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SUPREME COURT OF ARIZONA

PETITION TO PERMANENTLY) Supreme Court No. R-18-____
ADOPT AND AMEND RULE 8.1,)
ARIZONA RULES OF CIVIL) **Petition**
PROCEDURE)
) **Expedited Consideration Requested**
_____)

The Commercial Court Review Committee (“CCRC”) through its undersigned Chair petitions this Court to permanently adopt the amendments to Rule 8.1 of the Arizona Rules of Civil Procedure that are shown in the Appendix.

I. Background. The Arizona Supreme Court established a Business Court Advisory Committee in 2014. That committee’s [December 2014 Report to the Arizona Judicial Council](#) recommended that the Supreme Court establish a specialized commercial court in the Superior Court in Maricopa County on a pilot basis. The Arizona Judicial Council concurred in this recommendation, and the Supreme Court by [Administrative Order No. 2015-15](#) then established a three-year commercial court pilot program in Maricopa County beginning on July 1, 2015 and

ending on June 30, 2018. A.O. No. 2015-15 also adopted Experimental Civil Rule 8.1, which governed eligibility criteria and management procedures for cases in the pilot court. A.O. No. 2015-15 further adopted two new forms, Rule 84 Forms 14(a) and 14(b), for Rule 16 joint reports and scheduling orders in commercial cases.

A.O. No. 2015-15 required the submission of annual progress reports to the Arizona Judicial Council. The 2016 progress report requested amendments to Experimental Rule 8.1 to address unexpectedly high workloads that the commercial cases generated for the assigned judges. The Court implemented these amendments in February 2017 by the entry of [Administrative Order No. 2017-17](#).

In December 2015, the Court established a Committee on Civil Justice Reform. In October 2016, that committee submitted a report that recommended reforms to civil case management and discovery, and in January 2017, that committee filed [rule petition number R-17-0010](#) requesting codification of those recommendations. An essential component of those recommendations was the establishment of a system of tiered civil discovery. Under this system, Tier 1 cases would be simple, Tier 2 cases would be of intermediate complexity, and Tier 3 cases would be the most logistically or legally complex. That committee recommended modifications to Experimental Rule 8.1(e) (“assignment of cases to commercial courts”) and Rule 8.1(f) (“case management”). As set forth in the [R-17-0010 Reply](#),

the proposed amendments to Rule 8.1(f) provided, among other things, that “cases in the commercial court are deemed to be assigned to Tier 3.”

In September 2017, the Court by [Order No. R-17-0010](#) adopted the proposed amendments to Rules 8.1(e), (f), and (g), as well as amendments to Rule 84, Forms 14(a) and 14(b), and established an effective date for those amendments of July 1, 2018. The R-17-0010 Order made no amendments to the other sections of Rule 8.1.

As the three-year pilot program approached its expiration date, the Supreme Court entered [Administrative Order No. 2018-17](#). This Order established the Commercial Court Review Committee—the Petitioner herein—and requested its recommendations concerning the commercial court program in the Superior Court in Maricopa County. The CCRC presented its [report to the Arizona Judicial Council on June 18, 2018](#). Among the recommendations were the following: that Experimental Rule 8.1, with certain modifications suggested by the CCRC, become a permanent rule within the Arizona Rules of Civil Procedure; and that the CCRC be authorized to file a rule petition seeking permanent adoption of Rule 8.1, with its suggested amendments to the rule. The Arizona Judicial Council approved these recommendations.

On June 26, 2018, the Court entered [Administrative Order No. 2018-64](#) titled “In the Matter of Extending the Pilot Commercial Court and Experimental Rule 8.1, Arizona Rules of Civil Procedure.” The Order provides that the pilot commercial

court in Maricopa County and Experimental Rule 8.1 (as shown in Attachment A to the Order) “...continue to be effective on and after July 1, 2018 pending the Court’s consideration of the Committee’s rule petition at the December 2018 rules agenda.” Attachment A to this Order consolidated Experimental Rule 8.1 sections (a) through (d), as promulgated by A.O. 2017-17, with sections (e) through (g) as adopted by R-17-0010 (the civil justice reform rules.)

