dedicate judges to a business court, or assign their judges to a business court for a decade or longer. A similar, relatively permanent assignment of judges to a business court in Maricopa County may not be achievable. However, Judge Rea believes that in the short term, it might be feasible to establish a pilot business court in Maricopa County that utilizes 3 judges on concurrent 3-year assignments. The optimal time to begin this pilot would be in June 2015, simultaneously with annual judicial rotations.

A 3-year pilot program would allow sufficient time to process and evaluate a meaningful number of cases. The workgroup believes that the committee should recommend that the pilot program adopt metrics for measuring success. The workgroup also recommends that the 3-judge pilot program include a judge from the complex bench

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(who deals with complex business cases), another judge from civil “special assignment” (who may have more flexibility in calendaring), and a third judge from a general civil calendar. It might be useful to compare the effectiveness of these business court judges with a civil judge who may have some business cases, but who does not have a designated business court docket under the pilot program.

The committee members discussed the anticipated volume of business cases for this pilot. They specifically discussed whether assignment of a case would be on a voluntary basis, or whether assignment would be mandatory if the case was otherwise eligible. One member suggested that the committee resolve this decision now because it will influence the committee’s design of the pilot’s rules and procedures. The member was concerned about opposition to a mandatory program if the business court’s rules are significantly different from current rules of civil practice.

A number of members expressed the belief that the program must be mandatory for eligible cases; if the program is voluntary, it might fail to capture the requisite volume of cases. Also, if the program is voluntary, it might lead to a dispute between parties regarding whether they should opt-in or opt-out of the pilot, and this dispute could require judicial resolution; a mandatory pilot would eliminate that issue. Most importantly, the fundamental concept of a business court is that all commercial cases should be heard there. The members agreed that business court rules must have the flexibility to be modified by agreement of the parties or court order so the rules can meet the needs of individual cases. Accordingly, if the needs of an otherwise eligible commercial case warrant reassignment of the case to a general civil calendar, the rules should provide that option. A member also observed that publicizing the business court’s advantages, such as cost effectiveness and efficiency, will garner interest from the legal and business communities and increase overall support for the court.

A related question was whether a case would be eligible for the pilot if it was filed before the program’s implementation date. The members envisioned that the 3 program judges might be able to identify portions of their current caseloads for assignment to the pilot. If non-business court judges could refer some of their existing cases, the program could start with an even larger nucleus of cases. Referrals would need to be selective, because a case could have pre-existing discovery plans that might be disrupted if the case was reassigned to the pilot and subject to a different set of procedures and timelines. Some members also expressed concern about randomly assigning cases to the business court.

ACTION: At the next meeting, Mr. Billotte will provide further statistical information concerning the number of pending cases that might be eligible for the pilot, including more detail regarding a large number of cases that currently appear in a “miscellaneous” category.

A further issue dealt with data collection by court administration after the pilot begins. The members agreed that the court should collect data on business cases both at the time of filing, as well as when the case is resolved. A revised cover sheet would be helpful not only for determining eligibility, but also for capturing front-end data. The Chair observed that someone would need to evaluate the data. One member suggested

that this committee should monitor the data on an ongoing basis. This would allow the committee to propose modifications to rules, forms, or methods of data collection as necessary and appropriate during the term of the 3-year pilot.

3. Case Eligibility Workgroup [presented by Ms. Stanton.] Ms. Stanton reported that in reaching its recommendations, this workgroup discussed business court criteria used by other jurisdictions. The Case Eligibility Workgroup accordingly recommended that criteria for the Arizona pilot should:

- (a) Identify cases that are not eligible for business court.
- (b) Also identify cases that are eligible without regard to the amount in controversy (e.g., actions involving corporate governance, shareholder actions, and lawsuits concerning trade secrets.)
- (c) Include eligibility criteria for a broader set of case types, which were specified in a workgroup memo, when the amount in controversy reaches a designated dollar threshold. Ms. Stanton noted that the workgroup did not reach consensus on the amount of the dollar threshold for this group of cases.

The system envisioned by the workgroup would utilize a “gatekeeper” to confirm that a case is eligible, and the gatekeeper would likely be a business court “duty” judge.

