

**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.