II. Summary. This rule petition requests:

(1) amendments to Experimental Rule 8.1, sections (a) through (c), and the abrogation of section (d), as those four sections were adopted by A.O. No. 2017-17; and removal of the prefatory word “Experimental” in the title of Rule 8.1 to reflect the Court’s permanent adoption of this rule;

(2) amendments to current Rule 8.1(e) as previously adopted by the Court in Order No. R-17-0010, but renumbered as section (d), and with the renumbering of current Rules 8.1(f) and (g) as Rules 8.1(e) and (f); and

(3) adoption of a new Rule 8.1(g).

III. Proposed amendments to Rule 8.1, sections (a) through (d). While Rule 8.1 sections (e) through (g) were permanently adopted by R-17-0010, sections (a) through (d) were not permanently adopted, and they continue to be titled as “experimental.” This petition therefore requests their permanent adoption, with modifications and removal of the word “experimental” from the title of Rule 8.1.

Rule 8.1, Section (a) is titled “application; definitions.” The CCRC’s report to the Arizona Judicial Council noted that “there are too many cases in commercial court given the available resources.” (Report at pages 10-11.) Because of this unexpectedly high volume of commercial cases, the proposed amendments reflect the CCRC’s intent to funnel into the commercial court only those cases that require the court’s specialized case management. Whereas the current section says that the commercial court “will hear ‘commercial cases’ as defined in this rule,” the proposed version says the commercial court “will hear eligible ‘commercial cases’ assigned to it in accordance with this rule. To be eligible for the commercial court, a commercial case must meet the requirements of Rule 8.1(b).”

Rule 8.1, Section (b) (“eligible case types”) continues with the above-noted intent to limit the availability of the commercial court to eligible cases. The current rule says that “a commercial case that meets one of the following [13] descriptions is generally a commercial case.” By comparison, the proposed rule says that “a commercial case is generally eligible for the commercial court if it meets one of the following [13] descriptions.” As in section (a), the key word is “eligible.” With the exception of subpart (b)(13), which concerns insurance disputes, the descriptive text of eligible case types remains unchanged from the current rule.

Rule 8.1, Section (c) (“ineligible case types”) contains the most significant change for limiting the volume of eligible cases. A new sentence at the beginning

of section (c) says, “A case that seeks only monetary relief in an amount less than \$300,000 is not eligible for the commercial court.” This provision would align the eligibility requirements of Rule 8.1 with the R-17-0010 amendment to Rule 8.1(f) that deems commercial cases to be assigned to Tier 3. (Rule 8.1(f) provides, “Notwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3.” *See* also Rule 26.2(c)(3)(C), which provides that actions claiming \$300,000 or more in damages are generally assigned to Tier 3.) Under the proposed new provision, and unlike the current rule, cases seeking solely monetary relief above Maricopa’s \$50,000 compulsory arbitration cap, but less than \$300,000, would no longer be eligible for the commercial court. Not only would this change better align Rule 8.1 with the new rules on tiering, it should also reduce the workloads of commercial court judges in a meaningful way by eliminating relatively smaller cases from their dockets. And it should help to assure that cases most in need of judges with business backgrounds are the ones assigned to the commercial court.

Rule 8.1, Section (d) (“compulsory arbitration”) of the current rule provides, “A commercial case that is subject to compulsory arbitration is not eligible for assignment to commercial court.” A.R.S. § 12-133(A)(1) sets a maximum

jurisdictional amount of \$65,000 for cases subject to compulsory arbitration. An arbitrable case would be less than the \$300,000 threshold established by proposed section (c) for eligible commercial cases. Current section (d) therefore adds nothing to the proposed rule. The CCRC proposes to delete it and to renumber subsequent sections of Rule 8.1 accordingly.

IV. Proposed amendments to current Rule 8.1, sections (e) through (g).

Although sections (e) through (g) became effective very recently—so recently that when the CCRC submitted its report to the AJC, these sections had not yet become effective—the CCRC’s narrow focus on Rule 8.1 permitted it to address some practical issues concerning commercial case operations that might have been beyond the purview of the Civil Justice Reform rule amendments. These proposed amendments result from three years of commercial court experience by the judges, court administrators, and practitioners who served on, or provided input to, the CCRC.