Member comments included the following:

- Can a defendant file a motion to designate a case for the complex court after plaintiff has indicated that it is a business court case? The members agreed that the defendant could do so.
- Are class actions eligible for business court? Possibly. A complex class action is eligible for the complex court. A consumer class action against a business may not belong in a business court, although another type of class action, such as one involving securities fraud, might. The committee should decide whether consumer cases under the UCC are eligible for the program. A similar decision should be made concerning class actions against government entities.
- A “shotgun” complaint might include a cause of action that is eligible for business court, but the case as a whole may not be eligible. The duty judge’s review will determine the eligibility of these cases.
- A recent study by the Maricopa County Court Administrator found that 30 percent of resolved business cases were under \$50,000, and another 15 percent were under \$100,000. The committee’s decision concerning the amount of the dollar threshold could affect eligibility for a significant percentage of cases.
- Equal access to justice means that even cases involving lower dollar amounts should be eligible for business court; some of these cases have issues, and require work, which is comparable to a higher dollar case. One of the concepts supporting a business court is establishing a forum to litigate a smaller

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commercial case cost-effectively. The dollar threshold should therefore be relatively low.

- However, the criteria should not divert cases into business court that are otherwise subject to superior court arbitration. Arbitration cases have high rates of resolution and party satisfaction.
- The volume of eligible cases will have an impact on the workload of business court judges, especially if there is a mandatory Rule 16(d) conference.
- Lawsuits involving business on both sides of the “v.” should presumptively be eligible, and business torts should be in business court, but there are exceptions. For example, a motor vehicle accident involving drivers from two different companies does not belong in business court.
- The list of eligible cases should include a “catch-all” provision.

This committee’s discussion concluded with tentative agreement among the members that the dollar threshold should be \$50,000. The category should include business versus business cases and other categories where a business is a party, but there should be exceptions for certain case types, among them motor vehicle accidents and possibly some class actions or consumer lawsuits. The court sometimes might rely on the parties’ own identification of a case as a “business” case. Even when a case is assigned to business court, if the assignment subsequently appears to be inappropriate, the court can remove it from the business court track (and it could remain assigned to a business court judge.) Furthermore, the proposed rules, similar to the complex rules, might provide that any judge can utilize business court case management techniques in any case where those rules may be useful.

4. Rules, Procedures, and Forms Workgroup [presented by Ms. Refo]. Ms. Refo advised that the workgroup’s most divisive issue was whether admission to the pilot program should require a mandatory waiver of jury. One member asked whether business courts in other jurisdictions require such a waiver (staff was unaware of any), and commented that juries are unpredictable and can drastically alter expected outcomes. The business community would therefore prefer a mandatory jury waiver. Ms. Refo noted that juries typically have the task of discerning who is telling the truth, but the overwhelming majority of cases will be resolved with neither a jury nor a bench trial. One member observed that there are more skirmishes over discovery than battles at trial. In any event, the parties can always waive a jury and try the case to a judge, and a mandatory waiver of jury might be disfavored by the community as a whole. A mandatory waiver also has constitutional dimensions. Although there was not unanimity among the members, the majority sentiment was that a jury waiver should not be a requirement of the pilot business court.

Other case management concerns, including time and expense, were also considered by the workgroup. In particular:

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- There should be a mandatory stay of discovery pending disposition of a motion to dismiss when that motion might resolve the entire case. A partial motion to dismiss only should stay discovery of those issues or claims that are the subject of the motion.
- The business court judges may wish to adopt an abbreviated type of motion practice (for example, “letter motions.”) However, since there are a variety of practices, each business court judge may wish to use his or her preferred method, and the committee should not recommend a uniform practice. Regardless of the method, there needs to be a quick and efficient way of getting issues before a judge to obtain a speedy judicial resolution. A judge member requires the parties to place a telephone call to him prior to filing certain kinds of motions. The judge can rule at the conclusion of the phone call, or if the issue is more complex, the judge then can order the parties to file briefs. If the issue involves a matter requiring special expertise, the judge will encourage the parties to speak with an expert, and the expert can then report to the court.
- A streamlined form of protective order should be available, and it should presumptively be entered by the court upon request of a party. This form should be flexible enough to be customized for the needs of a particular case.
- The business court rules should include a list of documents that presumptively do not belong in a privilege log. The use of agreements under Rule 502 should be encouraged. The business court should also make use of checklists and presumptions that effectively drive down the costs of litigation.
- Early judicial intervention is important. Rule 16 conferences should be mandatory, with “honest to goodness” case management. The parties should confer with the judge on “proportionality” issues early in the case. Early judicial intervention is especially critical in cases where attorneys or parties are unable to independently reach agreement on case management issues.

