

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

BCAC draft minutes
08.29.14

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.

BCAC draft minutes
08.29.14

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.