Rule 8.1, Section (d) (“assignment of cases to the commercial court,” **currently section (e)**) clarifies and streamlines how cases are assigned to the commercial court. Subpart (d)(1) (“request”) removes an ambiguity under the current rule about whether the program is mandatory. The revised version recites that a party “may” request the assignment to clarify that the program is optional. Subparts (d)(2) (“by plaintiff”) and (d)(3) (“by other parties”) balance the

opportunities for all parties in a case to request assignment to commercial court by an equivalently simple process. Subpart (d)(4) (“assignment”) removes a requirement in the current rule for the court administrator to review the complaint in each case in which a request is filed. Instead, upon the filing of a request, the case would be automatically assigned to the commercial court.

The title of proposed subpart (d)(5) is “transfer out of commercial court by a commercial court judge.” The proposed subpart would permit a commercial court judge to transfer a case out of the commercial court if the judge determines that the case is not eligible for assignment. A new subpart (d)(6) (“discretion of presiding judge”) would allow the presiding judge to reassign to a general civil court a case that is otherwise eligible for commercial court under subparts (b)(6) (commercial real estate transactions), (7) (franchise cases), (10) (Uniform Commercial Code cases), or (11) (professional malpractice). This provision would provide a mechanism for the presiding judge to adjust commercial court judges’ workloads, if necessary, by weeding out cases that typically may not require specialized case management. Subpart (d)(7) (“judicial request to transfer to the commercial court”) also has a new title and requires that all judicial requests for transferring a case to the commercial court go through the presiding judge.

Subpart (d)(8) (“complex cases”) was modified by deleting a reference to Civil Rule 8(i), which was abrogated as part of the Civil Justice Reform rule

amendments, and by adding a reference to “Maricopa County” before the words “complex civil litigation program,” because Maricopa is the only county with such a program, and is likely for the foreseeable future to be the only county to have a complex program.

Rule 8.1, Section (e) (“case management,” **currently section (f)**) deals with the scheduling conference, an early meeting, the joint report and proposed scheduling order, and motions to dismiss. Except for renumbering the section from (f) to (e), the CCRC’s version makes no changes to the current version.

Rule 8.1, Section (f) (“motions,” **currently section (g)**) also makes no changes to the current rule, except for renumbering.

V. Proposed new Rule 8.1(g). Administrative Order 2018-17, which established the CCRC, directed the Committee to consider whether a commercial court should be available in other counties. The CCRC envisions Rule 8.1 as a statewide rule, even though only one of Arizona’s 15 counties currently has a commercial court program. As a practical matter, most Arizona counties currently lack the volume of commercial cases that would justify the establishment of a specialized commercial court. However, the CCRC also recommended that the case management principles in Rule 8.1(e) be available for any judge statewide who might find those principles beneficial in managing a commercial case.

Petitioner therefore proposes a new Rule 8.1(g) that codifies this recommendation. This new section is modeled on a similar principle contained in a comment to Civil Rule 16.3—which was recently abrogated by R-17-0010—regarding the management of complex civil litigation. The section would allow judges in any county, including any Maricopa County judge, to use Rule 8.1(e) in appropriate commercial cases.

VI. Request for expedited consideration. Pursuant to Supreme Court Rule 28(G) and as contemplated by A.O. No. 2018-64, Petitioner requests expedited consideration of this petition. Petitioner specifically requests that the Court provide a two-month comment period beginning on or about the filing date of this petition, followed by a one-month period for Petitioner to prepare a Reply. This schedule should allow the petition to be considered by the Court during its December 2018 rules agenda, as provided by A.O. No. 2018-64.

VII. Conclusion. Petitioner therefore requests the permanent adoption of a modified Rule 8.1, as shown in the Appendix.

RESPECTFULLY SUBMITTED this 23rd day of July 2018.

By /s/ David B. Rosenbaum
David B. Rosenbaum, Chair