One member responded that discovery issues are less frequent when all parties realize the detriment of “mutually assured destruction” through excessive discovery. Problems instead arise when one side unilaterally attempts to destroy the other with unnecessary discovery. The member observed the difficulty of legislating professionalism by court rule, and suggested that the court use effective sanctions against counsel who are incompetent or unprofessional. Another member responded that in matters of discovery and disclosure, an attorney relies on what the client provides, and clients can mistakenly or intentionally overlook their obligations. In some particularly complex cases, the attorney for a party may need to be at the client’s workplace to supervise discovery and disclosure. Another member suggested the use of a special master, especially one who has expertise concerning a particular discovery issue. And another member pointed out that some judges have a fundamental philosophy against imposing sanctions. The Chair expressed a hope that business court judges would impose discovery sanctions infrequently, because the business court rules

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should specify what everyone's obligations are and the parties and their attorneys should discuss those obligations at the inception of litigation. A member proposed that the rules could provide a list of what discovery issues the parties need to agree upon in standard cases. The rules could also address streamlining procedures for straightforward cases, and cost-shifting in appropriate situations. Mr. Arkfeld suggested that "sampling" issues be added to that list.

This led to a discussion of electronically stored information ("ESI"). Mr. Arkfeld observed the rapidity with which technology is developing, and he cautioned that a rule written for today's ESI requirements might be inapplicable in the near future. For example, document custodians are being supplanted by servers on the cloud. He also mentioned the cost-saving benefits of new and fast-changing electronic search methodology. He believes that parties should discuss ESI early in the process. He also mentioned that ESI requires a cultural shift: that the parties need to realize, especially in a lower dollar case, the possibility that something might be missed, and that the amount in controversy in many cases does not justify incurring discovery costs to find "everything." He pointed out that a manual review of documents sometimes reveals almost the same amount of information as predictive coding.

Mr. Arkfeld added that digital technology has existed for almost 30 years, yet the legal profession has not kept up with, nor always appreciated, the spectrum of technology. He recommended that attorneys who appear in business court certify that they are competent to handle technology issues that may be present in the case. New York and California have adopted this requirement, although they offer an alternative for counsel to provide a list of other individuals, including experts, who can address those technology issues on their behalf. He encourages parties to "e-disclose" before they "e-discover." He also referred to a New York administrative order that permits the identification of privileged documents by category (for example, e-mail threads) rather than by identifying each individual document.

5. Roadmap. The Chair directed staff to prepare documents that reflect today's discussions for the committee's review at the next meeting. Rules, checklists, and forms that streamline business litigation are a core objective of this committee. One member encouraged the committee's work product to "push the envelope" on ESI issues. The member believes it's untenable that litigation considerations require businesses to retain massive volumes of information. He also noted an expanding gap between the capability of business technology, and the capacity of attorneys to ask the right questions.

The Chair confirmed that the next meeting will be on Friday, August 29, 2014.

6. Call to the Public; Adjourn. There was no response to a call to the public. The meeting adjourned at 11:47 a.m.

Business Court Advisory Committee
State Courts Building, Phoenix
Meeting Minutes: August 29, 2014

Members attending: David Rosenbaum (Chair), Michael Arkfeld, Ray Billotte, Judge Kyle Bryson, Glenn Hamer by his proxy John Ragan, William Klain, Mark Larson, Lisa Loo, Judge Scott Rash, Judge John Rea, Marcus Reinkensmeyer, Mark Rogers, Nicole Stanton, Stephen Tully

Absent: Andrew Federhar, Patricia Refo, Steven Weinberger, Judge Christopher Whitten

Staff: Mark Meltzer, Theresa Barrett, Sabrina Nash, Nick Olm

1. Call to Order. The Chair called the meeting to order at 9:00 a.m. and after preliminary remarks, he requested the members to review draft minutes of the July 11, 2014 meeting.

