

**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

**BCAC draft minutes**  
**06.06.2014**

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.

**BCAC draft minutes**  
**06.06.2014**

- 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

**BCAC draft minutes**  
**06.06.2014**

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.