MOTION: A member moved to approve those minutes. The motion was followed by a second, and it was unanimously passed by the members. **BCAC: 2014-03**

2. Draft Rule 8.1. The Chair then directed the members to the draft of a proposed new rule of civil procedure for commercial cases, denominated as Rule 8.1. The draft rule includes a definition of a “commercial case,” sections describing cases that are eligible for a commercial court, and provisions for management of commercial cases. Staff prepared one version of the draft rule, and Mr. Arkfeld provided another version that contained alternative text primarily dealing with electronically stored information (“ESI”). The Chair invited Mr. Arkfeld to discuss his version.

Mr. Arkfeld first noted that his version would provide a lower threshold for the amount in controversy (\$25,000, versus staff’s proposed \$50,000), which Mr. Arkfeld believes would enhance access to the commercial court by small businesses. The Chair responded that \$50,000 harmonizes with the maximum amount for mandatory arbitration in Maricopa County, and other committee members expressed consensus that \$50,000 was the most appropriate figure.

Mr. Arkfeld continued by observing that ESI should be viewed as a method of enhancing case management rather than as a source of conflict between the parties, and that the focus of a case be on substantive rather than technology issues. He believes that an essential requirement of effective commercial case management is for parties to meet early to discuss ESI issues. He maintained that if attorneys lack the competence to deal with these issues (he added that many lawyers lack technological competence), they need to engage other individuals who are knowledgeable about information technology. His proposed version of Rule 8.1 contains provisions on technological competency modeled on rules adopted in New York and California. He proposed boards of discovery masters composed of IT experts rather than attorneys.

The Chair suggested that certain elements of Mr. Arkfeld’s version, including requirements for an early meet-and-confer and for disclosure of pertinent ESI, were

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included in staff's version of Rule 8.1, and that these provisions would be adequate for the great majority of commercial cases; routine cases require nothing more. Members concurred with some of Mr. Arkfeld's ideas concerning disclosure and discovery of ESI, but they did not believe that pertinent details belong in the proposed rule. Instead, it might be useful if disclosure and discovery of ESI were governed by local protocols. A protocol could be modified as technology changes without the need for formal rule amendments. Other members made these comments:

- Ethical rules already require competency of counsel. Attorneys are not required to certify their skills in substantive areas of the law; why should they be required to certify their technology skills?
- Imposing a duty for technological competence might have undesirable consequences on sole practitioners as well as large firms. Solos may not have the resources to hire IT consultants for a business case. Large firms might feel the proposal requires that they engage an IT consultant in every business case, which would increase rather than mitigate the cost of litigation in commercial court.
- ESI is now discussed to a limited degree in Civil Rule 16(d).

The members proceeded to make substantive and grammatical edits to staff's draft of Rule 8.1. Substantive edits included the following:

- Rule 8.1(a): A sole proprietorship, as well as a political entity involved in a commercial transaction, are within the definition of a "business organization." A "business contract or transaction" includes materials, intellectual property, and funds, among other things. The committee confirmed its intent to exclude consumer transactions from this definition.
- Rule 8.1(b): "Receivership" is added in paragraph (1) following the word "dissolution." "Derivative action" includes an action brought by a "member" (of an LLC) as well as a "shareholder" (of a corporation.)
- Rule 8.1(c): Wording in paragraph (1) is rearranged to state that the case "arises from a contract or transaction governed by the U.C.C." The word "tortious" is added in paragraph (2).
- Rule 8.1(d): "Wrongful termination" is added to the list of ineligible cases.
- Rule 8.1(e): Paragraph (2) is rephrased to require a party to file a motion to transfer within 20 days after the filing of a response to a complaint; allowing a later motion filing could interfere with the meet-and-confer requirement. However, the rule has no time limit for a judge's sua sponte motion to transfer.

The members discussed whether section (c) concerning eligible cases is necessary in light of the definition of a commercial case in section (a). The consensus was that

section (a) indicates whether a case “might” go to the commercial court, but sections (b) and (c) add requisite details for determining if a case “will” go to that court.

3. Revisions to the civil cover sheet. The revised civil cover sheet would permit the court administrator to screen for commercial cases and to automatically assign those cases to a commercial court. The members discussed adding an “other” checkbox to the cover sheet, as well as a space for supporting reasons, for cases that might be appropriate for the commercial court in “other” ways (colloquially referred to as “businessy” cases), and which might avoid the need for a subsequent motion to transfer. The members agreed that those “other” cases would probably be a small percentage of the total, and that they should be transferred to the commercial court only by motion. A judge member added that a degree of laxity in the rule would facilitate the use of judicial discretion to admit appropriate cases. The members also made other changes to the draft cover sheet, including one that would allow a filer to check more than one box for applicable cases.

4. Draft administrative order. The members reviewed a draft Supreme Court administrative order that would authorize the Maricopa County Superior Court to implement a 3-year pilot commercial court. The order authorizing the complex civil litigation program served as the model for this draft, and the members requested to see the earlier complex court order at the next meeting for comparison purposes. Otherwise, the members had no revisions to the draft order. The draft order would require Maricopa County’s presiding judge to enter a companion order to actually establish the commercial court. The Supreme Court’s order would adopt Rule 8.1 as a rule applicable to the pilot. Maricopa’s order could adopt appropriate local processes, such as an ESI protocol. The proposed Supreme Court order would extend the term of this committee and its members for 3 years, which the members did not oppose.

5. Data. The members reviewed additional tables and charts concerning superior court civil filings for the purpose of estimating the volume of cases for a pilot commercial court. This data indicated that a large category of “miscellaneous” or “unclassified” civil cases for which detail was not previously available would produce only a few eligible cases for the pilot court. Mr. Reinkensmeyer noted that a decade ago, the complex civil litigation committee greatly overestimated the volume of complex litigation. He offered to provide an update of pertinent commercial case data at this committee’s next meeting. Another member commented that actual case volumes might require revisions to Rule 8.1 to increase or decrease the flow of cases into the pilot program. On a related subject, Judge Rea observed that assigning judges to a commercial court for more than 3 years could pose challenges to Maricopa’s system of judge rotation, but the court will accommodate these challenges for the pilot period. The Chair pointed out that the tax court judge has a 5-year assignment, and it might be less disruptive to the judges’ rotation if the tax court judge also served as one of the commercial court judges.

6. ESI. The members discussed ESI protocols from the Northern District of California and from the District of Maryland. The members favored those from the Northern District of California, including a checklist for use by the parties at their meet-and-confer session. The members agreed that this committee should prepare ESI protocols for the pilot, rather than requesting that Maricopa County develop them.

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ACTION: Judge Rea, Mr. Arkfeld, and the Chair will meet as a workgroup before the next committee meeting to draft protocols, using the Northern District of California's protocols as a model.

While the members agreed that attorneys need to develop technological competence, they also agreed that judges have a similar need. Education of judges on this subject is essential. Judge Rea noted that Mr. Arkfeld will be doing a presentation on technology issues to Maricopa's civil bench later this year. The members should include a recommendation in their report for ongoing judicial education in this area. The report should also include a recommendation that the State Bar's ethics committee consider adding a comment (although not an amendment) to the ethical rules about attorneys having the requisite technological competence for their cases.

7. Repository of commercial court decisions. In preparation for today's meeting, the members reviewed several online repositories of commercial court decisions maintained by other jurisdictions. The members supported the development of a similar repository for Maricopa's commercial court decisions because it would enhance predictability in commercial cases. Ideally, decisions in the repository would be indexed and searchable, and judges might be able to prepare decision summaries or add keywords to assist users in this regard. Maricopa has a repository for lower court appeals, and Mr. Billotte thought it might be feasible, within budgetary constraints, to add a repository for commercial decisions. Another option is utilizing the State Bar's "Fastcase" service as a repository. Mr. Reinkensmeyer also will speak with Westlaw about posting the pilot program's decisions on its website. All options should be considered.

One issue related to the repository is whether judges would have discretion concerning which decisions would be posted. Another issue is the amount of time judges would require for preparing suitably written decisions in each case. A third issue is whether the posted decisions would be citable. A decision on a pending petition concerning Supreme Court Rule 111 may affect this third issue. The committee should follow up on these issues at a subsequent meeting.

8. Roadmap; call to the public; adjourn. The members agreed to the mornings of Thursday, October 2, and Thursday, November 13 for the next meetings.

The members noted the desirability of obtaining input from constituent groups (for example, the business section of the State Bar) before submission of the committee's report to the Arizona Judicial Council. The members might also solicit feedback by publicizing the work of this committee in the State Bar's e-Legal newsletter. The members should discuss these subjects further when the committee has an initial draft of its report.

There was no response to a call to the public. The meeting adjourned at noon.

Business Court Advisory Committee

State Courts Building, Phoenix

Meeting Minutes: October 2, 2014

Members attending: David Rosenbaum (Chair), Michael Arkfeld, Ray Billotte by his proxy Phil Knox, Andrew Federhar, William Klain, Mark Larson, Lisa Loo, Judge Scott Rash, Judge John Rea, Patricia Refo, Mark Rogers, Stephen Tully, Judge Christopher Whitten

Absent: Judge Kyle Bryson, Glenn Hamer, Nicole Stanton, Marcus Reinkensmeyer, Steven Weinberger

Guests: Peter Kiefer

Staff: Mark Meltzer, Theresa Barrett, Sabrina Nash, Nick Olm

1. Call to Order. The Chair called the meeting to order at 9:05 a.m. After introductions, he requested the members to review draft minutes of the August 29, 2014 meeting.

MOTION: A member moved to approve those minutes. The motion was followed by a second, and it was unanimously passed by the members. **BCAC: 2014-04**

2. Revisions to draft Rule 8.1. The Chair then directed the members to the most recent revisions to proposed Rule 8.1 of the Arizona Rules of Civil Procedure, which was first presented at the August 29 meeting. The members discussed and resolved the following issues concerning the most recent draft of this rule:

- (a) Section (d) concerns ineligible cases. If the complaint includes causes of action that are eligible for commercial court, does the presence of an ineligible cause of action under section (d) render the entire case ineligible? Judge Rea noted that when such an issue arises, the court may exercise discretion under section (e), and to emphasize this point, the members added a specific reference in section (d) to section (e). Another member suggested, and the members agreed, that the rule include a tangible standard for judges to consider when deciding this issue. Accordingly, the members added to the first sentence of section (d) the phrase, “unless other criteria specified in Rule 8.1(b) and (c) predominate the case.”
- (b) The members made other revisions to section (d), including deletion of paragraph (8), which made ineligible “any matter that a statute or other law requires another court or court division to hear.” The members concurred that this paragraph was jurisdictional in nature and was not the proper subject of a procedural rule. For the same reason, the members agreed that including a requirement in section (d) that parties exhaust administrative remedies was not appropriate.
- (c) The members made revisions to section (e) to conform it to recent revisions to other sections.

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- (d) The members also made organizational and stylistic revisions to section (f) regarding case management. One member indicated that a provision that required parties to consider cost-shifting at a conference regarding ESI (electronically stored information) was ill-conceived, because the generally accepted practice in Arizona now is for the producing party to pay those costs; the provision could create controversy when none currently exists. A member suggested adding the words “if appropriate” to the provision, and the members agreed that this would address their concerns about mentioning cost-shifting.

Staff suggested that the distinction between section (c) cases, where the amount in controversy was not an eligibility factor, and section (d) cases, which require a \$50,000 threshold, was immaterial. Staff reasoned that in Maricopa County, cases under \$50,000 proceed to mandatory arbitration; because they are diverted in this manner, it is self-evident those cases would not be eligible for the commercial court. One member expressed a concern that without this monetary distinction, appeals from arbitration awards could overwhelm the commercial court. Staff responded that section (d) could expressly state an exception for arbitration cases. Some members felt that the committee had previously decided this issue after substantial study, and the members should not revisit it. One member asked whether, after some experience with the pilot and an accumulation of data, the committee could recommend adjustments to Rule 8.1’s eligibility provisions. The members concluded that they could. The committee now can only speculate about the number of cases that might be assigned to the pilot court, and the committee will revisit the issue once the pilot is underway, if necessary.

A member questioned whether section (f) should make scheduling conferences mandatory. These conferences are time consuming (judges typically need to reserve a full 15 minutes for each conference, even if some conferences only take a few minutes), and if the parties have agreed on everything in the proposed scheduling order prior to a conference, the conference might not be meaningful. The Chair recalled that at prior committee meetings, the members had concurred that a mandatory conference was a key feature of the commercial court. A member observed that whether these conferences would consume a substantial amount of a judge’s available time would depend on the actual, and now unknown, volume of commercial cases. The most persuasive reason for making the conference mandatory was that if it was optional, it would probably be omitted in cases where there was a need for one. Moreover, judges should have early involvement in virtually every commercial case. The members’ consensus was to keep the requirement of a mandatory scheduling conference, but to reconsider this requirement based on the experience of the pilot program.

The members also discussed whether section (g), which allows a judge to modify the formal motion requirements of Rule 7.1(a), should also permit a judge to modify formal requirements for a Rule 56 motion. The members agreed that proposed section (g) should not allow judges to do that.

3. Revisions to the civil cover sheet. Today’s meeting materials included a revised civil cover sheet. (A civil cover sheet is required under existing Rule 8(h).) The cover sheet presented at the last meeting included a list of Rule 8.1 section numbers on the reverse side of the sheet that would require a plaintiff to indicate the basis of a case’s

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eligibility by checking corresponding boxes. Today's revision eliminated that series of checkboxes, and instead added a single check box on the front side of the cover sheet that states, "Rule 8.1 commercial court pilot program applies." This revision proposed that a plaintiff who checked that box also complete a supplemental cover sheet to specify the applicable eligibility factors. Members' responses to these proposed revisions included the following:

- Counterclaims may trigger commercial court eligibility, but they do not require a cover sheet; by what mechanism would a defendant/counterclaimant request assignment of a case to commercial court?
- If the primary purpose of the cover sheet is to collect relevant data, the BCAC should permit the court administrator to collect data as he determines is appropriate. The BCAC should not try to micromanage this process by a rule or a form.
- The parties should provide in their Rule 16(b) joint report the reasons that the case is eligible for the commercial court.
- A local rule could require the parties to complete a form with necessary data elements and file it with the clerk at the mandatory scheduling conference (with recognition that parties in cases that settle before the scheduling conference would provide no data.)
- A local law school may have interest in assisting the court in compiling data, especially if data compilation requires a review of documents rather than an automated process. A law school could use the data for a research study.
- The court's data collection functions are contingent on its case management system, which is currently being updated. Those functions transcend the scope of this committee, and the committee should defer to the court.

The Chair suggested that the committee go forward with the simpler cover sheet, and let the court determine how to capture detailed case data; the members agreed with his suggestion.

Mr. Klain raised a related issue. If a case is designated as a commercial case solely by a cover sheet that is filed but not served, how would a defendant be aware of the designation and know when to timely file an objection? He suggested adding the words "commercial court assignment requested" to the caption of the complaint, and the members supported this idea. Mr. Kiefer, who is Maricopa County's civil court administrator, said he presumed that a judge would designate a case as commercial by a minute entry, as is done with complex civil cases, and that neither a party nor the court administrator would determine the assignment of a case to the commercial court. This led to a series of comments, including whether a case should be presumptively assigned to the commercial court by the administrator unless and until it is declined by a judge; whether using a distinctive case number prefix could alert a defendant of a

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request for assignment to the commercial court; and whether a judge's determination of a case as commercial should be deferred as an issue to be addressed at the mandatory scheduling conference. Mr. Kiefer also informed the members that the court administrator assigns a judge to a specific case by a complex algorithm, and today's discussion might require either modifications to the algorithm, or creation of a process that requires the court administrator to assign a commercial case to a judge manually.

Action: With the concurrence of the members, the Chair directed committee staff to have further conversations with the court administrator on these issues, and to propose the best solutions at the next committee meeting.

4. Revisions to the draft Administrative Order. The members concurred with revisions that had been made to the draft Administrative Order after the August 29 meeting, with one exception: should the order add the judges who are assigned to the commercial court as members of this committee? The Chair believed that the Court has inherent authority to add members to the committee, but he agreed that the draft order should include express language to this effect.

5. A proposed ESI protocol. As noted in the minutes, the Chair established a workgroup at the August 29 meeting (composed of the Chair, Judge Rea, and Mr. Arkfeld) to develop an ESI protocol based on the one used in the Northern District of California. The workgroup thereafter developed, and presented at today's meeting, a proposal that includes a two-page ESI checklist. The intent of the checklist is to make the parties' preliminary meet-and-confer conference concerning ESI productive and comprehensive. The workgroup also presented a two-page explanation sheet that accompanies the checklist, and a proposed, three-page stipulated order regarding ESI.

The members began by discussing the proposed requirement of an ESI liaison. One member felt it was inefficient for the liaison to "be able to learn about" electronic systems after a conference, and suggested that a liaison should be knowledgeable beforehand. Another member responded that a liaison should not be expected to know everything about electronic systems at the initial conference, but should have an opportunity thereafter to acquire that knowledge. While this was the prevailing view, a member expressed concern about the need for a liaison in every commercial case, especially smaller cases. The members exchanged anecdotes about using or not using liaisons that both favored and opposed the liaison practice. The Chair noted that in a simple case, it might be practical if an attorney for a party, or a paralegal, served as a liaison. Another member questioned whether an attorney should be present during the liaisons' discussions; or, if one of the liaisons was an attorney and the other was not, whether this circumstance raised ethical considerations. Mr. Arkfeld observed that the parties should utilize the liaisons in whatever way is most effective, with or without the attorneys present, and in a manner in which the parties are comfortable. In some cases, use of a liaison may be inappropriate. But Mr. Arkfeld emphasized that in other cases, especially those where ESI becomes a procedural bottleneck, costs could be significantly reduced if each side utilized a liaison who understood the relevant nomenclature and technology.

The members agreed to these changes to the protocol documents:

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- In the stipulated order, removing that liaisons are mandatory, and making the parties' use of liaisons optional and only if appropriate.
- In the explanations, rather than saying a liaison might assist in "many" cases, changing it to "some" cases.
- In the checklist, requiring a liaison to be knowledgeable about "terminology" as well as systems; and adding the word "media" in the paragraph concerning "location and types of IT systems."

The members also agreed to add to section (f) of Rule 8.1 this phrase: whether in their joint report the parties would request the trial court to enter an ESI order.

6. A repository of commercial court decisions. The Chair informed members that following the August 29 meeting, Mr. Reinkensmeyer contacted Westlaw and Fastcase representatives concerning creation of a repository for the pilot commercial court's decisions, and was advised that both companies were interested in posting the rulings. The Westlaw representative was going to confer with senior management, and the Fastcase representative asked for data on the projected volume of court rulings. Neither representative anticipated any obstacles. The Chair expressed appreciation for Mr. Reinkensmeyer's inquiry, and he looks forward to a follow-up report from Mr. Reinkensmeyer at the next committee meeting.

7. A draft report to the AJC. In light of the amount of time the members spent on previous items on today's agenda, and the expectation that today's changes to Rule 8.1 and other proposed documents will require revisions to staff's draft report, the Chair deferred consideration of the committee's draft report to the Arizona Judicial Council ("AJC") until the next committee meeting.

8. Roadmap; call to the public; adjourn. The members have set their final 2014 meeting for Thursday, November 13. At that time, the members will review and finalize their report and supporting documents for the AJC's consideration. The Chair will present the committee's report to the AJC on December 11, 2014. The Chair added that he would also present on the status of this committee to the Business Law Section of the State Bar in late October, and he encouraged other committee members to conduct outreach to stakeholders regarding the work of this committee. Judge Rea and Mr. Klain agreed to make a presentation to the Committee on Superior Court, which is an AJC standing committee, when it meets on November 7, 2014.

There was no response to a call to the public. The meeting adjourned at 11:40 a.m.